IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA404/2022
[2024] NZCA 692

BETWEEN	MICHAEL JOHN SMITH Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	8–10 November 2023 (further submissions received 18 March 2024)
Court:	Cooper P, Mallon and Wylie JJ
Counsel:	D M Salmon KC, N R Coates and S J Humphrey for Appellant J M Prebble, K F Gaskell and D Ranchhod for Respondent A S Butler KC, R A Kirkness and H Z Yáng for Human Rights Commission as Intervener
Judgment:	19 December 2024 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] Michael Smith is an elder of Ngāpuhi and Ngāti Kahu. He has been engaged in environmental advocacy for more than 30 years. He is the plaintiff in a claim against seven New Zealand companies for their contribution to the adverse effects of climate change and damage or interference with the climate system through their emission of greenhouse gases (GHGs) or their supply of products that release GHGs when burned. That claim is in tort and alleges public nuisance, negligence and a breach of a duty to cease materially contributing to that damage and interference with the climate system and to the adverse effects of climate change. The claim ultimately survived a strike out application on appeal with the Supreme Court's decision delivered earlier this year in *Smith v Fonterra Co-operative Group Ltd.*[1]

[2] This appeal concerns Mr Smith's separate claim against the Crown for its alleged inadequate action in relation to climate change. The claim is brought for an alleged breach of a common law duty to avoid dangerous interference with the climate system, breach of the right to life and the right to culture affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA), and for breach of the Treaty of Waitangi | te Tiriti o Waitangi (the Treaty | te Tiriti) and of fiduciary duties owed to Māori. These claims were struck out by Grice J in the High Court as untenable.[2] Mr Smith appeals that decision.

[3] It can be safely said that the claim is ambitious. To some extent it challenges existing authority or seeks extensions to that authority in the light of the global threat that humankind faces from climate change and the fact that, if this threat is to be met, urgent global action is required. That threat and the urgency of global action has continued to result in a proliferation of cases around the world and a developing climate change jurisprudence.

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1 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 [*Smith v Fonterra* (SC)].

2 *Smith v Attorney-General* [2022] NZHC 1693 [High Court judgment].

[4] Reflecting the ambitious nature of the claim and the developing law internationally in this area, the authorities relied on by Mr Smith and the Crown comprise 22 volumes. The intervener (Te Kāhui Tika Tangata | the Human Rights Commission) relied on still more. This judgment does not canvass them all. Instead we have focussed our consideration on what emerged at the hearing and in our deliberations to be the key authorities for the issue before us — namely, whether the causes of action are so clearly untenable that they cannot succeed.

[5] We have concluded that it is not clearly untenable that an inadequate response by the Crown to the risks from climate change could give rise to a breach of the right to life (under s 8 of NZBORA) and a breach of the right to culture (under s 20 of NZBORA) for which declaratory relief is potentially available. Mr Smith's claims for breach of these rights rely on fundamental rights affirmed in NZBORA and international jurisprudence on the comparable rights in international instruments. Those instruments include the International Covenant on Civil and Political Rights (the ICCPR) to which New Zealand is a party and which NZBORA affirms.[3] International jurisprudence on these comparable rights recognises that a state's response to climate change may engage these rights.

[6] The more challenging part of these claims is whether the pleaded particulars relied on by Mr Smith give rise to a tenable basis on which it could be said that the ss 8 and 20 rights are breached. These particulars relate to the Crown's response to national emissions as well as the Crown's response to its own emissions.

[7] In relation to national emissions, the pleaded claim seeks to have the court determine that the legislative framework, principally the framework under the Climate Change Response Act 2002 (the CCRA), is inadequate to protect Mr Smith, his whānau, members of Ngāpuhi and Ngāti Kahu and future descendants thereof from threats to their right to life and their right to culture. While it is not clearly untenable that ss 8 and 20 of NZBORA might place positive obligations on the Crown to protect

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[3] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]; and New Zealand Bill of Rights Act 1990 [NZBORA], long title.

against denials of the rights to life and to culture in the climate change context, we consider it is clearly untenable that this extends to the claim pleaded here.

[8] We say that because the legislative framework is comprehensive in its reach, in that it covers a framework for emissions reductions intended to enable New Zealand to meet its international obligations, as well as a framework for risk assessment and adaptation. The pleaded gaps in that framework are not of a kind that could constitute a failure to take positive steps to protect against the denial of the risk to life or culture under NZBORA. Rather they reflect policy choices that are for Parliament under New Zealand's constitutional framework. The success or otherwise of the legislative framework under the CCRA in protecting the rights to life and to culture will depend on the decisions that are made under it. That includes, for example, decisions that are or are not made under the CCRA to review the emissions reductions targets.

[9] This comprehensive framework, from which Crown emissions are not exempt, also means that it is not tenable that the Crown has breached the right to life or the right to culture by not having a regulatory framework to measure, monitor and reduce its own emissions. If the CCRA meets any positive obligation to put in place a regulatory framework designed to provide effective deterrence against the threat to life and culture from climate change, then the Crown has met its positive obligation and there is no additional positive obligation to have a specific regulatory framework for its own emissions.

[10] Accountability mechanisms for decisions made under the CCRA include consultation, judicial review and NZBORA claims in respect of particular decisions, as well as general and local government elections. It is via judicial review and NZBORA claims in relation to particular decisions made under the CCRA, or other legislation under which decisions are made where climate change risks are relevant, that Mr Smith may be able to plead a tenable cause of action in the future. The defendant in any claim would be the Minister of Climate Change, or the Minister under that other legislation. Mr Smith's claim here, however, is against the Attorney-General and is about an inadequate regulatory framework to deter the risk that climate change presents, rather than an alleged failure of the Crown to take timely and reasonably available and proportionate measures to respond to a real risk to the right to life to

Mr Smith or those he represents or their right to culture that is said now to be imminent. The Attorney-General is therefore entitled to a strike out order in respect of this claim.

[11] We have concluded that a claim that the Crown's response to the risks from climate change breaches the Treaty or a fiduciary duty to Māori arising from the Treaty is clearly untenable. The law has not to this point recognised such a claim, and the claimed fiduciary duty is inconsistent with the circumstances of climate change in which the Crown represents and must balance many interests — it cannot just act in the interests of Mr Smith, his whānau and his future descendants. Parliament has established a different framework for giving effect to the principles of the Treaty. That includes Treaty clauses in legislation and the jurisdiction conferred on the Waitangi Tribunal to make recommendations in respect of Treaty breaches. The CCRA contains a comprehensive Treaty clause through which the principles of the Treaty are given effect. It follows that the Crown's response to climate change, principally though the CCRA, cannot be said to be inconsistent with the Treaty or to breach a fiduciary duty owed to Mr Smith and those he represents.

[12] We have also concluded that the novel common law claim must be struck out. To the extent it relies on NZBORA and the Treaty, those aspects stand or fall on whether claims are tenable under NZBORA (not tenable as pleaded) or under the Treaty (also not tenable). They do not add to the case for the pleaded common law claim. To the extent that this claim relies on the public trust doctrine, extending that doctrine beyond its limited traditional application in allowing public access to the seashore and navigable waters, to protecting the environment from climate change is problematic.

Background context

Climate change

[13] As is now well known (and not disputed by the Crown),[4] humans have warmed the atmosphere, ocean and land, principally through the emission of GHGs.[5] Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have already occurred.[6] Some of the impacts of climate change are already locked in and increased GHG emissions will lead to increased global warming.[7] The global harm will be significantly greater if average temperatures increase by 2ºC or higher than if temperature increases are kept to 1.5ºC.[8] Global action is necessary to protect the climate system for the benefit of present and future inhabitants of the planet. Rapid and deep reductions in GHG emissions are necessary with the window of opportunity to ensure a liveable and sustainable future for all rapidly closing.[9]

[14] The foundational international treaty is the United Nations Framework Convention on Climate Change (UNFCCC).[10] Its ultimate objective is to achieve stabilisation of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[11] This is to be

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4 As discussed below at [36]–[37], for the purposes of a strike out application pleaded material facts are generally assumed to be true. In light of this, we have set out a very brief summary of the causes and consequences of, and the necessary actions that must be taken in response to, climate change, as well as the international and domestic response to it. For the scientific position Mr Smith has relied upon reports prepared by the Intergovernmental Panel on Climate Change (IPCC), in particular the Sixth Assessment Report [AR6]. AR6 comprises four reports, one by each of its three working groups and an overall synthesis report. These reports summarise the current state of knowledge of climate change, its impacts, and areas of mitigation and adaptation. For a more extensive summary, see: *Smith v Fonterra* (SC), above n 1, at [13]–[48]; *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064 at [18]-[55] (currently before this Court); and *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [8]–[72].

5 IPCC *Climate Change 2023: Synthesis Report – Summary for Policymakers* (20 March 2023) [AR6 Synthesis Report Summary] at [A.2.1].

6 At [A.2].

7 IPCC *Climate Change 2021: The Physical Science Basis – Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 9 August 2021) [AR6 Working Group I] at [B.5]; and AR6 Synthesis Report Summary, above n 5, at [B.3].

8 See the modelling at [B.2]–[B.3] and [Figure SPM.5] in AR6 Working Group I, above n 7, simulating changes in temperature, precipitation and mean total column soil moisture at different degrees Celsius of global warming.

9 AR6 Synthesis Report Summary, above n 5, at [C.1].

10 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC].

11 Article 2.

achieved within a timeframe that allows ecosystems to adapt naturally, that ensures food production is not threatened and that enables economic development to proceed in a sustainable manner.[12] Amongst other things, it provides for parties to keep and to publish a national inventory of their emissions by sources and removals by sinks of all GHGs.[13]

[15] The Paris Agreement, later adopted by the parties to the UNFCCC (including New Zealand), aims to strengthen the global response to the threat of climate change.[14] Its goal is to hold the increase in the global average temperature to well below 2ºC above, and to pursue efforts to limit the temperature increase to 1.5ºC above, pre-industrial levels.[15] It provides for party countries to communicate a "nationally determined contribution" to the global response to climate change every five years.[16]

[16] The CCRA is the domestic legislation intended to enable New Zealand to meet its international obligations under the UNFCCC and the Paris Agreement.[17] Its purposes include providing a framework by which New Zealand can "develop and implement clear and stable climate change policies" that: (a) contribute to the global effort to limit the global average temperature increase to 1.5ºC above pre-industrial levels; and (b) allow New Zealand to prepare for, and adapt to, the effects of climate change.[18]

[17] The framework for New Zealand's contribution to the global effort to reduce emissions includes statutory targets for the reduction of its emissions. By 2050 and

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12 Article 2.

13 Articles 4 and 12. Another of the international instruments is the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005). For an overview of the Kyoto Protocol see: *Thomson v Minister for Climate Change Issues*, above n 4, at [26]–[30]; and *Smith v Fonterra* (SC), above n 1, at [28]. In essence, the Kyoto Protocol provided legally binding targets on developed countries but it was largely unsuccessful because it ultimately did not gain sufficient support.

14 Paris Agreement 3156 UNTS 79 (opened for signature 22 April 2016, entered into force 4 November 2016) [Paris Agreement], art 2(1).

15 Article 2(1)(a).

16 Articles 3, 4(2) and 4(9).

17 Climate Change Response Act 2002 [CCRA], s 3(1)(a). The CCRA was also intended to enable New Zealand to meet its obligations under the Kyoto Protocol. These obligations are not relevant for present purposes other than as part of the history because Mr Smith says that the Crown has known since the UNFCCC of the need to take action to respond to the risks from climate change.

18 Section 3(1)(aa).

for each subsequent year, GHG net emissions, other than biogenic methane, are to be zero.[19] By 2030, biogenic emissions are to be 10 per cent less than 2017 emissions and by 2050 and for each subsequent year are to be 24 to 47 per cent less than 2017 emissions.[20] The responsible minister is to set economy-wide emissions budgets, beginning 2022–2025 and then for five yearly periods until 2050.[21] The budgets are intended to be "stepping stones" to the 2050 target.[22] For each budget period, the minister must publish an emissions reduction plan setting out the policies and strategies for meeting the relevant budget.[23]

[18] He Pou a Rangi | the Climate Change Commission (the Commission), established under the CCRA,[24] provides advice to the Minister on the emissions budgets, the emissions reduction plans and, if requested to do so by the Minister, on any other matters relating to reducing emissions.[25] It also monitors and reports on emissions budgets and the 2050 target and can recommend changes to them.

[19] The CCRA also provides for the operation of New Zealand's emissions trading scheme (the ETS) which is intended to assist New Zealand to meet its international obligations and its 2050 target and emissions budgets.[26] It is a market-based scheme that attempts to drive efficient behaviour change through the sale and purchase of

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19 Section 5Q(1)(a).

20 Section 5Q(1)(b).

21 Section 5X. Section 5ZC sets out the matters that the Minister must have "particular regard" to and "regard to" when determining emissions budgets. In the former category are the key opportunities for emissions reductions and removals in New Zealand and the principal risks and uncertainties associated with emissions reductions and removals. In the latter category are the projected emissions and removals for the period, scientific advice, existing and anticipated technology, the need for budgets to be ambitious but likely to be technically and economically achievable, public consultation results, the likely impact of actions taken to achieve the budget and the 2050 target and to adapt to climate change, the distribution of those impacts across the regions and communities of New Zealand and from generation to generation, economic circumstances and the likely impact of the Minister's decision on taxation, public spending, and public borrowing, the implications of land-use change for communities, responses to climate change by parties to the Paris Agreement or the UNFCCC and New Zealand's relevant obligations under international agreements.

22 See *Smith v Fonterra* (SC), above n 1, at [37], citing Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3.

23 CCRA, s 5ZG.

24 Section 5A.

25 See s 5J, which sets out the Commission's functions. Section 5ZC requires the Commission to have particular regard to and regard to the same matters as the Minister (set out at n 21 above).

26 Section 3(1)(b). The emissions trading scheme is provided for in pt 4. The scheme has been described as New Zealand's "main tool" for reducing GHG emissions: see *Smith v Fonterra* (SC), above n 1, at [40], citing Climate Change Response (Emissions Trading Reform) Amendment Bill 2019 (186-1) (explanatory note) at 1.

tradeable emissions units (the price of which is often referred to as the carbon price).[27] Additionally, the CCRA provides for a levy on specified synthetic greenhouse gases contained in motor vehicles and another levy on other goods.[28] This is also intended to assist New Zealand to meet its international obligations, 2050 target and emissions budgets.[29]

[20] The CCRA framework for allowing New Zealand to prepare for, and adapt to, the effects of climate change requires the periodic preparation of national climate change risk assessments.[30] These assess the risks to New Zealand's "economy, society, environment, and ecology" from the current and future effects of climate change.[31] They are also to "identify the most significant risks to New Zealand, based on the nature of the risks, their severity, and the need for co-ordinated steps to respond to those risks" in the six-year period to which the assessment relates.[32] The Minister was required to prepare the first of these assessments, and thereafter the Commission is required to prepare them every six years.[33]

[21] In response to each national climate change risk assessment, the Minister must prepare a national adaptation plan.[34] Amongst other things, each plan is to set out the Government's objectives and the strategies, policies and proposals for meeting those objectives.[35] In preparing the plan, amongst other things, the Minister must take into account broadly the same matters the Commission is required to take into account when preparing national risk assessment plans.[36] The Minister is also required to publicly consult in preparing the plans.[37] The Commission monitors and reports to the

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27 See the description in *Smith v Fonterra* (SC), above n 1, at [42]–[44].
28 CCRA, pt 7.
29 Section 3(1)(c).
30 Sections 5ZP, 5ZQ and 5ZR.
31 Section 5ZP(1)(a).
32 Section 5ZP(1)(b).
33 Sections 5ZQ and 5ZR. As set out in s 5ZQ, amongst other things, as most relevant for present purposes, the Commission is required to take into account economic, social, health, environmental, ecological and cultural effects of climate change, the distribution of the effects of climate change across society, taking particular account of vulnerable groups or sectors, New Zealand's international obligations, current and future likely effects of climate change and scientific and technical advice.
34 Section 5ZS(1).
35 Section 5ZS(2).
36 Section 5ZS(4).
37 Section 5ZS(6). As set out in s 5ZT(1)(a), the Minister is required to present national adaptation plans to the House of Representatives.

Minister on national adaptation plans and, if requested to do so by the Minister, reports on any other matters relating to adapting to climate change effects.[38]

Mr Smith's evidence

[22] Mr Smith's affidavit evidence[39] discusses the Māori world view as it was explained to him — with the overarching principle of whakapapa (the "link between all things through a process of evolution from the beginning of space, time and the multiverse") and the supporting principles of mana atua (the "supreme seniority and authority of the cosmic and subsequent natural world"), mana tangata (the "delegated authority of humans to organise and live within the environmental boundaries determined by [mana atua]") and mana whenua (the "distribution and use of resources in accordance with the [mana atua and mana tangata]").

[23] He also discusses the close emotional and spiritual association Māori have with the land. This connection is reflected in te reo Māori words such as whenua (meaning land, but also meaning the afterbirth that connects a child to its mother), tangata whenua (meaning "people of the land"), tūrangawaewae (meaning a "place to stand" and the "wellbeing that comes from belonging to a place or having a home in a place") and ūkaipō (literally meaning the "place you were nurtured in the night by your mother['s] breast" but also meaning the "nurturing relationship between [the] land and [its] people").

[24] Mr Smith explains that this close connection is why, for coastal Māori communities (especially those built on fertile river flats), climate change is an existential threat not just to property or things but to their identity. "Managed retreat" from the effects of climate change would mean permanent disconnection from coastal Māori communities' tūrangawaewae and a permanent loss of identity. Ngāpuhi and Ngāti Kahu are kaitiaki (guardians) of their whenua. As such, Mr Smith considers he has a responsibility to do everything he can to protect that whenua for future generations. This is why he is bringing the claim.

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38 Sections 5J(i) and 5K.

39 We set out Mr Smith's evidence to provide the high level context as he sees it for this appeal. If the claim were to proceed to a trial, these matters would be the subject of evidence, and with the opportunity for further detail and for the testing of that evidence.

[25] Mr Smith discusses the rohe of Ngāpuhi and Ngāti Kahu. He discusses his close connection with the whenua known as the Mahinepua C Block, which is located in Mahinepua Bay, near Whangaroa Harbour. In the vicinity of Mahinepua Bay there are hundreds of sites of special cultural, historical and spiritual significance to Ngāpuhi and Ngāti Kahu. Many of these sites are threatened by climate change. Mr Smith says other iwi throughout Aotearoa will have their own stories and treasures that are in similar danger.

[26] The impacts on Māori have been recognised by a recent Intergovernmental Panel on Climate Change (the IPCC) report.[40] The report noted, amongst other things, that extreme coastal flooding (caused by sea level rise, superimposed upon high tides and storm surges) had increased, with impacts "on cultural sites, traditions and lifestyles of Aboriginal and Torres Strait Islander Peoples in Australia and Tangata Whenua Māori in New Zealand".[41] The report noted that Māori have long-term interests in land and water and are invested in climate-sensitive sectors.[42] It noted that many Māori owned lands and cultural assets, such as marae and urupā, are located on coastal lowlands vulnerable to sea level rise impacts, and Māori investments in fisheries and aquaculture are facing substantial risks.[43]

Mr Smith's pleading

[27] Mr Smith's pleading[44] relies on the current scientific consensus as to the nature, effects, and mitigation requirements of climate change as set out in the most recent reports of the IPCC.[45] This includes the consensus as to the minimum global reductions of GHG emissions to avoid dangerous climate change[46] and as to the

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40 IPCC *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 28 February 2022) [AR6 Working Group II] at [11.4.2].

41 At 1583 (as set out in the Executive Summary to ch 11 describing impacts on Australasia).

42 At [11.4.2].

43 At [11.4.2]. See in particular Table 11.12.

44 The appeal proceeded on the basis of a draft second amended statement of claim provided by memorandum dated 21 September 2023.

45 See above at n 4.

46 The pleaded particulars are: global GHG emissions must peak by 2025; and relative to 2019 levels, global CO_2 emissions must be reduced by 48 per cent by 2030 and 80 per cent by 2040, global CH_4 emissions must be reduced by 34 per cent by 2030 and by 44 per cent by 2040; and global GHG emissions must be net zero by 2050.

adverse effects on people and ecosystems globally.[47] The latter includes "[a]n unacceptable risk of social and economic collapse and mass loss of human life and civilisation".

[28] Mr Smith pleads that, through its signature and ratification of the UNFCCC, the Kyoto Protocol[48] and the Paris Agreement, the Crown knew by no later than about June 1992 that continued GHG emissions would cause harm to the environment and human welfare in New Zealand and globally. He pleads that the Crown also knew that decisions should be made on the best available scientific evidence, New Zealand could not delay action even though it is a small country, deep cuts to emissions were necessary, New Zealand was amongst the countries that needed to take the lead on emissions reductions, and that:

> … a failure by New Zealand to take action would cause and contribute to harm to climate systems and human welfare not only by the direct contribution to climate change caused by the emissions that the Crown itself caused, permitted or encouraged but also by the harm done to collective global action by its own inaction.

[29] Mr Smith pleads that some of New Zealand's national emissions are caused by Crown activities and these emissions have had and will continue to have the adverse impacts on ecosystems and the human population in New Zealand and elsewhere (referred to as Crown emissions). He pleads that the Crown has knowingly failed or refused to measure, monitor and mitigate Crown emissions or to "put in place an effective policy or regulatory framework to mitigate Crown emissions".

[30] Further, Mr Smith pleads that the Crown has also knowingly failed to exercise its public power to reduce national emissions to avoid the dangerous impacts of climate change on ecosystems and human populations in New Zealand and elsewhere "by adopting policies to achieve offshore mitigation instead of national emissions, which have not been effective to reduce emissions". He pleads that national emissions have not reduced at all since 1992 but instead have increased year on year since then.

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47 The pleaded particulars are: increases in temperatures; loss of biodiversity and biomass; loss of land and productive land including as a result of sea level rise; risks to food and water security; increasing extreme weather events; geopolitical instability and population displacement; adverse health consequences; economic losses from these effects; and "[a]n unacceptable risk of social and economic collapse and mass loss of human life and civilisation".

48 See above at n 13.

[31] Mr Smith pleads that in New Zealand Māori communities will be disproportionately burdened by the adverse effects of climate change. This is because Māori communities have: interests in land that will be irreparably damaged by the inundation and erosion of those lands; customary interests in resources (including fisheries) that will be irreparably damaged by sea level rise, increasing surface temperatures, ocean warming and ocean acidification; and particular vulnerabilities to the adverse effects of climate change arising from the historical and ongoing consequences of colonisation.[49]

[32] The pleaded harm to Mr Smith and his whānau is focussed on the Mahinepua C block. He pleads that many of the customary sites and resources are located in the sea or in close proximity to the coast, waterways or low lying land. He pleads that climate change will result in:

(a) "increasing sea levels, causing increased coastal erosion, inundation, flooding and storm surges";

(b) "the irrevocable and irreplaceable loss of land, resources, and species that are economically, culturally and spiritually significant to [Mr Smith] as tangata whenua (including interests protected under [the Treaty]"; and

(c) "increasing heath impacts".[50]

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49 The specific pleaded greater vulnerabilities and disadvantages are: vulnerabilities and disadvantages associated with dispossession of and displacement from traditional land and resources; higher levels of poverty and health issues than the general population; and that Māori communities generally reside in locations more likely to suffer to loss or damage from inundation and extreme weather events, generally have greater reliance on access to customary natural resources and face cultural vulnerabilities associated with loss of sites cultural, historical, customary and spiritual significance.

50 The pleaded irrevocable damage to the family land that will occur is as a result of: the physical loss of land from erosion and inundation; a loss of productive land from saltwater intrusion; a loss of economic value of the land because of this; and a loss of cultural and spiritual significance that cannot be compensated by money or the substitution of different land or remedied by relocation to a different area. Further it is pleaded that irrevocable damage to customary sites and resources will occur as a result of: the loss and impairment of traditional or customary fisheries from sea level rise, ocean warming and ocean acidification; the physical loss and impairment of traditional or customary coastal landing sites for waka and access to those sites; and the physical loss of burial caves and cemeteries from erosion or inundation.

[33] Mr Smith pleads these impacts have or will have a greater impact on him and his iwi than on the general population of New Zealand. In addition to these future effects and impacts, Mr Smith pleads that:

> … [s]ome of [these impacts], including those related to sea level rise and increases in the severity and intensity of severe weather events and storms, have either already begun to occur or are inevitable as a result of emissions of GHG to date.

[34] He further pleads that these impacts will become "increasingly inevitable" if the pleaded minimum global reductions are not achieved or bettered.

[35] The above pleadings form the background to the specific pleadings for each of the pleaded causes of action which we set out and discuss below.

Strike out jurisdiction

[36] The court may strike out all or part of a pleading if it "discloses no reasonably arguable cause of action".[51] As summarised by this Court in *Smith v Fonterra Co-operative Group Ltd*:[52]

> [38] We [address each cause of action] through the lens of well-established strike out principles. That is to say, we assume the pleaded material facts are true save for those that are entirely speculative and without foundation and we also bear in mind that the strike out jurisdiction is to be exercised sparingly and only in clear cases. We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law. The fact a claim involves a complex question of law which requires extensive argument should be no bar provided we have the requisite materials and assistance to determine the matter. We must also be mindful of the well established principle that if any deficiencies can be cured by an amendment to the pleadings, allowing the claim to proceed on condition the necessary amendments are made, is preferable to strike out.

[37] On appeal, the Supreme Court focussed on the "[w]e must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area

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51 High Court Rules 2016, r 15.1(1)(a).

52 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] NZLR 284 [*Smith v Fonterra* (CA)] at [38], as quoted in *Smith v Fonterra* (SC), above n 1, at [74] (footnotes omitted).

of law" aspect of these principles.[53] After reviewing the key authorities about this the Court concluded:

> [83] These authorities articulate what are long-established principles: a measured approach to strike out is appropriate where a claim—whether in negligence, nuisance or otherwise—is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.
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> …
>
> [85] Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.

Right to life

The right

[38] Section 8 of NZBORA provides:[54]

> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

The pleading

[39] The proposed cause of action is as follows:

(a) "[L]ife" in s 8 includes the presence of circumstances which are fundamental to a dignified and meaningful life and, in particular, the presence of a sustainable climate system.

(b) Mr Smith, his whānau, and members and future generations of Ngāpuhi and Ngāti Kahu are rights-holders under s 8.

(c) Crown emissions and national emissions have created and do create a real and immediate risk that the rights-holders will be deprived of life

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53 *Smith v Fonterra* (SC), above n 1, at [76].

54 Section 5 of NZBORA provides: "Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Crown does not rely on s 5 in support of its strike out application. We therefore do not discuss it further.

in a manner that is not established by law or consistent with the principles of fundamental justice.

(d) The Crown has breached the rights under s 8 of the rights-holders by:

(i) being responsible for Crown emissions and failing or refusing to put in place any regulatory framework to measure, monitor and mitigate Crown emissions which provides for rational and effective deterrence of the real and immediate risk that the right-holders will be deprived of life; and

(ii) failing to put in place a regulatory framework in relation to national emissions that is sufficient to provide rational and effective deterrence of the real and immediate risk that the right-holders will be deprived of life.

[40] As is apparent, the claim encompasses both emissions produced by the Crown directly (called Crown emissions) and those produced across the whole country, including by the private sector (called national emissions). In relation to Crown emissions, although the pleading alleges that the Crown has directly breached rights by its emissions, on appeal Mr Smith has confined his claim to an alleged breach by omission through the failure by the Crown to regulate its emissions. In relation to national emissions, the claim is that the Crown breached s 8 by omission because it has failed to put in place a regulatory framework that is sufficient to protect rights.

[41] The relief sought is a declaration that the Crown has breached and is breaching s 8, a declaration that the CCRA is inconsistent with s 8 and reporting orders requiring the Crown to update the court of the steps it is taking to bring itself into a position of compliance with NZBORA (including the possibility for further relief).

High Court

[42] The Judge concluded the claim under s 8 was untenable on the basis that it was not supported by any authority.[55] Specifically, the Judge considered that:

(a) Consistent with the legislative history of NZBORA, this Court in *AR (India) v Attorney-General* had taken a relatively narrow approach to the scope of s 8 by rejecting that the right to life included a right to dignity.[56]

(b) While the United Nations Human Rights Committee (HRC) in *Teitiota v New Zealand* accepted the right to life included a positive obligation on the state to take steps to provide for the basic necessities for life, it held that climate change risks were not an "imminent, or likely, risk of arbitrary deprivation of life". Similarly, here there was no real or identifiable risk to a specified individual or class of individuals.[57]

(c) The claim was not analogous to the High Court decision in *Wallace v The Attorney-General*, where it was held that the police had created a dangerous situation that put at risk an identifiable class of persons which called for positive protective intervention.[58] Here, there is a "multifocal legislative and monitoring framework in place managing the climate change risks to the whole population".[59]

(d) The decision of the Supreme Court of the Netherlands in *The State of the Netherlands (Ministry of Economic Affairs and Climate*

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55 High Court judgment, above n 2, at [174]–[195].

56 At [176]–[177], citing *AR (India) v Attorney-General* [2021] NZCA 291, [2021] NZAR 248 at [38], [47] and [57].

57 At [178]–[181], citing United Nations Human Rights Committee *Views: Communication No 2728/2016* UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) [*Teitiota v New Zealand*] at [9.6]; and see ICCPR, art 6. Article 6 of the ICCPR relevantly provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." New Zealand ratified the ICCPR on 28 December 1978.

58 At [193], referring to *Wallace v The Attorney-General* [2021] NZHC 1963 [*Wallace v Attorney-General* (HC)]. Subsequent to the delivery of the decision under appeal, this Court delivered a decision on appeal, which is discussed below at [81]–[83]: see *Wallace v Attorney-General* [2022] NZCA 375, [2022] 3 NZLR 398 [*Wallace v Attorney-General* (CA)].

59 At [193].

Policy) v Stichting Urgenda relied on arts 2 and 8 of the European Convention on Human Rights (the European Convention) (an expanded right to life and right to respect for family and private life, the latter of which has been interpreted as including a right to protection from environmental hazards) to find that the Netherlands was required to "do its part" in circumstances where the government had backed away from its previous climate change commitments.[60] NZBORA does not include the art 8 right of respect for private and family life.[61] *Urgenda* should "be treated with caution".[62]

Submissions

[43] Mr Smith says the Judge defined "life" too narrowly as not including the ability to live with dignity and to access the necessaries of life, including a healthy environment. He says the rights in NZBORA are to be interpreted generously, s 8 is capable of a generous and purposive interpretation and this Court was wrong in *AR (India)* to hold that s 8 did not include a right to live with dignity.[63] He says it is out of step with the HRC on art 6 of the ICCPR, as most recently discussed in the context of climate change impacts in *Teitiota* and *Billy v Australia*.[64]

[44] Mr Smith also says the Judge erred in failing to find that the protective duty is capable of being engaged as pleaded. He says that s 8 encompasses a protective duty that imposes positive obligations on the Crown to put in place regulatory frameworks that are effective to reduce the risk to human life. He says a protective duty has been repeatedly recognised by the European Court of Human Rights (ECtHR) under art 2 of the European Convention and the domestic courts of state parties to that Convention, citing the decisions of the ECtHR in *Öneryildiz v Turkey* and the

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60 At [194], citing *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* ECLI:NL:HR:2019:2007 at [5.7.1]–[5.7.9] and [8.3.4]; and see Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention], arts 2 and 8.

61 At [194].

62 At [194].

63 *AR (India) v Attorney-General*, above n 56.

64 *Teitiota v New Zealand*, above n 57; and United Nations Human Rights Committee *Views: Communication No 3624/2019* UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [*Billy v Australia*].

Supreme Court of the United Kingdom in *Rabone v Pennine Care NHS Foundation Trust.*[65]

[45] Mr Smith says this duty arises because the Crown has and has had knowledge of a real and immediate risk to the lives of members of the public. He says the Crown has breached this positive duty because the Crown has not put in place any regulatory framework to measure and mitigate Crown emissions and its national framework is unreasonable, irrational and ineffective in reducing national emissions. He says that whether that is so is fundamentally a trial issue to be determined on the basis of evidence and full argument.

[46] The intervener's submissions are directed to legal issues rather than the pleaded claim. The intervener submits that: the right to life can impose positive obligations; the right to life encompasses living a life with dignity as well as simply being alive; climate change poses a reasonably foreseeable threat to life and thus engages s 8; whether the relevant risk affects a particular class of individuals or many individuals is not relevant to a determination of whether s 8 is engaged; and the extent to which the Crown should be afforded any weight (also referred to as the margin of appreciation in the international jurisprudence) for the judgements it has made in relation to its climate change response is an issue for trial.

[47] The Crown submits that s 8 is about actual loss of life or increased likelihood of death. It says it does not encompass measures that impact on a person's quality of life. It says this Court in *AR (India)* correctly rejected that s 8 could be construed to include a diminution of dignity.[66] As Mr Smith's claim does not substantiate an immediate risk to his life or the life of an identifiable individual, the Crown says a positive duty under s 8 cannot arise. The Crown further says that s 8 does not impose a positive obligation on the Crown to protect life when adopting measures in the climate change context. It says such an obligation is not consistent with *Wallace,* nor the decisions of the HRC or the ECtHR.[67] Even if there were the claimed positive obligation, the Crown says it is met by the measures being taken.

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65 *Öneryildiz v Turkey* (2004) 39 EHRR 253 (Grand Chamber, ECHR); and *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72.

66 *AR (India) v Attorney-General*, above n 56.

67 *Wallace v Attorney-General* (CA), above n 58.

Does the right to life include the right to a life with dignity?

[48] The first issue that arises is whether it is tenable that s 8 encompasses living a life of dignity as well as simply being alive. In this context, as the intervener put in its submissions, a right to life with dignity refers to a "minimum baseline as to the quality of one's life".

[49] This Court's decision in *AR (India)* is not a complete answer to the issue of whether the right to life includes such a minimum baseline.[68] It arose in quite a different context.[69] The claim that the State had breached s 8 of NZBORA by decreasing the appellant's quality of life was weak and relied on an expansive view of a life with dignity.[70] This Court rejected that s 8 encompassed "an unqualified deprivation of dignity".[71] It considered that this could not be reconciled with the plain meaning of s 8 and Parliament's intention when adopting its "comparatively narrow formulation".[72] This intention was evident from the fact that, when NZBORA was enacted, New Zealand was a signatory to the International Covenant on Economic, Social and Cultural Rights (the ICESCR).[73] Despite the recommendation of the Justice and Law Reform Committee that New Zealand's Bill of Rights should cover some major social and economic rights, NZBORA as enacted does not do so.[74]

[50] The Court in *AR (India)* did, however, acknowledge that "the meaning of the rights in … NZBORA may gradually expand in ways that accord with international jurisprudence".[75] Since then, the relevance of international jurisprudence on the

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68 *AR (India) v Attorney-General*, above n 56.

69 AR was Muslim and claimed he faced persecution in India that was accentuated when he joined a Muslim political party. He made several unsuccessful applications for refugee status in various countries, including three in New Zealand. The last of those concerned a notation in his passport as to his temporary visa status, which referred to his pending refugee appeal: see at [3]–[14].

70 He claimed that the notation in his passport breached s 8 of NZBORA because it decreased his quality of life in New Zealand. This notation was said to have prevented him from working, travelling or being able to live with dignity causing his mental health to deteriorate and feeling unworthy in the eyes of others in New Zealand: see at [15]–[21] and [28]–[30].

71 At [47].

72 At [47].

73 International Covenant on Economic, Social and Cultural Rights 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].

74 *AR (India)*, above n 56, at [41]–[42], citing "Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand" [1987–1990] XVII AJHR I 8C [Justice and Law Reform Committee NZBORA report] at 4 and New Zealand Bill of Rights Bill 1989 (203–1) (explanatory note) at i–ii. NZBORA affirms New Zealand's commitment to the ICCPR but not to the ICESCR: see NZBORA, long title.

75 At [46].

ICCPR, which NZBORA affirms, has been emphasised in the Supreme Court. For example, in *Fitzgerald v R* Winkelmann CJ said "it is important … to reflect that [NZBORA] has common law, statutory and international antecedents" when applying and interpreting it, remembering that it is an enactment intended to fulfil New Zealand's obligations under the ICCPR.[76] NZBORA is to be given a "generous interpretation – an interpretation suitable to give individuals the full measure of the enacted fundamental rights and freedoms".[77]

[51] A generous interpretation does not mean ignoring differences in the wording between s 8 of NZBORA and art 6 of the ICCPR. As McGrath J in the Supreme Court in *Helu v Immigration and Protection Tribunal* put it, the international text may not be used to contradict or avoid applying the terms of the domestic legislation, but:[78]

> … [r]esort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations. …

[52] A generous interpretation is also consistent with the international jurisprudence. In *General comment No 36* the HRC[79] said that the right to life in art 6 of the ICCPR is not to be interpreted narrowly and extends to the right to enjoy life with dignity.[80] It said that "degradation of the environment" or "deprivation of indigenous peoples' land, territories or resources" could engage the right to life with dignity.[81] It commented that:[82]

> Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. … Implementation of

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76 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [42]. See also at [250] per Glazebrook J.

77 At [41]

78 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J (footnote omitted).

79 The HRC was established by the ICCPR and it, amongst other things, publishes through "general comments" its interpretation of parts of the ICCPR. It also receives and considers complaints (referred to as communications) made by individuals (referred to as authors) who claim rights violations under the ICCPR. The HRC may only consider individual complaints from State Parties that have submitted to its jurisdiction through the Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). New Zealand ratified the Optional Protocol on 26 May 1989.

80 United Nations Human Rights Committee *General comment No 36 Article 6: right to life* UN Doc CCPR/C/GC/36 (3 September 2019) at [3].

81 At [26].

82 At [62] (footnotes omitted).

> the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. …

[53] In *Teitiota* and *Billy* the HRC relied on *General comment No 36*. Both cases concerned the effects of climate change:[83]

(a) *Teitiota* concerned a claim (referred to as a "communication" in the HRC jurisdiction) made to the HRC by Mr Teitiota against New Zealand, he having unsuccessfully applied for refugee status through New Zealand's domestic courts. He claimed that New Zealand had violated his right to life under art 6 of the ICCPR by removing him to Kiribati.[84] His family in Kiribati relied largely on subsistence agriculture and fishing on the island of Tarawa.[85] Mr Teitiota claimed that the situation on Tarawa had become increasingly unstable and precarious due to sea level rise caused by global warming, with fresh water becoming scarce because of saltwater contamination and overcrowding.[86] The lack of habitable land due to contamination and erosion was destroying food crops and causing land disputes that were at times violent.[87]

(b) *Billy* was a claim brought by eight Torres Strait islanders and their children who resided in low-lying islands particularly vulnerable to the effects of climate change.[88] They contended that Australia had violated various rights in the ICCPR including, relevantly, art 6.[89]

[54] In considering Mr Teitiota's claim under art 6, the HRC said:[90]

> [9.4] The Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures. The Committee

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83 *Teitiota v New Zealand*, above n 57; and *Billy v Australia*, above n 64, at [8.3].
84 *Teitiota v New Zealand*, above n 57, at [3].
85 At [2.5].
86 At [2.1].
87 At [2.1].
88 *Billy v Australia*, above n 64, at [2.1].
89 At [1.1].
90 *Teitiota v New Zealand*, above n 57 (footnotes omitted).

> also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death … The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 of the [IPCCR] even if such threats and situations do not result in the loss of life. Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.

[55] The HRC made similar comments in *Billy*.[91] The Crown distinguishes this jurisprudence from what is says is the proper approach to s 8 partly on the basis of NZBORA's legislative history. The Crown refers to the explanatory note to the Bill that became NZBORA which provided:[92]

> The rights and freedoms set out in the Bill are confined to civil and political rights … The Bill does not cover social, economic, and cultural rights. In this respect it departs from the recommendations of the Justice and Law Reform Committee, which recommended that certain social and economic rights be included in the Bill …

[56] The Crown submits that, as discussed in *AR (India)*, NZBORA's drafters were likely drawing a distinction between the ICCPR and the ICESCR and the more expansive rights in the latter were ultimately not included.[93] While we accept that point, *Teitiota* and *Billy* were about the right to life in art 6 of the ICCPR not the social and economic rights in the ICESCR.[94]

[57] In the context of a potentially unliveable planet because of climate change, or a planet in which land on a wide scale may become uninhabitable (with consequences for the ability of the planet to accommodate the population of humankind with a minimum level of dignity), we consider it is not clearly untenable that s 8 of NZBORA is engaged. Such an approach is not necessarily inconsistent with the words of s 8, is consistent with international jurisprudence on equivalent rights and may be necessary

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91 *Billy v Australia*, above n 64, at [8.3].

92 New Zealand Bill of Rights Bill (explanatory note), at i–ii.

93 *AR (India) v Attorney-General*, above n 56, at [41]–[42]. The Justice and Law Reform Committee referred to submissions that had suggested that certain social and economic rights be included in NZBORA, including "protection for the environment". It suggested that certain social and economic rights be included in the Bill including "[t]he right to a standard of living adequate for a person's health and well-being including food, housing, and medical care". See: Justice and Law Reform Committee NZBORA report, above n 74, at 10.

94 *Teitiota v New Zealand*, above n 57; and *Billy v Australia*, above n 64.

to give the right its "full measure".[95] Nor, in our view, is it precluded by *AR (India)* given the circumstances of that case.[96] The claim should not be struck out on this basis.

Do widespread effects prevent the right to life being engaged?

[58] The next issue is whether the risk to life can only be engaged if it affects a particular individual or class of individuals. The intervener submits that it is not correct that a reasonably foreseeable threat to life must only relate to one individual or a single class of individuals. It submits that the question is whether the risk is a reasonably foreseeable threat in relation to the person or persons on whose behalf the claim is brought. It submits that, logically, if a risk is real and identifiable in relation to one person, and it also meets that threshold in relation to all persons, then the outcome must be that the duty is owed to all those persons in the state's territory or jurisdiction.

[59] This submission appears to be consistent with the approach of the HRC in both *Teitiota* and *Billy*. In *Teitiota*, for example, the question was whether Mr Teitiota could show that his removal from New Zealand to Kiribati violated his right to life under art 6.[97] The majority view of the HRC was that Mr Teitiota had not shown this on the evidence.[98] This was because he had not shown that fresh water would be inaccessible to him or that its limited availability presented a reasonably foreseeable health risk that would impair his right to enjoy life with dignity or cause his unnatural or premature death. Nor had he shown a real and reasonably foreseeable risk that he would be exposed to indigence, deprivation of food, and extreme precarity that could threaten his right to life, including his right to life with dignity. He had also not demonstrated a threat to his right to life as a result of violence resulting from private land disputes.[99]

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95 *Fitzgerald v R*, above n 76, at [41]–[42] per Winkelmann CJ.
96 *Fitzgerald v R*, above n 76, at [41]–[42] per Winkelmann CJ; and *AR (India) v Attorney-General*, above n 56.
97 *Teitiota v New Zealand*, above n 57, at [9.2].
98 At [9.14]–[10].
99 At [9.7]–[9.9].

[60] The majority of the HRC did, however, accept that climate change effects could constitute risks to life in relation to an entire country. It gave the example of the risk of an entire country becoming submerged.[100] As this was such an extreme risk, the HRC considered that "the conditions of life in such a country [could] become incompatible with the right to life with dignity before the risk [was] realized".[101]

[61] The same approach is not clearly unavailable on the words of s 8 of NZBORA. Consistent with *Teitiota* and *Billy*, a risk to life under s 8 to a particular person or group of persons is nonetheless a risk to life even though it may also be a risk to life to everyone. We conclude on this issue that the fact that a larger group of persons, or all of the population, is potentially affected by a rights breach does not necessarily preclude the courts from recognising such breaches. The claim should not be struck out as untenable on this basis.

Are the risks to life from climate change sufficiently proximate?

[62] The next issue is whether it is tenable that the risk to life to Mr Smith, his whānau and his future descendants from climate change is sufficiently proximate to be within s 8 of NZBORA. As the intervener submits, the HRC has required there to be "reasonably foreseeable threats to life" for art 6 to be engaged. However, in the context at least of refugee claims where a person is claiming they should not be returned to a country because of the general conditions in that county, the HRC has required that the conditions in that country be "extreme". The person must also demonstrate "substantial grounds … that a real risk of irreparable harm exists".[102] The risk of an entire country being submerged is an example.

[63] In *Teitiota* this threshold was not met. Mr Teitiota had claimed that sea level rise was likely to render Kiribati uninhabitable within a timeframe of 10 to 15 years.[103] However, the evidence was that Kiribati was taking adaptive measures. The assessment made by the domestic courts was that the measures being taken would

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100 At [9.11].
101 At [9.11]. See also *Billy v Australia*, above n 64, at [8.7].
102 *Teitiota v New Zealand*, above n 57, at [9.3].
103 At [9.10].

protect Mr Teitiota's right to life. The HRC did not regard that assessment as clearly arbitrary or erroneous, or as amounting to a denial of justice.[104]

[64] *Billy* was not a refugee case.[105] It is more similar to the present claim in that the complaint under art 6 was that the State, in that case Australia, had failed to prevent a foreseeable loss of life to the Torres Island claimants from the impacts of climate change and to protect their right to a life with dignity.[106] They claimed art 6 was breached because Australia had failed to take adaptation and mitigation measures.[107] They claimed that their islands would become uninhabitable in 10 to 15 years in the absence of urgent action.[108]

[65] The majority of the HRC considered the evidence put forward did not disclose a violation of art 6.[109] It was accepted that "without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights" under art 6 of the ICCPR.[110] The majority of the HRC went on to refer to the sea wall programme that was underway on the Torres Strait islands. Some of that work was already completed and there were other adaptation and mitigation measures planned. It concluded:

> 8.7 … The Committee considers that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee also considers that the information provided

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104 At [9.12]. The general approach of the HRC is to defer consideration of the facts and evidence to the state unless it can be established the assessment was clearly arbitrary or amounted to a manifest error or a denial of justice: see at [9.3].

105 *Billy v Australia*, above n 64.

106 At [3.4]. The impacts on their traditional ways of life and subsistance and culturally important living resources were said to present significant social, cultural and economic challenges; impacts on infrastructure, housing, land-based food production systems and marine industries; and health problems such as increased disease and heat-related illness: see at [2.6].

107 At [3.4].

108 At [8.7]. The decision sets out the detailed basis for this, including data that the sea level rise caused flooding and erosion on the claimants' islands. Five communities were particularly vulnerable to inundation. Erosion had caused the shoreline to advance and detach a small area from the island. A cyclone in 2019 had caused severe flooding, erosion and destroyed buildings. Approximately one metre of land was lost every year. A recent tidal surge had destroyed family graves and scattered human remains. High tides and strong winds seawater to flood one village every two to three years. On one island, erosion had washed away most of its sand. Sea level rise had caused saltwater to intrude into soil so that areas used for traditional gardening could no longer be cultivated. It had also caused coconut trees to become diseased so that they did not produce fruit or water. Sea level warming and ocean acidification was causing the decline of nutritionally and culturally important marine species.

109 At [8.3]–[8.8].

110 At [8.7].

> by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms on the islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient and therefore represent a direct threat to the authors' right to life with dignity.

[66] This reasoning, if applied to s 8 of NZBORA, suggests that the loss of land or important food sources for a community as a result of climate change does not breach the right to life (including the right to dignity) if timely measures are available and underway to address the risk. As to this, the scientific consensus articulated in the ICCPR reports, as well as other sources, is relevant to the imminence of the risk to life and the timeframe within which measures will be available.

[67] The issue of imminence of a risk to life was also discussed in the recent decision of the ECtHR in *Verein KlimaSeniorinnen Schweiz v Switzerland*.[111] The case was brought by a not-for-profit association, established to promote and implement effective climate protection on behalf of women living in Switzerland, predominantly those aged over 70 years, and by four women who were members of that association.[112] They claimed that the Swiss government's climate policies violated the right to life (art 2 of the European Convention) and the right to private and family life (art 8 of the European Convention).[113]

[68] Their claim was based on the demonstrable health risks during heatwaves (increasing and intensifying because of climate change) to vulnerable groups, in this case older women. The case failed in the Swiss domestic courts but succeeded before the ECtHR, by a majority, on the art 8 claim.[114] The majority found it unnecessary to decide the case under art 2 although it commented that it was "more questionable"

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111 *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 (Grand Chamber, ECHR). The European Court of Human Rights has jurisdiction amongst the member states of the Council of Europe, who are all parties to the European Convention. It has jurisdiction to hear applications alleging violation of the rights guaranteed under the European Convention when domestic remedies are exhausted.

112 At [10]–[21].

113 Article 2 of the European Convention is similar to art 6 of the ICCPR in that it includes a positive statement to the right to life as well as the right not to be deprived of life. Relevantly, art 2(1) provides: "*Everyone's right to life shall be protected by law*. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." (Emphasis added.)

114 *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, at [573].

whether the alleged shortcomings in the government's policies relied upon could trigger art 2.[115]

[69] In reaching its decision, the majority discussed the requirement in an art 2 claim that there be a "real and imminent risk" to life for the right to life to be engaged.[116] It did so having discussed the recent IPCC reports in some detail.[117] It considered the claim fell into the kind of case where the activity was, by its very nature, capable of putting an individual's life at risk.[118] It described the scientific evidence as compelling in showing a link between climate change and an increased risk of mortality, particularly in vulnerable groups.[119] It emphasised the need for an assessment in the particular circumstances of the seriousness of the risk and its temporal proximity, saying:[120]

> 511. The applicability of Article 2, however, cannot operate *in abstracto* in order to protect the population from any possible kind of environmental harm arising from climate change. In accordance with the case-law … in order for Article 2 to apply in the context of an activity which is, by its very nature, capable of putting an individual's life at risk, there has to be a "real and imminent risk" to life. This may accordingly extend to complaints of State action and/or inaction in the context of climate change, notably in

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115 At [536].

116 At [512]–[513]. It appears that European Convention cases have not consistently applied a "real and immediate risk" standard to all claims under art 2 of the European Convention, most notably in cases where it was claimed that the state was under a positive obligation to adopt an effective regulatory framework to address the risk to life: see Vladislava Stoyanova "Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights" (2020) 33 LJIL 601 at 612; and *R (on the application of Plan B Earth and others) v The Prime Minister* [2021] EWHC 3469 (Admin), [2021] All ER (D) 92 (Dec) at [41]. In any event, a "real and immediate risk" standard was applied in *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, and that is what is pleaded in this case by Mr Smith.

117 The majority referred to the modelled global pathways for limiting warming to 1.5°C and to 2°C that required rapid and deep emissions reductions and that without a strengthening in current policies the report predicted a median global warming of 3.2°C (2.2 to 3.5°C) by 2100 with "medium confidence". It also noted that the IPCC had stressed the urgency of near-term climate action with a "rapidly closing window of opportunity to secure a liveable and sustainable future for all" and that "the choices and actions implemented in this decade would have impacts now and for thousands of years": see *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, at [64]–[68] and [107]–[120].

118 At [509].

119 At [509]–[510]. The majority referred to the IPCC findings that climate change, particularly through increased frequency and severity of extreme events, increased heat-related human mortality. Other scientific studies had found that heatwaves had caused tens of thousands of premature deaths in Europe since 2000. Further, the IPCC had found that populations at highest risk of temperature-related morbidity and mortality included older adults, children, women, those with chronic diseases and those taking certain medication. The majority described the scientific evidence as compelling in showing a link between climate change and an increased risk of mortality, particularly in vulnerable groups.

120 Citations omitted.

> circumstances such as those in the present case, considering that the IPCC has found with high confidence that older adults are at [the] "highest risk" of temperature-related morbidity and mortality.
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> 512. It may be impossible to devise a general rule on what constitutes a "real and imminent" risk to life, as that will depend on the Court's assessment of the particular circumstances of a case. However, the Court's case-law indicates that the term "real" risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life … The "imminence" of such a risk entails an element of physical proximity of the threat … and its temporal proximity …
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> 513. In sum, in order for Article 2 to apply to complaints of State action and/or inaction in the context of climate change, it needs to be determined that there is a "real and imminent" risk to life. However, such risk to life in the climate-change context must be understood in the light of the fact that there is a grave risk of inevitability and irreversibility of the adverse effects of climate change, the occurrences of which are most likely to increase in frequency and gravity. Thus, the "real and imminent" test may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant. ….

[70] The majority determined that the four individual applicants (who were in any event members of the association) did not have standing to bring their claim.[121] They had provided evidence and data about how heatwaves affected older women in Switzerland, and were associated with increased mortality and morbidity, and showed that several summers in recent years had been among the warmest summers ever recorded in Switzerland.[122] The majority considered this to be insufficient to establish standing, saying:

> 533. However, while it may be accepted that heatwaves affected the applicants' quality of life, it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection, not least given the high threshold which necessarily applies to the fulfilment of the criteria set out … above. It cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country …

[71] In contrast, the majority considered that the association did have standing to bring the claim. This was because of the urgency of combating the adverse effects of

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121 At [527]–[535].
122 At [529].

climate change and the grave risk of their irreversibility, requiring that measures be taken not just for individuals currently affected by climate change but also for those in the future whose rights under the European Convention may be "irreversibly affected in the future in the absence of timely action".[123] While the association had standing to raise the art 2 claim, the majority did not determine whether Switzerland's shortcomings in its measures to combat the adverse effects and threats of climate change "had such life-threatening consequences as could trigger the applicability" of art 2 because the claim could be considered under art 8 alone.[124] The majority considered that art 8 undoubtedly applied whereas, and as noted earlier, art 2 was "more questionable".[125]

[72] *Verein KlimaSeniorinnen Schweiz* illustrates the difficulty for claimants to establish that climate change raises a sufficiently timely and proximate risk to life to them so as to engage the right to life in art 2 of the European Convention. On the other hand, it recognises the risk to life in the climate-change context must be understood in light of the grave risk of inevitability and irreversibility of the adverse effects of climate change that are likely to increase in frequency and gravity.

[73] In so far as Mr Smith brings his claim for his living whānau, *Verein KlimaSeniorinnen Schweiz* suggests that it is necessary to show that they are personally at risk from the effects of climate change (relevantly here to their life or to a minimum baseline for a life with dignity) and that there is a "pressing need" to ensure their protection from these effects that cannot be alleviated by available adaptive measures. It also suggests that a claim may be brought on behalf of future generations whose rights to life (or to a minimum baseline for a life with dignity) are at risk of being irreversibly affected in the absence of timely action that is not and will not be taken albeit that this will be a different case to prove.

[74] In the context of a strike out application, whether the risk to life pleaded by Mr Smith is sufficiently timely and proximate for Mr Smith and those on whose behalf he brings the claim so as to engage s 8 of NZBORA may require particulars and would

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123 At [499].
124 At [536]. See also [521]–[526].
125 At [536].

be a matter of evidence for trial. This is a challenging issue for Mr Smith's claim but we do not say that the cause of action is so clearly untenable on this basis that it must be struck out.

Can s 8 impose positive duties?

[75] The next issue is whether s 8 of NZBORA can impose a positive obligation on the Crown to have a framework of laws to protect life. As pleaded, the positive obligation is that the Crown is required to measure and monitor and to have a framework for mitigating Crown emissions, and to have a framework for regulating national emissions that provides a rational and effective deterrence of the real and immediate risk to life to Mr Smith and those on whose behalf he brings his claim.[126]

[76] This pleading largely relies on jurisprudence on art 2 of the European Convention. As it was put by the House of Lords in *R (Middleton) v West Somerset Coroner*:[127]

> [2] The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. …

[77] A positive obligation under art 2(1) to the European Convention to have a legislative and administrative framework designed to provide effective deterrence against threats to the right to life has arisen in various cases,[128] including those involving dangerous activities. For example:

(a) *Öneryildiz v Turkey*:[129] 39 people died from a landslide caused by a methane explosion at a rubbish tip in Turkey which was known by authorities to be at risk of explosion and of causing major damage to

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126 As noted, Mr Smith also pleads that the Crown has actively breached the rights-holders' rights by producing Crown emissions. That is, the Crown has actively interfered with the rights-holders rights rather than failed to prevent an interference. This aspect was not pursued by Mr Smith on appeal.

127 *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182.

128 See D J Harris and others *Law of the European Convention on Human Rights* (5th ed, Oxford University Press, Oxford, 2023) at 208–220.

129 *Öneryildiz v Turkey*, above n 65.

neighbouring dwellings.[130] Other than an application by the local Mayor for the temporary closure of the tip, no substantive steps were taken to address the risk prior to the accident.

(b) *Budayeva v Russia*:[131] eight people were killed when a succession of mudslides hit the Russian town of Tyrnauz.[132] The area was prone to mudslides and emergency work to repair a mud retention dam to protect the town was not undertaken.

(c) *Kolyadenko v Russia*:[133] without warning to the nearby inhabitants, authorities released water from a reservoir near Vladivostok because of the risk of a dam breaking as a result of that day's exceptional weather conditions.[134] This caused a flash flood that damaged homes and put residents at risk of drowning.[135]

[78] In *Öneryildiz*, the ECtHR described the duty on the Turkish State under art 2 in relation to dangerous activities as follows:[136]

> 89. The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 … entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life …
>
> 90. This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.

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130 At [10]–[18]. The landslide engulfed "some ten slum dwellings" situated below the tip that were part of a "slum" that had developed near the tip with the knowledge but not authorisation of the Government. Some two years earlier, relevant local councils, the governor and the central Government had received a report indicating that the tip did not comply with relevant regulations and posed a major health risk. It noted that the tip had no system for burning off methane gas created by the decomposition of rubbish, creating a risk of explosion. It warned "[m]ay God preserve us, as the damage could be very substantial given the neighbouring dwellings".

131 *Budayeva v Russia* (2014) 59 EHRR 59 (ECHR)

132 At [26]–[33].

133 *Kolyadenko v Russia* (2013) 56 EHRR 77 (ECHR).

134 At [162]–[163].

135 At [153]–[155].

136 *Öneryildiz v Turkey*, above n 65.

[79] The reasons in *Budayeva* and in *Kolyadenko* are to similar effect. As to the choice of the practical measures a state is required to take, these authorities make clear that the state is to be afforded a wide margin of appreciation.[137] An impossible or disproportionate burden is not to be imposed without consideration for operational choices the state must make as to priorities and resources.[138] The "scope of the positive obligations imputable to the state in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation".[139] In all three cases, violations of art 2 were found.[140]

[80] In *Verein KlimaSeniorinnen Schweiz*, alleged failures by Switzerland in its response to climate change were regarded as being in the class of case involving dangerous activities that were, by their very nature, capable of putting a person's life at risk of which *Öneryildiz*, *Budayeva* and *Kolyadenko* were all examples.[141] Although the majority of the ECtHR in *Verein KlimaSeniorinnen Schweiz* decided the case under

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137 *Budayeva v Russia*, above n 131, at [134]–[135]; *Öneryildiz v Turkey*, above n 65, at [107]; and *Kolyadenko v Russia*, above n 133, at [160].

138 *Budayeva v Russia*, above n 131, at [135]; *Öneryildiz v Turkey*, above n 65, at [107]; and *Kolyadenko v Russia*, above n 133, at [160].

139 *Budayeva v Russia*, above n 131, at [137].

140 In *Öneryildiz v Turkey*, above n 65, the timely installation of a gas-extraction system could have been an effective measure that would not have been a disproportionate burden or given rise to policy problems, and the Government had not informed the inhabitants of the neighbouring dwellings of the risks they ran by living near the tip. Further, the regulatory framework allowed the tip to operate without conforming to technical standards, did not provide a coherent supervisory system to encourage those responsible to take steps adequate to protect the public, or for coordination and cooperation between the administrative authorities so that the risks did not become so serious as to endanger lives: see at [101]–[109]. In *Budayeva v Russia*, above n 131, the State could reasonably have been expected to inform civilians of the risk to them and to make advance arrangements for an emergency evacuation. It had taken no measures to protect against the "foreseeable exposure of residents … to mortal risk" and there was a causal link between the "serious administrative flaws" of the State and the death and injuries sustained by those on whose behalf the claim was brought: see at [152]–[158]. In *Kolyadenko v Russia*, above n 133, there were failings by the State in relation to town planning policies in the vicinity of the reservoir, in the supervision of those responsible to take steps to protect the population, in failing to have in place an emergency warning system, to ensure cooperation between authorities in bringing attention to the risks, and remaining inactive on the day of the flood: see at [185].

141 *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, at [507]–[509].

art 8 of the European Convention rather than art 2, it did so noting that the principles under each were to a "very large extent" similar.[142] The majority said:[143]

> … The scope of the positive obligations imputable to the State in the particular circumstances will depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation. …

[81] The Crown submits that the rights in s 8 of NZBORA are materially different from art 2 of the European Convention and art 6 of the ICCPR because, unlike those articles, s 8 is framed in negative terms (the right not to be deprived of life) without also including the positive affirmation that life is to be protected (everyone has the right to life) which is included in the European Convention and ICCPR framing of the right. The Crown further submits this Court made it clear in *Wallace* that a positive framework obligation, of the kind discussed in *Öneryildiz*, is not available under s 8, when it said:[144]

> [98] … [T]o hold the State liable under s 8 is to find that it is responsible for someone being deprived of life without lawful justification. The need for a causal connection between the acts of State actors and a death points to a need for operational error rather than systemic effects.

[82] We do not see that comment in *Wallace* as necessarily determinative of whether the pleaded positive obligations are tenably within s 8. The dicta was in the context of a discussion of whether s 8 encompassed indirect acts that caused a death. It was not a comment that focussed on whether s 8, although expressed negatively and without the positive "everyone has the right to life" wording, could encompass

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142 At [537]. Those principles included obligations on the state to put in place legislative and administrative frameworks designed to provide effective protection of human health and life and to apply that framework effectively in practice. The Court was required to allow the state a wide margin of appreciation and the choice of means fell within the margin of appreciation. A disproportionate burden was not to be imposed on authorities without consideration of the operational choices they had to make in terms of priorities and resources: see at [538].

143 At [538(g)].

144 *Wallace v Attorney-General* (CA), above n 58 (footnote omitted). We note that the framework duties in European Convention jurisprudence on the right to life are often referred to as "systems duties" as opposed to "operational duties". In some cases there may also be procedural duties on the state. See generally: *Rex (Maguire) v Blackpool and Fylde Senior Coroner* [2023] UKSC 20, [2023] 3 WLR 103 at [10]–[12] per Lord Sales SCJ.

positive obligations. More relevantly for present purposes, this Court went on to say:[145]

> [111] Article 6 of the ICCPR speaks of the inherent right to life, while s 8 speaks of a right not to be deprived of life. Nothing turns on this. The Attorney accepts that s 8 affirms the inherent right to life. …

[83] The Court accepted that a s 8 claim "might extend to failures in planning and control of the police operation that ended in Mr Wallace's death".[146] The Court also accepted that there was an implied right in s 8 "to have an ICCPR-compliant investigation into potentially unlawful deaths for which the State may be held accountable" and that this right existed as a "necessary incident of the right to life".[147] As the Crown acknowledges, the courts have found that s 8 can involve a duty on the state to act when it has knowledge of the risk to life faced by a particular individual. The Crown accepts it was implicit in this Court's decision in *Re J (An infant): B and B v Director-General of Social Welfare* that the State had a duty to act to prevent the child's death because it was aware that there was a risk to life to the child from the parents' religious choices.[148]

[84] The Crown submits that in these cases there was the necessary degree of proximity between the state and the individual whose life was at risk such that there was a duty on the state to act to protect the life. Similarly, the Crown submits there was the necessary proximity between the person who had died in *Wallace* and the duty to investigate that death. The Crown compares these cases with the widespread risk from COVID-19 considered in *R (on the application of Gardner and another) v Secretary of State for Health and Social Care*, a decision of the High Court of England and Wales.[149] The case concerned claimants whose fathers were amongst the 20,000 residents of care homes in England who died of COVID-19 during the first wave of the pandemic in 2020.[150]

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145 Footnote omitted.

146 At [99].

147 At [132].

148 *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA). Although in a different context, see the discussion of positive obligations that may be imposed by the right to freedom of expression in some situations: *Moncrieff-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [67]–[74].

149 *R (on the application of Gardner and another) v Secretary of State for Health and Social Care* [2022] EWHC 967 (Admin), [2022] 4 All ER 896.

150 At [1].

[85] The Court considered that the positive duty under art 2 of ICCPR to put in place a legislative and administrative framework to provide effective deterrence against threats to the risk of life was met. That was because this duty was a "high level structural duty" rather than an obligation of result.[151] There was nothing wrong with the framework under which the policies were promulgated.[152] Instead the complaint was about those policies which engaged the operational aspect of the art 2 positive obligations rather than the duty to put in place an effective regulatory framework, as pleaded here. The Court rejected this complaint, saying:

> [250] We draw the following from the domestic and Strasbourg cases which we have cited:
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> (i) a real and immediate risk to life is a necessary but not sufficient factor for the existence of an art 2 operational duty;
>
> (ii) generally, the other necessary factor is the assumption by the State of responsibility for the welfare and safety of particular individuals, of whom prisoners, detainees under mental health legislation, immigration detainees and conscripts are paradigm examples since they are under State control;
>
> (iii) however, the duty may exist even in the absence of an assumption by the State of responsibility, where State or municipal authorities have become aware of dangerous situations involving a specific threat to life which arise exceptionally from risks posed by the violent and unlawful acts of others (*Osman*) or man-made hazards (*Oneryildiz*, *Kolyadenko*) or natural hazards (*Budayeva*), or from appalling conditions in residential care facilities of which the authorities had become aware (*Nencheva*, *Campeanu*);
>
> (iv) *Watts* suggests that, in appropriate circumstances (which remain so far undefined), the operational duty may also arise where State or municipal authorities engage in activities which they know or should know pose a real and immediate risk (according to *Maguire*, an exceptional risk) to the life of a vulnerable individual or group of individuals.
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> …
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> [252] There is no authority of the Strasbourg court which has gone as far as holding that a State is under an operational duty to take all reasonable steps to avoid the real and immediate risk to life posed by an epidemic or pandemic to as broad and undefined a sector of the population as residents of care homes for the elderly. There is no clear and consistent line of Strasbourg authority which indicates that such a duty exists and we cannot be at all confident – indeed we gravely doubt – that the ECtHR would be willing to declare that it

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151 At [226].
152 At [227].

> does. We should keep pace with the Strasbourg jurisprudence, but not run past it and disappear into the distance. The Defendants did not, in our view, owe the art 2 operational duty for which the Claimants contend.
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> [253] In the circumstances the 'disproportionate burden' and 'margin' issues do not arise; and it is also unnecessary for us to consider the causation argument put pithily by Ms Grey in these terms: 'COVID-19 is a virulent and dangerous disease, but the risk to life which it presents was not created, nor disproportionately increased, by the March Hospital Discharge Policy'.

[86] *Gardner* is consistent with the requirement for temporal proximity between the risk to life and the applicants emphasised in *Verein KlimaSeniorinnen Schweiz*. It also cautions against broadening the positive obligation under art 2 to threats to life to an undefined and broad section of the public, that are not of the state's making or over which it has no control or has not made worse. It accepts that an assumption of state responsibility is generally required for operational positive obligations to arise under art 2 and exceptionally can also arise when it is aware of dangerous situations involving a specific threat to life. It suggests, however, that this might not apply to a dangerous disease that was not created nor made disproportionately worse by state action.

[87] Climate change is a different order of threat than the more confined and specific threats in the exceptional dangerous activities line of decisions (*Öneryildiz*, *Budayeva* and in *Kolyadenko* amongst others).[153] The causative link in the climate change context was discussed in *Verein KlimaSeniorinnen Schweiz*. The majority of the ECtHR noted that the adverse effects on and risks for specific individuals living in a given place arise from aggregate GHG emissions globally and emissions originating from a given jurisdiction make up only part of the causes of climate change's harms.[154] This made establishing a causal link between the acts or omissions of a state and the risk of harm "more tenuous and indirect" compared with local sources of harmful pollution.[155] However, the majority's view was that the relevant test was not the "but for" test. Rather, the state had responsibility for reasonable measures that it failed to take that could have had a real prospect of altering the outcome or mitigating the harm. And this was to be understood in light of the commitments made by states under the

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153 *Öneryildiz v Turkey*, above n 65; *Budayeva v Russia*, above n 131; and *Kolyadenko v Russia*, above n 133.

154 *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, at [439].

155 At [439].

UNFCC and the Paris Agreement.[156] Similarly, as the Supreme Court's decision in *Smith v Fonterra* (the private law claim brought by Mr Smith) indicates, the law may develop causation principles in light of the fact that every GHG emitted adds to the total GHGs in the atmosphere, which the best available science says must stop increasing.[157]

[88] Given the context of the climate emergency, which can be described as one of the greatest human rights challenges the world has ever seen,[158] and the developing jurisprudence around the world responding to this challenge, we consider that an art 2-consistent interpretation of s 8 that a right to life encompasses a requirement to take protective measures against foreseeable threats to life is not so clearly untenable that it cannot succeed. It is not clearly untenable that the right to life in s 8 may require the Crown in some cases to take positive steps beyond those discussed in *Wallace* so as to give practical effect to the right not to be deprived of life in s 8, in line with the international jurisprudence.

Does the Crown's regulatory framework tenably breach the right to life?

[89] We consider the more challenging aspect of the pleaded claim is whether it is tenable that any such positive obligations in respect of national emissions are not met by the CCRA framework.[159] As discussed, the international jurisprudence allows a

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156 At [444] and [546]. As to causation, Mr Smith also referred to the reasoning in the first instance decision in the Federal Court of Australia in *Sharma v Minister for the Environment* [2021] FCA 560, (2021) 391 ALR 1. The case was overturned on appeal, although it does not appear the factual findings were disturbed: see *Minister for the Environment v Sharma* [2022] FCAFC 35, (2022) 400 ALR 203 at [2].

157 See *Smith v Fonterra* (SC), above n 1, at [151]–[152].

158 The intervener referred to the advocacy on this topic by the Secretary-General of the United Nations: "… our task is urgent. Humanity has opened the gates of hell. Horrendous heat is having horrendous effects. Distraught farmers watching crops carried away by floods; [s]weltering temperatures spawning disease; [a]nd thousands fleeing in fear as historic fires rage. … If nothing changes we are heading towards a 2.8 degree temperature rise – towards a dangerous and unstable world": António Guterres, United Nations Secretary-General "Secretary-General's opening remarks at the Climate Ambition Summit" (New York, 20 September 2023).

159 Climate change effects are also relevant under other legislation. For example, s 7 of the Resource Management Act 1991 requires all persons exercising functions and powers under that Act in relation to natural and physical resources to have particular regard to the effects of climate change. Further, s 5ZN of the CCRA makes the 2050 target, emissions budgets and emissions reduction plans at least a permissive relevant consideration for any person or body exercising or performing a public function, power or duty, at least when the statutory scheme under which that person is acting permits this: *Students for Climate Solutions Inc v Minister of Energy and Resources* [2024] NZCA 152, [2024] 2 NZLR 822 at [88] per French and Gilbert JJ and [112] and [125]–[139] per Mallon J.

wide margin of appreciation to the state in implementing a framework, reflecting the respective constitutional roles and competencies of the courts and legislature. As noted, the CCRA's purpose is to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort to limit global average temperature increase to 1.5°C above pre-industrial levels. It includes setting emissions budgets to achieve net zero emissions by 2050.[160] While the courts certainly have a role in respect of decisions made under that framework in their judicial review jurisdiction, reviewing the policy choices that the CCRA framework represents is not something that conventionally would be thought of as within their institutional competence.

[90] This was the basis on which a similar human rights challenge failed in the United Kingdom in *R (on the application of Plan B Earth and others) v The Prime Minister*.[161] The case considered the Climate Change Act 2008 (UK) which is broadly similar to New Zealand's CCRA framework. The claimants contended that the United Kingdom's climate policies breached art 2 of the European Convention, essentially because the Climate Change Act framework was ineffective to deter the threat to the risk of life.[162] This was because the Government was said to be not heeding the expert advice of the Committee on Climate Change established under that Act.[163]

[91] The art 2 claim was on the basis of the positive framework duty to have in place an appropriate set of measures to deter the threat to life from climate change. It was rejected in the High Court of England and Wales because of the "insuperable problem" that there was an administrative framework in the form of the Climate Change Act.[164] The State enjoyed a wide margin of appreciation in this area.[165] The

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160 See above at [15]–[16].

161 *R (On the application of Plan B Earth and others) v The Prime Minister*, above n 116.

162 At [2]–[4].

163 At [41]. Amongst other things, it was not aligning emissions to the Paris temperature limit, there was a lack of measures to adapt and prepare for the current and projected impacts of climate change and recommendations that finance be made consistent with the delivery of a net-zero economy had not been implemented.

164 At [48].

165 At [50].

place for debate about its provisions properly occurred "in a political context with democratic, rather than litigious, consequences".[166]

[92] *Plan B Earth* contrasts with the approach in *Verein KlimaSeniorinnen Schweiz.* There the claim under the European Convention was framed around state omissions in legislation.[167] The conclusion in *Verein KlimaSeniorinnen Schweiz* finding a violation of art 8 was put this way:

> 573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets … By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

[93] Under the strike out jurisdiction the pleaded material facts are assumed to be true save for those that are entirely speculative and without foundation.[168] While the pleaded particulars here in respect of national emissions may be capable of proof on

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166 At [54]. In refusing permission to appeal to the Court of Appeal Singh LJ agreed, at [8] saying: "The fact is that the Government and Parliament take the view that the 2008 Act is sufficient. Others (such as these Claimants) disagree. As the [High Court] Judge observed, that debate is very much a matter for debate in the democratic forum and is not for the courts." See *R (On the application of Plan B Earth and others) v The Prime Minister* CA (Civ) CA-2021-003448, 18 March 2022. Similar concerns as to the Court's proper role appear to have been expressed in *Environment Jeunesse v Canada* [2021] QCBA 1871 at [31]–[36] although, as observed at [42], the case appears to have been brought at a high level of generality and was considered to be too imprecise as to give no means for implementation through enforceable orders. (We have been provided with an unofficial English translation, the original is in French and we have not found an official translation of this decision.)

167 *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, at [439]. We understand that to have reflected that Swiss law did not provide for constitutionality review of existing federal law but the Swiss Constitution does have similar or identical European Convention rights which does allow for review of legislation.

168 See above at [36].

evidence,[169] and they are largely framed as omissions, they are largely omissions of a kind that challenge the efficacy of the legislative framework which reflects Parliament's policy choices. That is as opposed to suggesting there is no framework at all.

[94] While New Zealand courts can review whether legislation is consistent with NZBORA and grant declaratory relief as to that, we consider the constitutional separation of powers in this country is closely aligned to that of the United Kingdom, which is reflective of the domestic court's decision in *Plan B Earth*,[170] rather than the ECtHR approach seen in *Verein KlimaSeniorinnen Schweiz* and other European Convention cases where, with a margin of appreciation, the efficacy of frameworks may be considered. We consider it is clearly untenable that the right to life under s 8 of NZBORA enables the court to second guess the policy choices that the CCRA reflects. The CCRA is comprehensive in its reach (setting targets and covering emission reductions, risk assessments and adaptation measures).

[95] We acknowledge that aspects of the CCRA of concern to Mr Smith could be seen as omissions of the kind that might tenably be comparable to those accepted in *Verein KlimaSeniorinnen Schweiz* under the art 8 claim. In particular, it is alleged that the 2050 net zero target is not within the range of reasonable targets having regard to the best available science. Mr Smith says this is particularly because it does not include biogenic methane which has its own separate (lesser) targets. It is also alleged

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169 The pleading in relation to regulating national emissions is that: (a) the net zero by 2050 target under the CCRA is not within a range of reasonable targets having regard to the best available science; (b) there is no prescribed methodology for the setting of emissions budgets with Ministers having a wide discretion subject only to 11 mandatory relevant considerations which (i) do not align with framework principles and (ii) enable the setting of budgets on the basis of irrational assumptions that currently un-invented or unproven technology will be developed or proven in the future; (c) the CCRA does not create any legal obligation on any person, including the Crown, to mitigate their emissions of GHGs and expressly authorises the use of offshore mitigation for achieving the 2050 target and emissions budgets wherever reduction of national emissions or removals are deemed not to be possible; (d) the CCRA does not confer the right on any person to apply to a court, tribunal or other authority for orders that any person take steps to mitigate their emissions of greenhouse gases; (e) the CCRA does not recognise the emissions implications of exported products (in particular fossil fuels) that result in offshore emissions; and (f) because the ETS under the CCRA has an emissions cap that is too high, the emissions subsidies are too great and the agriculture exemption results in people and entities responsible for a substantial quantity of national emissions not being subject to ETS, the ETS has been and will continue to be ineffective in mitigating national emissions.

170 Albeit that the domestic court was discussing its assessment of the current state of ECtHR jurisprudence.

that the ETS is ineffective to result in mitigation of emissions in part because the agriculture sector is excluded from it. We have carefully considered whether these might tenably be omissions engaging s 8 of NZBORA.

[96] We have concluded, however, that they are not. In relation to the 2050 target, emissions of biogenic methane are to be between 24 per cent and 47 per cent less than 2017 emissions. It may be that Mr Smith could establish on evidence at trial that this is not within the range of reasonable targets but the CCRA also provides that the 2050 targets may be reviewed.[171] In relation to the ETS, that is not the only policy that the framework relies upon. Ultimately, decisions about the treatment of agriculture emissions in the CCRA are for Parliament. Given the purpose of the CCRA it must be assumed that Parliament intends to contribute to the global effort to limit the global average temperature increase to 1.5ºC and that its framework, including its treatment of agriculture emissions, has been developed to do so.

[97] It is the decisions that are made under the CCRA that will determine the adequacy or otherwise of New Zealand's response to the threat to life arising from climate change. Such decisions are judicially reviewable. A tenable claim by Mr Smith or those he represents would need to be one that related to decisions made under the CCRA (or other relevant legislation) that are said to breach their right to life. It would be a claim brought against the relevant Minister under the CCRA or other legislation under which the decision is made. Such a claim would need to articulate a basis on which a substantial risk to life to Mr Smith or those he represents (including future generations) is sufficiently proximate and that timely and reasonable action is no longer available or is not being taken to protect the lives of future generations. The difficulty of establishing such a claim is illustrated by *Billy*[172] and *Teitiota*.[173] The claim as pleaded, however, is against the Attorney-General and is focussed on the national regulatory framework rather than particular decisions made (or not made) under that framework.

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171 CCRA, s 5S.
172 *Billy v Australia*, above n 64.
173 *Teitiota v New Zealand*, above n 57.

[98] We have considered whether the claim that the Crown has failed to put in place a regulatory framework to measure, monitor or mitigate its own emissions can survive a strike out if the claim in respect of national emissions cannot. Although Crown emissions are not exempt from the CCRA framework, the claim is that the Crown should have a framework specific to its own emissions in order to meet its positive obligation to provide for effective deterrence of the real and immediate risk that Mr Smith and those he represents will be deprived of their right to life. Such emissions are under the Crown's control and a framework that directly addresses Crown emissions may be a reasonable measure available to the Crown in light of the commitment New Zealand has made under the UNFCC and the Paris Agreement and might be argued to be a critical lacuna (as it was put in *Verein KlimaSeniorinnen Schweiz*) in the Crown's response to the threat to life that climate change represents.[174]

[99] However, the answer to this is our conclusion that the CCRA regulatory framework meets the positive obligation that the Crown may tenably have under s 8 of NZBORA. If the Crown has met this obligation because of the CCRA there is no additional positive obligation to also have a specific regulatory framework for its own emissions.

[100] We have concluded that the High Court was correct to strike out the right to life claim as pleaded in relation to national and Crown emissions. In reaching this conclusion we do not preclude that a tenable s 8 of NZBORA claim might arise in respect of failure by the Crown to take reasonable and proportionate measures in response to a risk to life that is real and imminent (a test that requires temporal and physical proximity in light of the grave risk of inevitability and irreversibility of the adverse effects of climate change as discussed in *Verein KlimaSeniorinnen Schweiz*) but this is not the claim that is pleaded here. In reaching these conclusions we have taken into account that the claim is novel in this jurisdiction and the jurisprudence internationally is developing and we should therefore be hesitant to pre-emptively

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174 *Verein KlimaSeniorinnen Schweiz v Switzerland*, above n 111, at [573].

eliminate it even though the claim may be difficult ultimately to establish.[175] We have nevertheless concluded that the claim pleaded here is clearly untenable and that pre-emptive strike out is appropriate.

Are reporting orders tenably available?

[101] Had we concluded that the pleaded claim was tenable, we would have concluded that the pleaded relief in so far as it seeks reporting orders requiring the Crown to update the court of the steps it is taking to bring itself into a position of compliance with NZBORA would not have been appropriate and would not be granted. While the court has the jurisdiction to grant declarations of inconsistency with NZBORA, its institutional role does not encompass an ongoing monitoring role of the measures the Crown is implementing in response to climate change. This is supported by the fact that Parliament has prescribed a process by which declarations are presented to the House of Representatives following a declaration of inconsistency.[176] It is not, in our view, anticipated under this scheme or at common law the courts have an ongoing role once that step is taken.[177]

Conclusion

[102] We have concluded that the pleaded s 8 NZBORA claim is so clearly untenable that it is bound to fail and must be struck out.[178] This does not, however, preclude a

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175 In *La Rose v Canada* 2023 FCA 241, 488 DLR (4th) 340 the Federal Court of Appeal of Canada overturned the Federal Court's decision to strike out claims by youth appellants and an indigenous group under s 7 of the Canadian Charter of Rights and Freedoms (which guarantees the life, liberty and security of persons) for alleged insufficient action in response to climate change on the basis that the court should be cautious in striking out what was a novel claim that, in the Court's assessment, was not doomed to fail.

176 NZBORA, ss 7A and 7B.

177 This reflects the ordinary constitutional position. The wide-ranging policy review sought here is quite distinct from the new remedy introduced by the Judicial Review and Courts Act 2022 (UK) which allows the quashing of a decision to be suspended before coming into effect and subject to conditions. The ability to specify conditions has been interpreted in that jurisdiction to enable court supervision of unlawful actions or omissions in the judicial review context in exceptional circumstances: see *R (on the application of ECPAT UK (Every Child Protected Against Trafficking) v Kent County Council* [2023] EWHC 1953 (Admin), [2024] PTSR 243 at [11]–[17] and [52].

178 In the High Court the Crown had also applied for an order that further particulars be given. As the claim was struck out, there was no need to address the application. The Crown has reserved its right to have this application determined in the High Court in the event it was unsuccessful on appeal. See: High Court judgment, above n 2, at [2]–[6] and [165]; and High Court Rules, r 5.21.

tenable claim under s 8 arising in respect of decisions made or not made by the Crown in response to a real and immediate risk to life from climate change in the future.

Right to culture

The right

[103] Section 20 of NZBORA provides:

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

The pleading

[104] The proposed cause of action is as follows:

(a) The rights-holders,[179] who are Māori, are members of a cultural minority.

(b) Emissions of GHGs and the current and estimated future impacts of climate change have created a real and immediate risk that the rights-holders will be deprived of their ability to enjoy their culture.

(c) The Crown has failed to put in place a regulatory framework that is sufficient to provide a rational and effective deterrent of the risk in (b) because:

(i) of the particulars set out in relation to the right to life above;[180]

(ii) there is no requirement that the setting of national climate change risk assessments includes assessments of the risks to Māori cultural rights and interests, and in preparing a national adaptation plan in response to such risk assessments, the responsible Minister need only take into account the effects of

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179 See above at [39(b)].
180 See n 195.

climate change on iwi and Māori and is not required to make any plan specifically focussed on addressing those impacts;

(iii) the Crown has failed to carry out any comprehensive assessment of the risk posed by GHG emissions and climate change to the cultural rights and interests of Māori; and

(iv) the Crown has failed to actively protect the cultural rights and interests of Māori from the impacts of climate change on the basis of such an assessment or assessments, including by failing to put in place any plan for adaptation to climate change which focusses on the protection of Māori cultural rights and interests.

[105] As with the right to life claim, the relief sought is a declaration that the Crown has breached s 20, a declaration that the CCRA is inconsistent with s 20 and reporting orders requiring the Crown to update the court of the steps it is taking to bring itself into a position of compliance with NZBORA.

High Court

[106] The High Court found this claim to be untenable on the basis of this Court's decision in *Mendelssohn v Attorney-General*.[181] The Judge considered that exceptional circumstances were necessary before positive duties were imposed on the State under s 20 of the NZBORA.[182] The Judge considered that there was no allegation of opposition or coercion targeting Māori that met the exceptional circumstances requirement.[183]

Submissions

[107] Mr Smith contends the Judge erred by not recognising that s 20, like s 8, contains an implied protective duty on the Crown which is engaged where it has actual or constructive knowledge of a real and immediate risk to the enjoyment of cultural

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[181] High Court judgment, above n 2, at [212]–[213], citing *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14] and [24].
[182] At [212].
[183] At [212].

rights. He submits that the right is not confined to claims by litigants who are asserting rights to access a minority group which is seeking to exclude them. Rather, it also includes claims by litigants who are invoking what are essentially the rights of all group members to oppose something the State is doing.[184] Mr Smith says *Mendelssohn* was a significantly different case, did not purport to set out all the circumstances in which a protective duty under s 20 could apply and was wrong to conclude that a protective duty was only engaged in exceptional circumstances.[185] He says international jurisprudence, particularly *Billy*, supports the pleaded protective duty in the context of the denial of cultural rights as a reasonably foreseeable risk from the impacts of climate change.[186]

[108] The intervener submits that s 20 may impose obligations on the State, including in relation to the effects of climate change on the ability of Māori to enjoy their culture, and that climate change may engage s 20.

[109] The Crown submits s 20 imposes a negative duty on the State not to take steps to deprive a person of the right to enjoy their culture. The Crown submits that, even if s 20 includes a positive obligation, it is limited to an obligation to avert a denial of the right by the State in respect of something within its control. The Crown submits Mr Smith's pleading does not demonstrate how measures within its control have caused a denial of rights nor show a substantial interference that gives rise to a denial of his rights or those on behalf of whom he brings the claim. Rather, the claimed effects are future-focussed and do not take into account the mitigation and adaptation measures the Crown is taking and will take.

Discussion

[110] *Mendelssohn* related to the Attorney-General's refusal to restore the Centrepoint Community Growth Trust (incorporated to advance the Centrepoint religious community) as a charitable trust, and the decision to order an inquiry into the

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184 Mr Smith refers to Paul Rishworth "Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights" (paper presented to International Center for Law and Religion Studies Australia Conference, Canberra, August 2009) at 9–11.

185 *Mendelssohn v Attorney-General*, above n 181.

186 *Billy v Australia*, above n 64.

Trust's affairs. Mr Mendelssohn was a member of the community.[187] He alleged, amongst other things, a breach of s 20 of NZBORA.[188]

[111] This Court dismissed an appeal against the striking out of the claim on the basis that it was untenable. It did so because s 20 of NZBORA did not impose "positive duties on the state, at least in any sense relevant to this case".[189] The Court relied on the negative framing of the duty in s 20 (that is, the right not to be denied culture) in contrast with other rights in NZBORA which impose positive obligations (for example, the right to be informed of certain rights and to be charged promptly).[190] The Court also relied on the fact that this distinction was also drawn in the relevant international provisions.[191] It concluded that there was "no possible basis in the particular circumstances of this case for recognising a positive duty on an exceptional basis".[192]

[112] The Crown says the decision in *Mendelssohn* reflects the white paper, presented to the House of Representatives by the Minister of Justice, proposing a Bill of Rights (the White Paper).[193] The White Paper describes what became s 20 of NZBORA as:[194]

> … aimed at … oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their very identity—their language, culture, and religion. …

[113] However, this aim does not itself mean that the right cannot impose a positive obligation on the Crown. Indeed, *Mendelssohn* accepted that a positive obligation could arise, albeit on an exceptional basis.[195] And five years before *Mendelssohn*, the

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187 *Mendelssohn v Attorney-General*, above n 181, at [1].
188 At [4]–[9].
189 At [14].
190 At [14]–[15].
191 At [16]–[19].
192 At [24].
193 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984]–[1985] I AJHR A6 [the White Paper]. The White Paper attached a draft Bill of Rights, which was subsequently considered by the Justice and Law Reform Committee: See Justice and Law Reform Committee NZBORA report, above n 74.
194 At [10.83].
195 *Mendelssohn v Attorney-General*, above n 181, at [24].

HRC's *General comment No 23* said of art 27 of the ICCPR, the corresponding article to s 20 of NZBORA and which is expressed in materially identical terms:[196]

> Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

[114] As discussed by Professor Paul Rishworth, with reference to *General comment No 23*:[197]

> The positive component of art. 27 that [*General comment No 23*] implies must, however, be correctly understood. The Committee is not here suggesting a freestanding obligation to promote and affirm the rights to culture, religion, and language. Rather, it is an obligation to ensure that those rights are not denied, and it is in the service of *that* obligation that positive acts may be required by states. …

[115] Professor Rishworth went on to explain:[198]

> That is, while rights of the "liberty" kind are generally observed by governmental abstention from interference, there may be circumstances when rights are threatened by third parties or other events for which government is not directly responsible. Depending on those circumstances, it may then become the government's duty to act positively so as to avoid a denial of the right. That is the best approach to art. 27 and hence to s. 20, for it is consistent not only with the Committee's Comment but also with general principles about the way that rights in bills of rights operate.

[116] Requiring the Crown to take action in response to an imminent risk to what would be a denial of the right to enjoy a minority's culture that goes to the very heart of their identity is therefore potentially within s 20, depending on the circumstances. However, the Crown submits that the circumstances pleaded here do not give rise to a denial of the cultural rights of Mr Smith and his whānau because of the absence of a

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196 United Nations Human Rights Committee *General comment No 23: Article 27 (Rights of Minorities)* UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at [6.1]. Article 27 of the ICCPR provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

197 Paul Rishworth "Minority Rights" in Paul Rishworth and others *The New Zealand Bill of Rights Act* (Oxford University Press, Melbourne, 2003) 398 at 404 (emphasis in original).

198 At 404.

causal connection between the adverse effects of climate change and any specific acts or omissions by the State. The Crown submits that Mr Smith does not identify any steps or actions within the Government's control that are having this impact. The Crown refers to the global nature of the problem over which the Crown has no control and that the CCRA is a regime protective of cultural rights in that it implements clear and stable climate policies.

[117] Whether climate change can give rise to a positive obligation to protect against the denial of the right to culture was considered in *Billy*, in which a claim under art 27 of the ICCPR (the right to culture) in addition to the art 6 (right to life) claim discussed above was made.[199] The claimants (referred to as the authors) alleged that Australia had failed to adopt adaptation measures, namely infrastructure to protect their way of life and culture against the impacts of climate change, especially sea level rise. The allegation was summarised as follows:[200]

> 3.5 The authors' minority culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas. Climate change already compromises the authors' traditional way of life and threatens to displace them from their islands. Such displacement would result in egregious and irreparable harm to their ability to enjoy their culture.

[118] Arguments by Australia raised in response included that it was not shown that any threat to the claimants' culture was imminent, that it was not possible to attribute the effects of climate change to Australia and that it was undertaking adaptation and mitigation measures in relation to the Torres Strait.

[119] The HRC noted that, in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting.[201] The protection of this right was therefore directed towards ensuring the survival and continued development of the cultural identity.[202] It was accepted that the claimants could not practise their culture on mainland Australia.[203] The evidence was that the

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199 *Billy v Australia*, above n 64.
200 Footnote omitted.
201 At [8.13].
202 At [8.13].
203 At [8.14].

claimants' ability to maintain their culture was already impaired by the reduced viability of their islands and the surrounding seas due to climate change impacts.[204]

[120] The HRC concluded that the claimants' rights under art 27 of the ICCPR were violated because:[205]

> 8.14 … *The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s*. While noting the completed and ongoing sea wall construction on the islands where the authors live, *the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors*. With reference to its findings …, the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the [ICCPR].

[121] The Crown submits that the facts alleged here do not involve a substantial interference with the right to enjoy culture, nor that the adaptation measures are too late. Instead the claim is about potential future acts, rather than compromises and real predicaments already being experienced. Although current impacts are also pleaded, these are not particularised. The Crown submits this distinguishes this claim from the predicament in *Billy* of the indigenous population in low lying islands in the Torres Strait who, it was accepted, could not practise their culture on the mainland of Australia.[206] Moreover, the Crown submits that the remedies in *Billy* were focussed on reparation and adaptation and no findings were made in respect of the alleged failure to adopt mitigation measures.[207]

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204 At [8.14].

205 Footnotes omitted and emphasis added. The HRC also found a violation of art 17 (the right to family life) for similar reasons. Australia was requested, under the optional protocol, to report to the HRC on the measures it was taking in response to the violation found. Measures were to include compensation, meaningful consultations with the authors' communities to conduct needs-assessments, measures to secure those communities continued safe existence on the islands and monitoring and reviewing measures: see at [11]–[12].

206 At [7.10] and [8.14].

207 At [11].

[122] As noted, a strike out proceeds on the basis that the pleaded material facts are true except where they are entirely speculative and without foundation. We accept the Crown's submission that as pleaded the claim is focused largely on future impacts.[208] However, it is also pleaded that emissions of GHGs and *the current* and estimated future *impacts of climate change* have created a *real and immediate risk* that the right holders *will be deprived* of their ability to enjoy their culture. It therefore also covers current impacts, although we accept the Crown's submission that it does so without particulars and Mr Smith's evidence does not address this either.

[123] We also accept the Crown's submission that the threshold for what amounts to a denial of the right under s 20 of NZBORA is high. For example, in *Mahuika v New Zealand* the HRC said that "measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27".[209] We agree with the Crown that not any damage to the Mahinepua C Block from a storm or flood event will amount to a denial of the right to culture. Substantial interference amounting to a denial of the right must be shown.

[124] Proceeding on the basis that further particulars could be provided of substantial interference with the Mahinepua C Block and the sites of cultural significance in its vicinity, and if so that such particulars could be established by evidence at trial, the question then is whether the Crown could be held to have failed to take positive action within its control to contribute to the prevention of that denial. That in turn, would require it to be held that it is now too late for the Crown to take timely action to protect against this risk. As to this, the pleading is that the Crown has failed to put in place a regulatory framework that is sufficient to provide a rational and effective deterrent of the pleaded real and imminent risk to the right of Mr Smith and those he represents to

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208 See above [109].

209 United Nations Human Rights Committee *Views:* Communication *No 547/1993* UN Doc CCPR/C/70/D/547/1993 (27 October 2000) [*Mahuika v New Zealand*] at [9.4]. This case was about the settlement of Māori customary fishing rights under what was known as the Sealord settlement. The HRC held that the replacing Māori traditional fishing rights with an entitlement to a share in the Sealord settlement was not a denial of their right to culture. Similarly, in United Nations Human Rights Committee *Views: Communication No 511/1992* UN Doc CCPR/C/52/D/511/1992 (26 October 1994) [*Länsman v Finland*], at [9.5] the HRC, in relation to proposed quarrying in lands important to Sami reindeer breeders (a minority group in Finland), said: "The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvarra is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region."

enjoy their culture. This is because of alleged omissions in the framework relating to both emissions and adaptation plans.

[125] As with the right to life claim, we consider the claim has difficulties because it asks the courts to review the policy choices the legislature has made as to how New Zealand will meet its international commitments. As noted, the CCRA's purpose includes developing and implementing clear and stable climate change polices that contribute to the global effort to limit global average temperature increase to 1.5°C.[210] It establishes a framework intended to do so. The success or otherwise of the framework will be in the decisions made under it. Those decisions are judicially reviewable against the decision-maker. To the extent that the ETS is not sufficiently driving efficient behaviour change, it is not the only policy that the framework relies upon.

[126] Under our constitutional arrangements, we consider it is not tenable that s 20 of NZBORA was intended to enable the courts to improve upon this regulatory framework by, for example, requiring that the legislation provide that every person, including the Crown, must mitigate their emissions. The policy choice that the legislature has made is that there are to be emissions budgets set that are stepping stones to the 2050 target and emission reductions plans that set the policies and strategies for meeting those budgets.

[127] To the extent that some of the adverse impacts of climate change may already be irreversible (or will become so because global reductions are insufficient or will occur too late), adaptation plans may assume significance. The pleading includes that the Crown has *failed to put in place a regulatory framework that is sufficient to provide a rational and effective deterrent of the risk* that the right holders will be deprived of their ability to enjoy their culture, including *by failing to put in place any plan for adaptation to climate change* which focusses on the protection of Māori cultural rights and interests.

[128] The Crown relies on affidavit evidence filed by Katherine Wilson, the director of Climate Adaptation at the Ministry for the Environment. Ms Wilson provides an

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[210] CCRA, s 3(1).

overview of the key aspects of the Government's current work programme, including work involving key sectors to reduce greenhouse emissions, steps taken to engage with Māori concerning climate change and potential impacts to Māori, and steps being taken to respond to climate change (adaptation). Amongst many other things set out in the affidavit, Ms Wilson refers to mechanisms in the CCRA that recognise and respect the Crown's responsibility to give effect to the Treaty, the commissioning of reports on the effects of climate change on Māori, and the guidance the Ministry has given to local government on how to how to adapt to coastal hazard risk from climate change.

[129] Mr Smith takes a different view about these steps. For example, he says that the work the Ministry is doing with the Iwi Chairs Forum, while positive, does not address what he says is the Crown's persistent failure to take action to reduce emissions at all nor the particular impacts to Māori of climate change at a local level. He also says that the CCRA is only a framework and does not represent real action by the Crown to understand the impacts of climate change on Māori or to take meaningful steps to reduce emissions to ensure these impacts are avoided.

[130] In relation to national emissions, we consider it is not tenable to claim that the regulatory framework under the CCRA breaches s 20 when both emissions reductions (with reduction targets by 2030 and a net zero 2050 target) and risk assessments and adaptation plans are intended. And, as with right to life claim, we consider it is not tenable that the absence of a specific regulatory framework for Crown emissions breaches s 20 when the regulatory framework under the CCRA does not do so. Nor would it have been tenable to grant reporting orders by way of relief had the pleaded s 20 claim been tenable.

[131] We consider that a tenable cause of action under s 20 of NZBORA of the kind that arose in *Billy* could potentially arise if in the future there is a failure to take reasonably proportionate available measures in a timely manner to address a real and imminent risk to the right to culture that Mr Smith and those he represents have. That is not what is pleaded here. We also note that judicial review is potentially available in respect of decisions made by the Commission or the Minister of Climate Change in respect of risk assessments and adaptation plans that are unreasonable in light of the

risks that Mr Smith and those he represents may face. Our decision on the pleaded claim here does not preclude claims of these kinds if the basis for bringing them arises in the future.

Conclusion

[132] We have concluded that the pleaded s 20 NZBORA claim is so clearly untenable that it is bound to fail and must be struck out. This does not, however, preclude a tenable claim under s 20 arising in respect of decisions made or not made by the Crown in response to a real and immediate risk to the right to culture from climate change in the future.

Te Tiriti breach

The pleading

[133] The pleaded claim is as follows:

(a) Te Tiriti is part of the law of New Zealand and creates binding legal obligations on the parties to it.

(b) Mr Smith, his whānau, Ngāpuhi and Ngāti Kahu are rights-holders under te Tiriti.

(c) In respect of Crown emissions, from 14 June 1992 the Crown: was responsible for Crown emissions; failed to measure and monitor levels of Crown emissions; failed to design and implement any plan or framework for the mitigation of Crown emissions; and failed to mitigate Crown emissions as swiftly as possible, in accordance with the best available science (including the minimum global reductions) and the framework principles or at all.

(d) In respect of national emissions, the Crown has failed: to measure and monitor national emissions; to prevent national emissions from increasing and to reduce them as swiftly as possible, in accordance with the best available science or at all; and to take steps to actively exercise

its authority in a manner that protects current and future generations of Māori from the adverse effects of climate change.

(e) The Crown has taken various "specific steps" that, taken collectively, have resulted in a breach of the Treaty.[211]

(f) The Crown has failed to put in place a regulatory framework that is sufficient to provide a rational and effective deterrent to emissions that create a real and immediate risk that the rights-holders will be deprived of their ability to enjoy their culture, including by:

(i) failing to carry out a comprehensive assessment of the risks posed by emissions and climate change to the cultural rights and interests of Māori; and

(ii) failing to put in place any plan for adaptation to climate change which focusses on the protection of Māori rights and interests.

(g) Parliament's legislative response to climate change has since 14 June 1992 constituted a knowing failure to reduce national emissions adequately or at all.

(h) By its acts and omissions in (c) to (g) above, the Crown has breached art 2 of te Tiriti by impeding, and not actively facilitating, the ability of Mr Smith, his whānau, Ngāpuhi and Ngāti Kahu to exercise tino rangatiratanga in respect of their taonga (their customary sites and resources).

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211 A long list of particulars are pleaded. The following gives a sufficient flavour of what is alleged: enacting the CCRA and the ETS neither of which have been effective in reducing emissions; implementing road building schemes and failing to prioritise active and public transport modes and to reduce and decarbonise New Zealand's vehicle fleet; issued onshore and offshore oil and gas exploration permits; allowed the Accident Compensation Corporation (ACC) to invest nearly $1 billion into companies responsible for the production of fossil fuels; allowed Meridian to enter into electricity supply contracts for Tiwai Point aluminium smelter and not taken steps to reduce agricultural emissions

[134] The relief sought is a declaration that the Crown has committed and is committing a breach of art 2 of te Tiriti.[212]

High Court

[135] The High Court concluded this claim was untenable. The Judge considered that, on the present state of the law, the Treaty does not give rise to free-standing obligations (as opposed to bearing on the interpretation of a statute or giving rise to grounds for judicial review such as where a decision-maker fails to consider the Treaty as a relevant consideration or is unreasonable).[213] The Judge noted there were suggestions that it was time for the Privy Council's decision in *Te Heuheu Tukino v Aotea District Maori Land Board* to be reviewed.[214] The Judge also considered it was arguable that a claim based on the Treaty might be tenable if coupled with other claims.[215] However, as formulated at that time, it rested on the novel common law duty pleaded which the Judge had found to be untenable.[216] Moreover, the Judge considered that any such claim would be owed to the public in general rather than to Māori as a subsection of New Zealanders.[217]

Submissions

[136] Mr Smith submits that the court can review the conduct of the Crown for consistency with te Tiriti. He says this is supported by the purpose of judicial review to supervise public wrongs. This can include judicial review of Treaty settlement

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212 The Māori text of art 2 is set out in sch 1 of the Treaty of Waitangi Act 1975 as follows: "Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona." The English text is as follows: "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf."

213 High Court judgment, above n 2, at [233]–[235].

214 At [234], citing *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) [*Te Heuheu* (PC)].

215 At [234].

216 At [234].

217 At [234].

negotiations for example on grounds of a breach of natural justice and legitimate expectations.[218] Mr Smith refers to te Tiriti as a solemn compact in which the Crown made promises to Māori. He says the courts have long accepted te Tiriti as a source of Crown obligations and duties.[219]

[137] Mr Smith acknowledges that the status of te Tiriti as a matter of law is more complex. He says it can be analysed as a valid international treaty, is now prolifically referred to in domestic legislation and, given its constitutional significance, the courts have said that:

(a) it may be arguable that the courts can declare conduct of the Crown to be inconsistent with te Tiriti;[220]

(b) it is a fundamental principle of statutory interpretation that legislation must be interpreted consistently with te Tiriti as far as possible;[221]

(c) the rights in te Tiriti are similar to fundamental common law rights and engage the principle of legality, and Parliament is presumed not to

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218 See *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [60]–[63]; *Ngāti Mutunga o Wharekauri Iwi Trust v The Minister for Treaty of Waitangi Negotiations* [2019] NZHC 1942 at [25]–[27]; and *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v The Attorney-General of New Zealand on Behalf of the Crown* [2020] NZHC 1882 (currently before this Court).

219 Mr Smith refers to *The Queen (on the prosecution of C H McIntosh) v Symonds* (1847) NZPCC 387 (SC); *Re The Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41; *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); and *Baldick v Jackson* (1910) 30 NZLR 343 (SC).

220 Mr Smith refers to *Kiwi Party Inc v Attorney-General* [2020] NZCA 80, [2020] 2 NZLR 224 in which this Court said at [50]: "[i]n an appropriate case it may be possible to argue that there is a similar jurisdiction to that recognised in [*Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213] for the courts to declare legislation inconsistent with the Treaty of Waitangi. That is an issue of major constitutional significance for New Zealand. If it arises, it will require careful analysis and an assessment of the implications of, amongst other provisions, the power of the Waitangi Tribunal to consider proposed legislation." (Footnote omitted.)

221 Mr Smith refers to *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643. This Court said in that case at [46], "even where the Treaty is not specifically mentioned in the text of particular legislation, it may, subject to the terms of the legislation, be a permissible extrinsic aid to statutory interpretation". See relevantly: *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 655–656 per Cooke P; and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [591].

authorise decision-makers to exercise discretions inconsistently with te Tiriti guarantees;[222]

(d) that "it requires no leap of faith … to suggest that in general the common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi";[223] and

(e) te Tiriti compliance can be a mandatory relevant consideration.[224]

[138] Mr Smith refers to cases supporting the availability of judicial review where a public actor adopts a policy or makes a clear public representation that it will follow a decision-making process.[225] He says each branch of government has recognised the fundamental importance of te Tiriti. He says his claim can be looked at through the lens of the Crown adopting a policy of complying with te Tiriti or through its actions giving rise to a legitimate expectation that it will comply with te Tiriti. He says the Crown's failure to put in place an adequate framework for identifying and addressing the impacts of climate change on Māori falls well short of what is required for active protection of Māori rights and interests. He says declaratory relief is appropriate given that this Court has expressly contemplated that such relief may be granted in appropriate cases.[226]

[139] The Crown submits that there are a range of ways in which our jurisprudence has evolved to recognise the status of te Tiriti but there are two fundamental points that are firmly part of our constitution, namely that: te Tiriti cannot override Acts of

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222 Mr Smith refers to *Lands*, above n 221, at 655 per Cooke P; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 221, at [151] per William Young and Ellen France JJ and [296] per Glazebrook J; *Students for Climate Solutions Inc v The Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612; *Ulrich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [55]; and Dean Knight "New Zealand—Te Tiriti o Waitangi norms, discretionary power and the principle of legality (at last)" [2022] PL 701.

223 Mr Smith refers to *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [249] per Glazebrook and Wild JJ.

224 Mr Smith refers to *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) [*Radio Frequencies*].

225 *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29], citing *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]; *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [90]; and *Te Pou Matakana Ltd v Attorney-General (No 2)* [2021] NZHC 2942, [2022] 2 NZLR 148 at [112] and [133].

226 See *Kiwi Party Inc v Attorney-General*, above n 220, at [50].

the legislature; and there is no free-standing justiciable duty that applies to the Crown-Māori relationship on the basis of the terms of te Tiriti alone. The Crown submits that it is necessary to point to the statutory incorporation of the rights that are alleged to be breached, relying on *Te Heuheu* and as later endorsed by the Court in *New Zealand Maori Council v Attorney-General* (the *Lands* case) and subsequently.[227] The Crown accepts that the courts will not easily read statutory language as excluding te Tiriti considerations where statutes do not reference it. Outside of statutory frameworks, the Crown says that te Tiriti may be relevant in the exercise of public powers on orthodox judicial review grounds but this does not extend to requiring substantive compliance with its terms.[228]

[140] The Crown also submits that there are important differences between the availability of a declaration that legislation is inconsistent with NZBORA and the declaration that is sought here. Specifically, consistent with the ICCPR which NZBORA affirms,[229] an underlying premise of NZBORA is that remedies are available for breach of fundamental rights.[230] However, te Tiriti has not been incorporated into statute and the orthodox position that international treaties cannot be directly enforced until incorporated in domestic legislation remains. The Crown submits that Mr Smith in essence seeks constitutional entrenchment of te Tiriti which has not occurred. Instead New Zealand's constitutional framework and the status of te Tiriti has developed around its status as not directly enforceable. The Crown says Mr Smith's claim seeks to reorder the current constitutional framework without Parliament addressing it.

[141] The intervener supports Mr Smith's position. To the extent that the Crown relies on *Te Heuheu* as authority for the proposition that te Tiriti cannot override "primary" legislation, the intervener says that may be so, but that is not part of

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227 See for example *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 [*Forests*], at [62]–[75], referring to *Lands*, above n 221, at 655–657 per Cooke P and 691 per Somers J, *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 168 per Richardson P, and *Radio Frequencies*, above n 224, at 135.

228 See above at [137(b)]–[137(e)] and the cases cited.

229 NZBORA, long title.

230 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [29]–[30] and [38]–[39] per Glazebrook and Ellen France JJ. See also *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191 per Richardson J; and *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

Mr Smith's case.[231] To the extent that the Crown also relies on *Te Heuheu* for the broader proposition that te Tiriti does not have direct legal effect unless it is statutorily entrenched, that is now questionable in light of legal developments in the law in the 83 years since *Te Heuheu* was decided.

[142] The intervener says that ascertaining the rights conferred under te Tiriti is not beyond the institutional competence of the courts, as reflected in the fact that Parliament has repeatedly called on the courts to engage in such analysis by incorporating Treaty provisions into legislation. The intervener submits that there is nothing inconsistent with the separation of powers for the courts to declare that legislation is inconsistent with fundamental rights. As to whether te Tiriti can be regarded as giving rise to fundamental rights, the intervener submits it is doubtful that too much can be made of the difference between rights under te Tiriti and under NZBORA in this context. This is evident from the fact that this cause of action overlaps with the cause of action under s 20 of NZBORA and inconsistency with te Tiriti would be determined incidentally as part of that cause of action.

Discussion

[143] We start our discussion of whether this cause of action is untenable with *Te Heuheu*, which Mr Smith contends should not be followed. In that case, Ngāti Tūwharetoa lands had been charged with a debt pursuant to legislation enacted by Parliament.[232] It was common ground at first instance that Ngāti Tūwharetoa landowners had cause to feel a sense of injustice about how this had come about.[233]

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231 *Te Heuheu* (PC), above n 214.

232 Native Purposes Act 1935, s 14.

233 *Te Heuheu Tukino v Aotea District Land Board* [1939] NZLR 107 (SC and CA) [*Te Heuheu* (SC and CA)] at 112 per Smith J at first instance. The statutory debt was imposed to settle a dispute with a timber company (Egmont), which claimed it had rights to cut timber on Ngāti Tūwharetoa land that had been wrongly terminated. Aotea District Māori Land Board (the Board), on behalf of Ngāti Tūwharetoa landowners had originally entered into an agreement with a different timber company (Tongariro Timber) under which the right to harvest timber on Ngāti Tūwharetoa land was granted in return for the construction of a railway and the payment of royalties to the landowners through the Board. Tongariro Timber subsequently transferred the timber cutting rights and obligation to construct the railway to Egmont. The agreement between the Board and Tongariro Timber was later cancelled by the Board. Egmont's claim was settled by the Board pursuant to the legislation including through the imposition of a charge against Ngāti Tūwharetoa land.

Ngāti Tūwharetoa's claim that the legislation was ultra vires the Treaty reached the Privy Council.[234] The claim was rejected because:[235]

> Under Article the First there had been a complete cession of all the rights and powers of sovereignty of the Chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.
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> …
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> So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him.

[144] The conclusion in *Te Heuheu* that the Treaty was not enforceable unless incorporated into domestic law was based on the then prevailing view that the Treaty was one of cession.[236] Some 46 or so years later, in the *Lands* case Cooke P said that there were some "big questions" about the Treaty, for example, as to its status at international law and the principles for interpreting international treaties, but these were not issues the Court was called upon to decide.[237] Nor was it contended in the *Lands* case that the Treaty was a fundamental or supreme constitutional document in the sense that it could override Acts of our legislature.[238] As Cooke P noted, nor could it have been in the face of the Privy Council's reasons in *Te Heuheu* that the rights of the Treaty cannot be enforced in the courts except in so far as a statutory recognition of the rights could be found.[239]

[145] Cooke P described *Te Heuheu* as "represent[ing] wholly orthodox legal thinking, at any rate from a 1941 standpoint".[240] But by the time of the *Lands* case,

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234 This aspect of Ngāti Tūwharetoa's claim was first made in the Court of Appeal. It did not succeed with this Court holding that a treaty was enforceable as part of the municipal law only if and when it is made so by legislative authority: see *Te Heuheu* (SC and CA), above n 233, at 120 per Myers CJ and 122 per Callan J.

235 *Te Heuheu* (PC), above n 214, at 596–597.

236 Much has been written about this. See for example: Philip Joseph *Joseph on Constitutional and Administrative Law* (online ed, Thomson Reuters) at [4.6]–[4.9]; and Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) in which the Waitangi Tribunal found there was no cession of sovereignty in Te Raki from the signing of the Treaty by rangatira and the Crown in February 1840 at 529.

237 *Lands*, above n 221, at 655 per Cooke P.

238 At 655 per Cooke P.

239 At 655 per Cooke P.

240 At 667 per Cooke P. Cooke P also said at 667 that "[b]y past standards [*Te Heuheu* (PC), above n 214] could have been called the leading case on the Treaty".

the Treaty of Waitangi Act 1975 and the State Owned Enterprises Act 1986 had been enacted, the former establishing the Waitangi Tribunal and the latter including a Treaty clause. As to how a Treaty clause in domestic legislation was to be interpreted, Cooke P said:[241]

> … A broad, unquibbling and practical interpretation is demanded. It is hard to imagine any Court or responsible lawyer in New Zealand at the present day suggesting otherwise. …
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> … The submissions [before the Court] were … that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. …

[146] The Treaty had also been recognised in other legislation by this time as well. That same year Chilwell J in *Huakina Development Trust v Waikato Valley Authority* said that the Treaty "was essential to the foundation of New Zealand" and that since it was signed "there has been considerable direct and indirect recognition by statute" of the Crown's Treaty obligations.[242] In 2021, in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, Ellen France J observed that the "courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question" and Treaty clauses in statutes should be given a "broad and generous construction" given "the constitutional significance of the Treaty to the modern New Zealand state".[243]

[147] In short, in the over 80 years since *Te Heuheu*, as the Crown put it in its oral submissions, the Treaty has come to occupy a powerful position in our constitution and legal system. It has not been necessary to decide whether the Treaty was directly enforceable absent statutory recognition because relevant legislation generally explicitly requires its proper consideration. And, when not explicitly required under

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241 At 655–656 per Cooke P.

242 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210, as cited in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 221, at [150] per William Young and Ellen France JJ. See also at [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

243 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 221, at [151] per William Young and Ellen France JJ.

the legislation, its powerful position in our constitution has generally meant that Treaty considerations are not excluded when the context of the legislation or decisions made under it makes them relevant.

[148] The pleaded cause of action primarily relates to failures in enacting the CCRA, in introducing the ETS, and in steps taken under the CCRA. However, it also encompasses decisions made under other legislation, for example the Land Transport Management Act 2003 and the Crown Minerals Act 1991. And it encompasses enacting the Resource Management (Energy and Climate Change) Amendment Act 2004.

[149] The CCRA contains a Treaty clause setting out how the Act is intended "to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty".[244] This encompasses requirements that:

(a) the Minister have regard to the need for members to have skills, experience and expertise, and innovative approaches, relevant to the Treaty before recommending an appointment to the Commission (and particular attention must be given to seeking nominations from iwi and Māori representative organisation for such appointments);[245]

(b) emissions reduction plans include "a strategy to recognise and mitigate impacts on iwi and Māori of reducing emissions and … ensure Māori are adequately consulted on the plan";[246]

(c) national adaptation plans "take into account the economic, social, health, environmental, ecological, and cultural effects of climate change on iwi and Māori";[247]

(d) where the Minister recommends secondary legislation under the CCRA in relation to various sections (relating to for example dealings and

244 CCRA, s 3A.
245 Section 3A(ab) and (ac).
246 Section 3A(ad).
247 Section 3A(AC).

price controls for "units", the carbon price, and activities excluded or exempted from the ETS), the Minister must consult (or be satisfied that the Chief Executive has consulted) representatives of iwi and Māori that appear to have an interest in the secondary legislation;[248] and

(e) where the Minister recommends a review of the operation of the ETS, and does so by appointing a review panel:[249]

(i) the Minister must ensure that the review panel has at least one member with appropriate knowledge, skill and experience relating to the principles of the Treaty and tikanga Māori to conduct the review;

(ii) the review panel must consult with the representatives of iwi and Māori that appear to the panel likely to have an interest in the review; and

(iii) the terms of reference for the review must incorporate reference to the principles of the Treaty.

[150] In other words, in all aspects of the CCRA framework, the Crown's obligations under the Treaty are given effect through representation of persons with relevant expertise on the Commission and any review panel, requiring that emissions reduction and national adaptation plans take into account impacts on iwi and Māori and through consultation requirements on all key aspects of the framework. Its comprehensiveness in practice is illustrated by the detailed consideration of Treaty issues in the

248 Section 3A(b).
249 Section 3A(d).

Commission's advice to the Minister.[250] In these circumstances, where Parliament has decided to give effect to the Crown's obligations under the Treaty in this way, there is no room for a claim to operate that seeks to directly enforce the Treaty through an independent duty. This is also not an appropriate case to consider the "issue of major constitutional significance for New Zealand" as to whether the courts may declare legislation inconsistent with the Treaty.[251] The CCRA cannot be said to be a breach of the Treaty where Treaty principle consistent decisions are available to be made under it.

[151] To the extent Mr Smith's claim concerns alleged inadequate steps taken under the CCRA, the question is whether the decisions relating to those steps have been made lawfully under the CCRA. If the decisions have been made unlawfully, any remedy is through an application for judicial review challenging those decisions. This would include, for example, a challenge on grounds that encompass whether the interests of Māori and iwi have been consulted or taken into account as required by the CCRA. If the decisions have been made lawfully under legislation that gives effect to the Crown's Treaty obligations, there is again no room for a claim to operate that the Treaty has been breached.

[152] The same applies to decisions made under other legislation. Onshore and offshore oil and gas exploration permits are granted or declined under the Crown

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250 See, for example: He Pou a Rangi | Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa — Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022 – 2025* (31 May 2021) at 17, 22–23, 26, 34, 44–45, 157–160 and 325–337; Ministry for the Environment | Manatū Mō Te Taiao *Te hau mārohi ki anamata — Towards a productive, sustainable and inclusive economy | Aotearoa New Zealand's First Emissions Reduction Plan* (ME 1639, June 2022) at 41–54; He Pou a Rangi | Climate Change Commission *2023 Draft advice to inform the strategic direction of the Government's second emissions reduction plan* (April 2023) at 71–77; Ministry for the Environment | Manatū Mō Te Taiao *National Climate Change Risk Assessment for New Zealand — Arotakenga Tūraru mō te Huringa Āhuarangi o Āotearoa* (ME 1506, August 2020) at 8–9; and Ministry for the Environment | Manatū Mō Te Taiao *Urutau, ka taurikura: Kia tū pakari a Aotearoa i ngā huringa āhuarangi | Adapt and thrive: Building a climate-resilient New Zealand – Aotearoa New Zealand's first national adaptation plan* (ME 1660, August 2022) at 28–31.

251 *Kiwi Party Inc v Attorney-General*, above n 220, at [50]. The case concerned an Order in Council made under the Arms Act 1983 that declared certain firearms to be military semi-automatic firearms and an amendment to the Act that made it an offence to sell, supply or possess prohibited firearms (and magazines and gun parts), including semi-automatic firearms (per the Arms (Prohibited Firearms, Magazines and Parts) Amendment Act 2019). A group of licensed firearms holders challenged the lawfulness of the Order and the Amendment Act on the basis that there was a constitutional right to bear arms. This Court upheld the High Court's decision to strike out the claim: see *Kiwi Party Inc v Attorney-General* [2019] NZHC 1163. It said there was no such constitutional right and no tenable basis that these laws breached te Tiriti: see [27] and [51].

Minerals Act. Section 4 of that Act provides that "[a]ll persons exercising functions and powers under [the] Act shall have regard to the principles of the Treaty". If decisions made under the Act to issue permits impede Mr Smith's whānau's rights in relation to its customary sites and resources, those decisions can be challenged through a judicial review application.[252]

[153] Similarly, decisions about planning and funding the land transport system are made under the Land Transport Management Act 2003. That Act contains a Treaty clause that provides that specified principles and requirements are intended to facilitate participation by Māori in land transport decision-making in order to "recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty" and "to maintain and improve opportunities for Māori to contribute to land transport decision-making processes".[253] And similarly, the Resource Management Act 1991 contains a Treaty clause.[254] Further, even if any of the particulars relate to Crown decisions that are not made under legislation with a Treaty clause, it is presumed that the principles of the Treaty have not been excluded.[255]

[154] In so far as the claim alleges that the Crown has failed to take steps since 14 June 1992, it would need to be shown that the customary sites and resources of Mr Smith's whānau are already irreparably impacted (regardless of protective measures that are available to the Crown now or in the future) in a manner that is inconsistent with the Crown's obligations under the Treaty. If such a claim can be made out, in addition to the potentially available avenue for a claim under s 20 of

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252 See for example *Students for Climate Solutions Inc v Minister of Energy and Resources*, above n 159, at [91]–[109] per French and Gilbert JJ.

253 Land Transport Management Act 2003, s 4.

254 Resource Management Act 1991, s 8.

255 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 221, at [151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ. See also *Lands*, above n 221, at 655–656 per Cooke P; *Huakina Development Trust v Waikato Valley Authority*, above n 242, at 210 and 233; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46].

NZBORA (discussed above), a claim could be made to the Waitangi Tribunal.[256] The Tribunal is conducting a priority kaupapa inquiry into the Crown's climate change policy. In light of these avenues, an independent cause of action alleging breach of the Treaty is clearly untenable in these circumstances.

Conclusion

[155] We have concluded that this cause of action is untenable and must be struck out.

Te Tiriti fiduciary duty

The pleading

[156] This claim is that:

(a) The Crown owes fiduciary or fiduciary-like duties to Mr Smith, his whānau, Ngāpuhi and Ngāti Kahu which includes duties to perform the commitments undertaken in te Tiriti, to take active steps to ensure those commitments are honoured and to act in good faith.

(b) By its acts and omissions as pleaded in relation to the te Tiriti breach cause of action above at [133], the Crown has committed a breach of its Treaty duties.

[157] The relief sought is a declaration that the Crown has acted and is acting in breach of its Treaty duties.

High Court

[158] The High Court considered this claim to be untenable because there was no New Zealand authority finding an enforceable fiduciary duty arising between the

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[256] Treaty of Waitangi Act, s 6. The Tribunal has a well-recognised and important function within New Zealand's "constitutional architecture" to determine whether the Crown has met its political obligations under the principles of the Treaty: see *Skerret-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493 at [36].

Crown and Māori based solely on the Treaty.[257] Moreover, given the wide ranging claim and the complex nature of climate change, any fiduciary duty would be owed to the public at large and this was untenable.[258]

Submissions

[159] Mr Smith submits that it is reasonably arguable that the elements for recognising a novel category of fiduciary duty are present. He says that, when te Tiriti was signed, the Crown held significant power (kāwanatanga) that was capable of being exercised in a way that would adversely affect the property rights of Māori. He says that, by signing te Tiriti, the Crown expressly assumed a responsibility to Māori to ensure that they could continue to exercise tino rangatiratanga over their taonga under art 2. In so doing, he says that the Crown was necessarily subordinating its ability to exercise its kāwanatanga freely to its obligations to Māori under te Tiriti. Mr Smith further submits that the courts have not finally determined whether te Tiriti gives rise to a fiduciary relationship or duties. He says the pleaded duty is reasonably arguable and should be considered in the full context of a trial and tested with the benefit of evidence and full argument.

[160] The Crown submits this claim attempts to directly enforce the Treaty through equity and is untenable because of the established status of the Treaty in our domestic law, as discussed above. The Crown also submits that the claim cannot succeed because it would require the Crown to favour Mr Smith's interests and Māori interests more generally over its kāwanatanga responsibilities in circumstances incompatible with finding a fiduciary duty exists. The Crown further submits that appellate court authority strongly indicates that a fiduciary duty based on the Treaty is not tenable.[259]

[161] The intervener did not make submissions on this cause of action.

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257 High Court judgment, above n 2, at [229].

258 At [233].

259 The Crown refers to *Stafford v Attorney-General* [2022] NZCA 165 at [74]–[85]; *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [391] per Elias CJ; *Forests*, above n 227, at [80]–[81]; and *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [185]–[186], [192] and [196] per McGrath J and [288] per William Young J.

Discussion

[162] In the *Lands* case Cooke P described the Treaty as signifying a partnership that created "responsibilities analogous to fiduciary duties" including the reciprocal duty to act "reasonably and in the utmost good faith".[260] This was in the context of identifying the principles of the Treaty to be applied to the Treaty clause in s 9 of the State-Owned Enterprise Act 1986. It was not about the independent enforceability of the Treaty, nor of the good faith obligation identified, outside of that context. Other dicta suggested the possibility that the Crown might owe Māori a fiduciary duty in particular circumstances. As explained by McGrath J in *Paki v Attorney-General (No 2)*:[261]

> [186] … These dicta indicate that while the Treaty of Waitangi provides "major support" for the existence of such obligations in New Zealand, recognition of a duty would not mean that the Treaty is being directly enforced in the domestic courts. Rather, a sui generis fiduciary duty would arise between the Crown and certain Maori, in the circumstances of particular situations, and against the background of the relationship constituted by the Treaty of Waitangi.

[163] In *Proprietors of Wakatū v Attorney-General* there were particular circumstances that gave rise to a fiduciary duty. This duty was to reserve part of a grant of land for the benefit of the Māori customary owners as the land had been taken by the Crown subject to that obligation.[262] However, as Elias CJ noted, this was not "to suggest that there is a general fiduciary duty at large owed by the Crown to

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260 *Lands*, above n 221, at 664 per Cooke P. The other members of the Court agreed the Treaty created expectations of good faith: see for example 680–683 per Richardson J and 693 per Somers J. In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304, Cooke P for the Court described the Court in the *Lands* case as holding that "the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other".

261 *Paki v Attorney-General (No 2)*, above n 259 (footnote omitted and tohutō (macron) omitted in original). The Supreme Court refrained from deciding when such a duty might arise because it did not squarely arise on the facts before it.

262 *Proprietors of Wakatū v Attorney-General*, above n 259. As it was put in the reasons of Arnold and O'Regan JJ at [786], for example: "Given the Crown's acceptance that Māori had not sold the Occupation lands and given that full title to land could only come through the Crown, we consider that the Crown was under fiduciary duties to local Māori in relation to any Occupation land to which it wrongly took title." See also at [389]–[391] per Elias CJ and [590] per Glazebrook J.

Māori".[263] This is because, absent particular assumed obligations, the Crown "wears many hats and represents many interests" and owes obligations to all.[264]

[164] The claimed fiduciary duty here is of a general kind. In essence it claims that insufficient Crown action on climate change (insufficient reductions of emissions and putting in place a regulatory framework that is insufficient to respond to the urgent action that climate change requires) is a breach of the principle of good faith under the Treaty. That claimed fiduciary duty seeks to enforce the Treaty directly in the domestic courts. It is not a sui generis fiduciary duty arising between the Crown and certain Māori as a result of particular dealings between them, such as that found in *Wakatū*.

[165] It is also a duty that would sit uneasily with the statutory scheme in the CCRA which:

(a) specifies how the Act is intended to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty;[265]

(b) provides a range of matters to which the Commission and the Minister must have regard in advising on and determining (respectively) an emissions budget that includes, for example, the distribution of those impacts across the regions and communities of New Zealand, and from generation to generation;[266]

(c) provides that the Commission must have regard to the same range of factors in advising the Minister on emissions reduction plans and,[267] in preparing such plans, the Minister must consider the Commission's advice and ensure that the consultation has been adequate, including with "sector representatives, affected communities, and iwi and Māori,

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263 At [391] per Elias CJ.

264 At [379] per Elias CJ, quoting *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96]. See also at [590] per Glazebrook J, and [784] and [784], n 1012 per Arnold and O'Regan JJ referring to *Guerin v Canada* [1984] 2 SCR 335; and *Stafford v Attorney-General* [2024] NZHC 3110 at [19] and [170]–[171].

265 CCRA, s 3A.

266 Section 5ZC.

267 Section 5ZH.

and undertake further consultation as the Minister considers necessary";[268] and

(d) provides that cultural effects of climate change are but one of a suite of considerations relevant to national climate change risk assessments and national adaptation plans.[269]

[166] The range of considerations relevant to the Crown's response to climate change under the CCRA, of which the effect on Māori communities is undoubtedly an important one, reflects the many interests and considerations that decisions on emissions reductions and adaptation plans entail (even though ultimately, and looked at in the round, humankind's interests in sufficient and timely emission reductions are aligned). In other words, the response to climate change is one where the Crown "wears many hats and represents many interests" and owes obligations to all and the CCRA reflects this.[270]

[167] This means that the claimed fiduciary duty is clearly untenable. It is not of a kind that the courts have previously recognised, is not of a kind that is consistent with the nature of fiduciary duties and would be inconsistent with how Parliament has determined the principles of the Treaty are to be given effect in relation to the Crown's response to climate change.

Conclusion

[168] We conclude that this cause of action as pleaded is untenable and must be struck out.

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268 Section 5ZI(1)(b).
269 Sections 5ZQ and 5ZS.
270 *Proprietors of Wakatū v Attorney-General*, above n 259, at [379] per Elias CJ, quoting *Wewaykum Indian Band v Canada*, above n 264, at [96].

Common law claim

The pleading

[169] A novel common law duty on the Crown is pleaded as follows:[271]

> The Crown exercises authority over the territory of New Zealand, the activities occurring there, and the atmosphere above New Zealand's territory, subject to a duty owed to the plaintiff, and cognisable under the laws of New Zealand, to actively exercise that authority in a manner that protects the plaintiff and future generations of his descendants from the adverse effects of climate change, including, without limitation, the loss of: life; health; culture; economic and social wellbeing; spirituality; lands; fisheries; forests; sites of cultural, customary, historical or spiritual significance; and taonga (Duty).

[170] This duty is said to:

(a) have crystalised since no later than 6 February 1840 (the date of the first signing of the Treaty);

(b) have required the Crown to take all necessary steps to reduce national emissions and to actively protect Mr Smith and his descendants from the adverse effects of climate change; and

(c) have required the Crown to "reduce national emissions as swiftly as possible by any available means" and to identify and protect Mr Smith and his descendants from harms from climate change with the choice of the specific pathway and its details being a matter for the Crown.[272]

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271 Emphasis omitted.

272 Specific steps said to have been and to be available are said to include: measuring and monitoring emissions; using public powers available to prevent emissions from increasing at all and reducing them in accordance with the best available science; in all decision-making, having particular regard to the implications of decisions on levels of emissions and actively seeking alternatives that will reduce or not increase emissions; revoking licences for exploration, extraction or export of fossil fuels and ceasing allowing any new licences; prioritising investment and infrastructure that will cut emissions and accelerating a move away from dependence on fossil fuels and towards a low emissions economy; not investing or facilitating development of infrastructure that increases emissions (such as in transport, agriculture, coal use, industrial processes and deforestation); undertaking risk assessments of areas or populations at higher risk of harm from climate change and taking steps to prevent or mitigate that harm; and undertaking risk assessments of interests protected under te Tiriti and then taking active steps to protect those interests from harm.

[171] The sources of the duty are said to include: te Tiriti; fiduciary or fiduciary-like obligations owed to Māori in respect of their lands and estates, forests, fisheries, taonga and other resources; fiduciary or fiduciary-like obligations owed to all persons arising out of the right of public ownership of the air, sea and running water and the public trust placed on the Crown to preserve and safeguard them to ensure a habitable atmosphere and environment; rights affirmed in NZBORA; other rights,[273] freedoms and duties not affected by NZBORA; tikanga Māori; and New Zealand's international law obligations.[274]

[172] The Crown is said to have breached that duty since 14 June 1992 and is continuing to breach that duty, by:

(a) in respect of Crown emissions: the Crown was responsible for Crown emissions; failed to measure and monitor levels of Crown emissions; failed to design and implement any plan or framework for the mitigation of Crown emissions and failed to mitigate Crown emissions as swiftly as possible, in accordance with the best available science or at all;

(b) in respect of national emissions: the Crown has failed to measure and monitor, and to prevent national emissions from increasing and to reduce them as swiftly as possible in accordance with the best available science or at all; failed to undertake risk assessments of areas/populations at higher risk of harm from climate change, and under the Treaty, and then take steps to prevent or mitigate those harmed; and failed to take steps to actively exercise its authority in a manner that protects current and future generations of Māori from adverse effects of climate change;

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273 Mr Smith cites the following rights in NZBORA: the right not to be deprived of life (s 8); the right to manifest religion and belief (s 15); rights of minorities (s 20); and the right to justice (s 27).

274 Mr Smith says these obligations include those under the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), the UNFCCC, and those according to customary international law.

(c) taking various steps that are ineffective to or contrary to reducing emissions;[275] and

(d) failing in its legislative response, which constituted a knowing failure to reduce emissions adequately or at all.

[173] The relief seeks a declaration that the Crown owes this duty and has breached it. It also seeks:

> A declaration that the Crown will continue to be in breach of the Duty unless and until it takes all necessary steps to reduce national and Crown emissions and/or remove greenhouse gases from the atmosphere in an amount and at a rate that is consistent with the achievement of the Minimum Global Reductions in accordance with the framework principles[.]

High Court

[174] The High Court found this pleaded cause of action was untenable. The Judge noted that the claim alleged in effect a comprehensive failure by Government, both Parliament and the Executive, and invited the Court to intervene in the parliamentary and executive responses to climate change due to this inadequacy.[276] This raised policy and justiciability issues as to whether the novel pleaded claim could be recognised.[277] Additionally, the novel claim was not based on recognised legal obligations and did not seek to incrementally identify a new obligation by analogy to existing principles.[278] This Court in *Smith v Fonterra* had held that the development of a common law tort claim was not an appropriate response to the climate change crisis which required a sophisticated regulatory response at a national level supported by international coordination.[279] The wide-ranging monitoring role for the Court

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275 A long list of particulars are pleaded. The following gives a sufficient flavour of what is alleged: enacting the CCRA and the ETS neither of which have been effective in reducing emissions; implementing road building schemes and failing to prioritise active and public transport modes and to reduce and decarbonise New Zealand's vehicle fleet; issuing onshore and offshore oil and gas exploration permits; allowing ACC to invest nearly $1 billion into companies responsible for the production of fossil fuels; allowing Meridian Energy Ltd to enter into electricity supply contracts for Tiwai Point aluminium smelter and not taking steps to reduce agricultural emissions.

276 High Court judgment, above n 2, at [133]–[134].

277 At [143]–[146].

278 At [148].

279 At [148]–[152], citing *Smith v Fonterra* (CA), above n 52, at [16] and [26]. The High Court's decision in relation to this appeal pre-dated the Supreme Court's determination of the appeal from this Court's decision in *Smith v Fonterra*.

sought in the relief would require a level of institutional expertise and democratic participation and accountability not available through court processes.[280]

Submissions

[175] Mr Smith submits that the Judge erred in concluding that that this cause of action is untenable. Principally, he says that the pleaded claim is not a duty in negligence or otherwise in tort and this erroneous characterisation led to the Judge approaching the claim in the wrong way. The pleaded duty is one owed by the Crown under the common law arising from its authority over the territory of New Zealand and the responsibilities it has under the Treaty, under *jus publicum*, and under domestic and international human rights' duties and tikanga.

[176] Mr Smith says the common law recognises and protects fundamental principles of the constitution and affords protection of fundamental individual rights and interests. Climate change is a unique collective action problem creating risks of catastrophic harm to individual rights and interests in orders of magnitude more serious than any other forms of conduct that have come before the courts. The State is uniquely placed to mitigate these risks through its authority over the territory of New Zealand, including over the atmosphere and ocean, to ensure the preconditions for fundamental rights are maintained. Providing remedies for interferences with fundamental rights and interests is a core component of the judicial function.

[177] Mr Smith submits that the public trust doctrine, with origins that can be traced to Roman law and under which the State has a duty to administer commonly held natural resources for the benefit of the public, provides a basis for the common law development in response to the climate crisis. He says that such a duty is supported by the recognition in many states of the constitutional right in domestic law to a healthy environment and by international law recognition of a general right to a healthy environment. New Zealand recognised that right by voting in favour of the resolution of the General Assembly of the United Nations in July 2022 affirming "the

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[280] At [151], citing *Smith v Fonterra* (CA), above n 52, at [26].

right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of all human rights".[281]

[178] The Crown submits this cause of action is misguided and cannot succeed. It says it is founded on matters that in-themselves do not give rise to binding duties on the Crown. The claim asks the Court to recognise a previously unrecognised constitutionally supreme law or duty of higher status than the Treaty and NZBORA, which would sit above and across the CCRA, and which would enable the court to pronounce the current legislation deficient. The court's role is not to develop the common law to replace the statutory regime that addresses climate change. Rather, its role is to support the existing statutory regime by holding the Government to account for decisions made under that regime. The Crown says the comprehensive nature of the statutory regime, that it involves policy rather than operational decisions, and that the court will be more cautious about omissions to act when the State is performing a role for the benefit of the public as a whole, all tell against finding a novel common law duty here.

Discussion

[179] We have discussed above the NZBORA and Treaty causes of action that have been separately pleaded. If these are tenable, there is no need for the novel duty in so far as it is concerned with NZBORA rights. If these causes of action are not independently tenable, it is difficult to see how they could be combined with other sources of law to found a common law cause of action. Nor was it explained how tikanga would be a source of the common law cause of action. The additional component for the source of the proposed new common law cause of action is the public trust doctrine. That doctrine has been relied on in the context of climate change litigation in, for example, the United States and Canada, albeit unsuccessfully.[282] We therefore focus our discussion on this aspect of the pleaded claim.

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281 *The human right to a clean, healthy and sustainable environment* GA Res 76/300 (2022).

282 *Juliana v United States of America* 947 F3d 1159 (9th Cir 2020) [*Juliana* (9th Cir CA)]; and *La Rose v Canada*, above n 175.

[180] Mr Smith has referred us to a Masters of Laws research paper on the public trust doctrine in New Zealand.[283] The paper explains that the public trust doctrine as encapsulated in its early Roman formulation was that certain resources were "common to all, by natural law" and that those resources were "the air, running water, the sea and therefore the seashores".[284] So, no one was barred from access to the seashore (provided they refrained from entry into houses, monuments and buildings that were not subject to the laws of the nation and the sea).[285] And, as rivers and ports were public, the right to fish was open to all in ports and rivers.[286]

[181] The paper goes on to discuss the recognition of the duty in early English law as affording fundamental rights to access the foreshore for the purposes of fishing and navigation and in more recent times in relation to whether public use of the beach for bathing was "as of right" or "by right".[287] The paper also refers to some mention of the doctrine in New Zealand case law. One such case is *Mueller v Taupiri Coal-Mines (Ltd)* in which Stout CJ, dissenting, referred to commentary that, where a river is navigable, "the public … have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway".[288]

[182] These rights of access cases are limited in kind. They are a long way from the extensive duty pleaded here. Indeed the author of the paper relied upon by Mr Smith specifically notes that she does not suggest that the public trust doctrine is useful for addressing the implications of climate change in New Zealand as of 2018 (when the paper was written) although she does suggest that if developed over time, it might have the potential to be relevant to climate change policy in the future.[289]

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283 N J Hulley "New Zealand's Public Trust Doctrine" (LLM Research Paper, Victoria University of Wellington | Te Herenga Waka, 2018). See also Nicola Hulley "The Public Trust Doctrine in New Zealand" (2015) RMJ 31.

284 Hulley "New Zealand's Public Trust Doctrine", above n 283, at 19.

285 At 19.

286 At 19. The origins and development of the doctrine, particularly in the United States, are also discussed in *Juliana v United States of America* 217 F Supp 3d 1224 (ED Or 2016) [*Juliana* (DC)] at 1252–1254.

287 At 20–29. See *Regina (Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] UKSC 7, [2015] AC 1547 for a recent treatment of the public trust doctrine.

288 *Mueller v The Taupiri Coal-Mines (Ltd)* (1900) 20 NZLR 89 (CA) at 19.

289 At 36.

[183] In the United States, where the public trust doctrine is recognised and more developed, a claim against the federal government for climate change injuries on the basis of the public trust doctrine, initially survived dismissal at first instance in the Federal District Court of Oregon in *Juliana v United States of America*.[290] However, that decision was reversed on appeal on the basis that the remedy was beyond the courts' power.[291] This was because it would require the court to order, design, supervise or implement the remedial plan necessarily involving complex policy decisions that were entrusted to the wisdom and discretion of the executive and legislative branches of government.[292]

[184] In Canada, claims against the federal government's climate policy and legislation based on the public trust doctrine have also failed.[293] In *La Rose v Canada* it was contended that Canada had breached its duty to preserve and protect inherently public resources (bodies of water, the air, and the permafrost) so that current and future generations could access, use, and enjoy these resources. The Federal Court of Appeal explained:

> [56] The contours of the public trust doctrine as pleaded by the appellant are imprecise and fluid; the doctrine is described as a trust-like duty, an aspect of the Crown's *parens patriae* jurisdiction, a fiduciary obligation and an unwritten constitutional principle. The doctrine is said to impose specific, enforceable obligations on Canada to preserve and protect public resources such as the air, the atmosphere, navigable waters and territorial seas. The doctrine would require Canada to exercise continuous supervision and control over these resources, to protect the public rights to their use and enjoyment and to ensure their integrity for future generations. The youth appellants say that Canada owes these obligations to its citizens, who, as beneficiaries, can enforce the doctrine where Canada has not lived up to its responsibilities.
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> …
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> [61] There are also a host of conceptual problems in imposing a fiduciary or trust-like obligation on the Crown, most notably the difficulty of reconciling the obligations of a trustee or fiduciary to act solely in the best interests of an identified person or group with the principles of Westminster parliamentary democracy. Parliament and Cabinet must act in what they consider to be the best interests of Canada as a whole …
>
> [62] Accepting that a public trust doctrine may some day be recognized in Canadian courts, [the authorities do not] approach the breadth of the rights

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290 *Juiliana* (DC), above n 286.
291 *Juliana* (9th Cir CA), above n 282.
292 At 25.
293 *La Rose v Canada*, above n 175.

> and actionable interests [claimed, nor do they] support a claim that Canada has an affirmative, trust-like duty to protect public resources in the way that the youth appellants desire … The principles that inform when trust-like duties may be imposed on the Crown are narrow. The public trust claim was therefore properly struck [out].

[185] We consider that this line of reasoning applies with equal force in this jurisdiction and in relation to this pleaded claim. There is the further problem that the doctrine could only operate to the extent that it is not displaced by legislation. The comprehensive framework that the CCRA provides does not leave room for the public trust doctrine to operate. The matters on which the Commission and the Minister are to have regard when advising on and setting emission reduction budgets, when advising on national risk assessments and national adaptation plans, and when setting national adaptation plans reflect the multifaceted interests involved. A public trust doctrine would cut across the balancing of those interests entrusted to the Minister and, ultimately, Parliament.

[186] The author of the paper on which Mr Smith relies proposes that the public trust doctrine could be "operationalised" as a ground of review.[294] For example, the obligation on the Crown as trustee of natural resources would be a relevant consideration. It is unnecessary to determine whether the law might develop in this way for present purposes. We can say, however, that judicial review of decisions made under the CCRA is an available avenue to challenge decisions under that Act that are insufficiently ambitious (in relation to emission reduction decisions) or insufficiently protective (in relation to risk assessments and adaptation plans) so as to amount to an irrational or unreasonable exercise of the statutory power in light of the climate change consequences for the natural environment, people and communities. While a previous judicial review challenge of this kind brought by the Lawyers for Climate Action NZ Inc failed in the High Court, that is not to say that further challenges will do so.[295] As the window for the necessary action for a stable climate closes, the reasonableness of decisions made will require closer scrutiny.

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294 Hulley "New Zealand's Public Trust Doctrine", above n 283, at 53.

295 *Lawyers for Climate Action NZ Inc v Climate Change Commissioner*, above n 4.

Conclusion

[187] We have concluded that this cause of action is untenable as pleaded and must be struck out.

Result

[188] For the above reasons, the appeal is dismissed.

[189] Mr Smith has brought this proceeding which tests the legal boundaries of the Crown's regulatory response to the risk that climate change presents and with the assistance of pro bono legal representation. In the circumstances we make no order for costs.

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