IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 51/2024
[2024] NZSC 105

BETWEEN	TRUSTEES OF THE MOTITI ROHE MOANA TRUST First Applicant
	TE MARU O NGĀTI RANGIWEWEHI Second Applicant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

Court:	Glazebrook, Kós and Miller JJ
Counsel:	J W Maassen and I F F Peters for Applicants M H Hill and R M Boyte for Respondent
Judgment:	27 August 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent one set of costs of $2,500.

REASONS

[1] In October 2016 the respondent, the Bay of Plenty Regional Council, notified Proposed Plan Change 9 (PC9) to the Water Quantity and Allocation chapter of the Bay of Plenty Regional Natural Resources Plan. PC9 was part of the respondent's implementation plan for the National Policy Statement for Freshwater Management (NPS-FM) 2014. Both applicant groups filed appeals against PC9 in the Environment Court, seeking stronger protections for Māori rights and interests in freshwater.

[2] The appeals were still ongoing in late 2019, when the Ministry for the Environment released a draft new NPS-FM to replace the NPS-FM 2014.[1] In February 2020, council staff presented a report advising the respondent to withdraw PC9, on the basis that continuing with the appeals related to PC9 would be a poor use of resources when attention could be more productively refocused on preparing to implement the new NPS-FM, which in any event had a stronger focus on Te Mana o Te Wai—a key issue in the appeals.

[3] On 25 February 2020, the respondent gave notice of a resolution withdrawing PC9 under sch 1 cl 8D of the Resource Management Act 1991 (RMA). The appeals were consequently treated as abandoned. The applicants sought unsuccessfully to challenge the withdrawal in the Environment Court, the High Court and the Court of Appeal.[2] An application to bring a "leapfrog" appeal to this Court before going to the Court of Appeal was also unsuccessful.[3]

Submissions

[4] The crux of the applicants' submissions is that the Courts below erred in holding that the respondent was not required to consider Māori customary interests in freshwater when making the withdrawal decision.[4] They argue consideration of those matters is required due to the respondent's overlapping obligations under ss 6(e), 7(a) and, in particular, 8 of the RMA.[5] Their concern is that the withdrawal of PC9 will lead to over-allocation of freshwater resources to the detriment of their customary interests, especially when many legacy permits come up for renewal in 2026.[6]

[5] The respondent submits the central flaw in the applicants' argument is that their original appeal against PC9 was premised on the notion that PC9 *failed* to adequately

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1 This became the now-operative National Policy Statement for Freshwater Management 2020.

2 *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, [2021] NZRMA 50 (Chief Judge Kirkpatrick); *Trustees, Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846, (2022) 24 ELRNZ 107 (Hinton J) [HC judgment]; and *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2024] NZCA 134 (Brown, Gilbert and Goddard JJ) [CA judgment].

3 *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZSC 144 (O'Regan, Ellen France and Williams JJ) [SC leapfrog judgment].

4 See HC judgment, above n 2, at [99]; and CA judgment, above n 2, at [17]–[26].

5 In support of this argument the applicants cite, inter alia, *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [95]–[105] and [117].

6 Permits issued under the Water and Soil Conservation Act 1967 expire in 2026.

protect their interests; and that in any case their submissions on the relevance of customary rights are based on a mischaracterisation of the High Court's holding. Overall, the respondent submits the proposed appeal raises no matter of general or public importance, instead inviting this Court to relitigate a fact-specific withdrawal decision which has no proven adverse consequences.

Our analysis

[6] The criteria for leave are not met and it would not be in the interests of justice to hear and determine the proposed appeal.[7] In dismissing the applicants' leapfrog application, this Court observed that the High Court Judge's remark that the respondent was not required to consider customary proprietary interests seemed to address only the decision to withdraw PC9, rather than making any broader comment about s 8.[8] That conclusion was also reached, subsequently, by the Court of Appeal and we discern no error in its reasoning.[9] The principal issue therefore raises no matter of general or public importance beyond the particular facts of this case.[10]

[7] Nor does any other matter of general or public importance arise. As we said in the earlier leapfrog judgment, the application has an element of futility about it when the NPS-FM has been replaced and PC9 will be superseded by a new process whether it is reinstated or not. Under the existing plan, freshwater take is classed as discretionary, requiring consideration of the s 104 factors including the newly-operative NPS-FM in consenting decisions, and the respondent has committed to engaging with tangata whenua in relation to those decisions. In any event, the respondent has resolved to notify a replacement plan change by September 2025, ahead of the relevant 2026 permit renewals. We agree with the Courts below that the appropriate forum for consideration of the applicants' concerns is in the development of that new plan.

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7 Senior Courts Act 2016, ss 74(1) and (2).
8 SC leapfrog judgment, above n 3, at [22].
9 CA judgment, above n 2, at [17]–[26].
10 Senior Courts Act, s 74(2)(a).

Result

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

[9] The applicants must pay the respondent one set of costs of $2,500.

Solicitors:
Kaupare Law and Consultancy, Auckland for Applicants
Cooney Lees Morgan, Tauranga for Respondent