**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 58/2024**
**[2024] NZSC 121**

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| BETWEEN | TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY<br>Applicant |
| AND | SHIRLEY WARU<br>First Respondent |
| | AUCKLAND COUNCIL<br>Second Respondent |

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| Court: | Ellen France, Kós and Miller JJ |
| Counsel: | P T Beverley and C A Easter for Applicant<br>J W H Little and H P Short for First Respondent<br>No appearance for Second Respondent |
| Judgment: | 24 September 2024 |

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**JUDGMENT OF THE COURT**

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

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

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**REASONS**

## Introduction

[1] The applicant, Tūpuna Maunga o Tāmaki Makaurau Authority (the TMA), seeks leave to appeal directly to this Court from a decision of the High Court.[1] The High Court allowed an application for judicial review by the first respondent,

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1 *Waru v Tūpuna Maunga o Tāmaki Makaurau Authority* [2024] NZHC 1414 (Tahana J).

Shirley Waru, challenging the decision of Te Kaunihera o Tāmaki Makaurau | Auckland Council to grant a resource consent on a non-notified basis which would allow the removal of exotic trees and the planting of native vegetation on Ōtāhuhu | Mount Richmond (Ōtāhuhu). (The history of Ōtāhuhu was laid out in the High Court judgment).[2] The TMA has also filed a notice of appeal in the Court of Appeal.

**Background**

[2] The TMA was established under Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Redress Act). The Redress Act reflected the settlement between the Crown and a collective of iwi/hapū, part of which restored ownership of certain maunga to the iwi/hapū so that they may exercise mana whenua and kaitiakitanga over the maunga. The TMA is the administering body of the various maunga. It developed a proposal to remove non-native vegetation and plant native vegetation on Ōtāhuhu. This was a part of a broader ecological restoration programme to restore native vegetation and to remove non-native vegetation across the different tūpuna maunga in Tāmaki Makaurau.

[3] In relation to Ōtāhuhu, the TMA sought a resource consent initially for the removal of 443 exotic trees and to replace them with native trees and plants. The application was subsequently revised so that it only included those trees 100 metres or further from residentially zoned property. This change would mean the removal of only 278 exotic trees.

[4] Ms Waru is from Te Uri-o-Tai, a hapū in Northland, and has lived in the suburb of Ōtāhuhu for over 30 years. Her application for judicial review in the High Court was successful because, as the Court summarised:[3]

> [141] While I accept there was adequate information on which to assess the *duration* of any temporary adverse effects, there was inadequate information on which to assess the *nature* of temporary adverse effects. This is because there was an absence of information before Mr Munro as to the temporary adverse effects on amenity values beyond visual amenity. The experts' assessments were limited to the adverse effects on visual amenity only. The

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2 At [3]–[7].
3 Emphasis in original.

> definition of amenity values in the RMA is broader than visual amenity alone. Ms Waru and Mr Barrell's evidence indicates that there was relevant information as to amenity values beyond visual amenity, that would have been available had the application for resource consent been notified. Whether there were any adverse effects on amenity values beyond visual amenity (whether temporary or permanent) should have been considered.

[5] There have been judicial review proceedings in relation to a similar proposal for Ōwairaka. The application for judicial review was unsuccessful in the High Court[4] but successful in the Court of Appeal.[5] The Court of Appeal found that there had been insufficient consultation, stating that a proposal of such significance needed to be provided for in the TMA's Integrated Management Plan. The Court also found there were errors in the way the Council dealt with the temporary effects of the tree removal proposal and in relation to how the heritage and historical significance of some of the trees had been addressed.

## The proposed appeal

[6] In the TMA's submissions, the grounds of appeal are summarised in this way:[6]

> …
>
> (a) The High Court erred in failing to account for material that was before the decision-maker on the nature of temporary adverse effects on amenity values, including recreational attributes, and by failing to recognise the specialist knowledge of expert decision-makers. …
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> (b) The High Court erred by applying an approach to notification under the [Resource Management Act 1991 (RMA)] which is unworkable in practice and requires a specificity of information beyond that which is intended by the RMA. The implications will have widespread implications for the operation of the RMA.
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> (c) The High Court erred by failing to account for or address the role of tikanga in assessing amenity values under the RMA, including as a key statutory purpose of [the Redress Act] is to provide mechanisms by which Ngā Mana Whenua o Tāmaki Makaurau … can exercise mana whenua and kaitiakitanga over the Tūpuna Maunga.

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4 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425.
5 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2022] NZCA 30, [2022] 3 NZLR 175.
6 Footnotes omitted.

**Our assessment**

[7] In terms of the first proposed ground, the High Court applied *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[7] In that case, this Court held that a consent authority had to have adequate information before it in order to properly assess the nature and scope of the activity for which consent is sought, the magnitude of any adverse effects on the environment and to identify the persons who may be more directly affected. There is no challenge to the principles set out in *Discount Brands*. Essentially, the TMA says that the High Court misapplied the test because its conclusion was not supported by the expert and other assessment and information before the decision-maker, or the evidence before the Court. We accept the submission for the first respondent that this point raises no matter of general or public importance.[8] It is rather a challenge to the application of *Discount Brands* to these particular facts.

[8] The high point of the second proposed ground is that there may be a more general question about the level of specificity of information required. However, on analysis, this is, again, really a challenge to the application of *Discount Brands* to these facts. And, in any event, we agree with the first respondent that the Court of Appeal should consider these matters first in the usual way.

[9] On the latter point, the applicant says that the Court of Appeal has looked at similar issues recently in *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* and so it would be useful to come to this Court now.[9] The High Court in this case did consider *Norman* and looked at some of the issues arising in this case in light of the approach in *Norman.* But the TMA does not suggest that the Court of Appeal would be bound to follow *Norman* and the first respondent says the TMA's position in the High Court (and in the appeal to the Court of Appeal) was that *Norman* should be distinguished. Nothing raised by the applicant supports the view that the appeal should

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7 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [114] per Blanchard J.

8 Senior Courts Act 2016, s 74(2)(a).

9 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority*, above n 5.

not proceed in the Court of Appeal first in the usual way. There are no exceptional circumstances warranting a direct appeal to this Court.[10]

[10] The third ground may raise more general questions, but the point made by the first respondent is that this argument did not feature in the High Court. This Court would be looking at the questions as a matter of first instance. In our view, it is preferable for the Court of Appeal to consider them first.

[11] In these circumstances, it is not in the interests of justice for this Court to hear the proposed appeal directly from the High Court and nor are there exceptional circumstances warranting that.[11]

**Result**

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

[13] The applicant must pay the first respondent costs of $2,500.

Solicitors:
Buddle Findlay, Wellington for Applicant
Duncan King Law, Auckland for First Respondent

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10 Senior Courts Act, s 75(b).
11 Sections 74(1) and 75.