IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 133/2023
[2024] NZSC 182

BETWEEN	GLENN MICHAEL SOROKA AS TRUSTEE OF THE PAKAU TRUST Applicant
AND	WAIKATO DISTRICT COUNCIL Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: J E Hodder KC for Applicant
P Moodley and E S Greensmith-West for Respondent

Judgment: 20 December 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

Background

[1] This proposed appeal concerns a special scheme under the Franklin District Plan that offered subdivision rights to landowners who agreed to protect significant indigenous biodiversity values on their land. Originally, the scheme allowed only the land being protected to be subdivided through the creation of "conservation lots". But in 2003, Plan Change 14 (PC 14) introduced the concept of "environmental lots", widening the scheme to allow landowners to transfer environmental lot entitlements derived from a "donor" property to a different "receiver" property. These were referred to as "transferrable rural lot rights" or TRLRs.

[2] Environmental lot entitlements would be calculated by reference to the quality of the bush (critical, high or moderate) multiplied by the area proposed to be protected. Rule 22.11.2.1(b) contained two tables setting out that calculation:

Table 1 – For all Management Areas except Hunua Rural and Southern Rural Management Areas

Biodiversity Significance	Minimum Size of Natural Feature(s) for 1 Lot	Minimum additional area of Natural Feature(s) for each Additional Lot	Maximum Number of Lots on any Lot	Maximum number of Lot Entitlements Lot Entitlements in excess of Maximum Number of Lots on any RURAL LOT must be transferred offsite
CRITICAL	0.5 ha	2.0 ha		20
HIGH	0.5 ha	3.0 ha		
MODERATE	1.0 ha	7.0 ha	2	10

…

Table 2 – For Hunua Rural and Southern Rural Management Areas …

Biodiversity Significance	Minimum Size of Natural Feature(s) for 1 Lot	Minimum additional area of Natural Feature(s) for each Additional Lot	Maximum Number of Lots on any Lot
CRITICAL	0.5 ha	2.0 ha	20
HIGH	0.5 ha	3.0 ha	
MODERATE	1.0 ha	7.0 ha	10

[3] Rule 22.18.1 contained further requirements. The Court of Appeal summarised the effect of the rule in these terms:[1]

> [36] The specific performance standards for TRLRs utilised within the same management area were set out in r 22.18.1 and included:

[1] *Soroka v Waikato District Council* [2023] NZCA 510 (Mallon, Moore and Fitzgerald JJ) [CA judgment] (footnotes omitted).

(a) a requirement that TRLRs be used where both the lots to be subdivided (receiver lots) and the sites to be amalgamated (donor lots) complied with r 50;

(b) maximum lot number and size requirements;

(c) a requirement that TRLRs be used on land with equivalent "versatile soil";

(d) a requirement that each transferred new title meets the subdivision standards for the zone the title was transferred to; and

(e) a requirement that all subdivisions comply with rr 22.7.2 (concerning non-complying activities) and 22.7.3 (requiring that the total maximum number of lots created on any rural lot resulting from any subdivision or combination of subdivisions be in accordance with the maximum numbers in rr 22.11.2 and 22.18, but also providing that these restrictions did not apply to subdivision with the Hunua and Southern Rural management areas).

[4] Rule 22.18.2 set out the specific assessment criteria for donor and receiver lots located in the same management area. These criteria involved an assessment of the receiver lot, as they related to: the boundaries of the lots; avoiding, remedying or mitigating adverse impacts on rural amenity, landscape and topography through lot design and specified building sites; and registering specified building areas against the title.

[5] Rule 22.19 applied where the donor and receiver lots were located in different management areas. The explanatory note to that rule reflected its equivalent under r 22.18, with the exception of the following additional point:

> However, the transfer of titles between identified Management Areas will require a more rigorous assessment given that the effects of this activity may be more significant.

The specific performance criteria were similar to those in r 22.18.1, focusing again on issues relevant only to the proposed receiver lot. Both rr 22.18.1(h) and 22.19.1(h) provided an exception by cross-reference to r 22.7.3, whereby subdivisions in the Hunua Rural and Southern Rural Management Areas were not subject to the total maximum lot entitlement of two lots per title. This exception is reflected in Table 1 and Table 2.

[6] Rule 22.4.2 provided that TRLRs involving donor and receiver lots in different management areas had discretionary activity status giving the consent authority broad discretion in relation to whether to grant consent.

Pakau Trust Application

[7] Mr Soroka, as trustee of the Pakau Trust, is the registered proprietor of the Klondyke Block comprising about 220 ha of rolling country west of Port Waikato. It is mostly covered in mature native bush. Table 2 applied to the Klondyke Block as it is located in the Southern Rural Management Area.

[8] In April 2012, Mr Soroka applied for TRLRs in return for registering a protective Queen Elizabeth II National Trust (QEII Trust) covenant over the bush on the Klondyke Block (the Pakau Trust application).[2] He planned to utilise 13 TRLRs derived from that land to subdivide a 25 ha dry-stock property at Chamberlain Road in Bombay. The Chamberlain Road property is located in the Hunua Rural Management Area. This means r 22.19 applies as the donor and receiver lots are in different management areas.

[9] Relevant context is that Franklin District Council had been disestablished in 2010 and its former territory divided between the newly amalgamated Auckland Council to the north, and the Waikato and Hauraki District Councils to the west and east respectively. The Klondyke Block fell within Waikato District and the Chamberlain Road land was in Auckland. As the donor and receiver lands were located across jurisdictional boundaries, the application was assessed by a joint panel. The applicable rules however remained as legacy Franklin subsections within the relevant District Plans.

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[2] About 175 ha of the block was assessed as having some qualifying ecological value but the subsequent consent application referred to covenanting 204 ha: *Soroka v Waikato District Council* [2021] NZHC 2191 (Hinton J) [HC judgment] at [5] and [8]; and CA judgment, above n 1, at [7] and [45]. Submissions in support of the application to this Court confirm the protected area of high biodiversity significance is 175 ha, giving rise, it is said, to a right to 59 TRLRs according to the formula in Table 2 (rather than the 64 lots referred to in the HC judgment, above n 2, at [2]; and CA judgment, above n 1, at [10]). These differences are not particularly material to the issues arising, but we will refer to both 204 ha and 175 ha as the background facts dictate.

[10] The number of TRLRs the trust applied for is disputed. Mr Soroka says the original application was for the maximum entitlement of 64 TRLRs.[3] Relatedly, and also in dispute, is what that maximum entitlement was under Table 2. The application suggested that the terms of r 22.7.3.3 meant there was no general maximum lot entitlement for Table 2 subdivisions so it was just a matter of applying the calculation in the table. The application provided:

> The proposal is to conserve approximately 204ha of native bush on the applicant's Klondyke Road property and use the Conservation Lot subdivision rules of the District Plan to create 29 lot entitlements. …
>
> It is proposed to transfer 13 of the 29 entitlements to the Chamberlain Road property using the Transferable Rural Lot Right subdivision rule of Proposed Plan Change 14 (PC14). … Further lots will be transferred to other properties in separate applications which are to follow soon.

[11] The claimed maximum entitlement was referenced as follows:

> A total of 64 additional allotments are provided for under this rule in accordance with Table 2. We are proposing to use only 13 of these Environment Lot entitlements for this application and further lots will be transferred to other properties in separate applications which are to follow soon. …

[12] The application concluded:

> The proposal will result in the physical protection of approximately 204 hectares of native bush on the Donor property. …
>
> The transfer of the 13 development rights approved through protection of the abovementioned ecologically significant feature[s] will remove the dwelling rights away from this significant natural area and will instead be created in an area better able to accommodate them. …
>
> While the Waikato District Plan (Franklin Section) and the Auckland Council Plan (Franklin Section) does not make provision for [TRLRs] between non-contiguous parcels of land, the proposal is generally consistent with the provisions for the [TRLRs] between properties falling within identified Management Areas of Rural plan change (Plan Change 14) …
>
> It is considered that the subdivision of the Receiver property will have a less than minor impact upon the landscape values of the area …
>
> The proposal is not contrary to the objectives and policies of the Rural Zone …

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[3] Mr Soroka has since revised that figure to 59.

> The proposal is consistent with the objectives for the sustainability of the natural and physical environment …
>
> We believe that this application demonstrates a high degree of compliance with both the Operative District Plan and Plan Change 14 rules and as such, we recommend it to Council for approval without delay.

[13] Mr Soroka obtained resource consent for the Chamberlain Road proposal in the Klondyke Block in July 2012 (the Pakau Trust consent). He registered the QEII Trust covenant in February 2013.

Variation 13 and the claim to additional TRLRs

[14] At around the time of the Pakau Trust application, the Waikato District and Auckland Councils notified Variation 13 to PC 14 to prevent the transfer of TRLRs across territorial boundaries. The variation became operative in February 2015.[4] The potential impact of Variation 13 on the Pakau Trust consent was that it would have precluded allocating any further TRLRs from the Klondyke Block to other sites on the Auckland side of the boundary.

[15] A dispute arose between Mr Soroka and the Waikato District Council over whether the Klondyke Block was productive of more TRLR entitlements than the 13 at Chamberlain Road. Mr Soroka appealed against Variation 13, in which he vented the further entitlements issue. His appeal was ultimately resolved by consent order in which the Environment Court amended Variation 13 to attribute a further 14 TRLRs to the Klondyke Block, all of which could be applied to receiver properties in the Auckland portion of the old Franklin District.

High Court

[16] Following resolution of his Environment Court appeal, Mr Soroka filed proceedings in the High Court seeking a declaration that, having locked up the Klondyke Block, he was entitled to 64 TRLRs. He further sought an order requiring the Waikato District Council to consent to the transfer of 35 more TRLRs from the Klondyke Block to other receiver properties as yet unidentified.[5] He accepted that a

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4 HC judgment, above n 2, at [34].

5 Mr Soroka had already utilised 29 TRLRs, including the original 13 lots utilised at the Chamberlain Road property, the additional 14 lots saved by the Variation 13 amendment and a

subdivision consent would be required when he attached the TRLRs to particular receiver properties in due course.

[17] Hinton J effectively held that TRLRs could not be created independently of an identified receiver property.[6] She found further, and in any event, that the Pakau Trust application was for 29 TRLRs and the Waikato District Council had no power to grant more TRLRs than Mr Soroka had applied for.[7]

Court of Appeal

[18] The Court of Appeal took a subtly different approach but reached the same result. The important point is that consistently with Hinton J's conclusion, the Court found that the overall environmental lot exchange scheme required consent as a single package. TRLR entitlements thus did not crystallise unless the receiver land had been identified and evaluated as part of the application in which the donor lot is identified.[8]

[19] In relation to the separate issue of the Pakau Trust's maximum TRLR entitlement, the Court held that, in any event, the maximum number of environmental lots available under Table 2 for a high biodiversity value lot in the Southern Rural Management Area was 20—that is, nine fewer than Mr Soroka had obtained consent for.[9]

Submissions in this Court

[20] The applicant argues that PC 14 is an incentive scheme requiring a landowner, at their own expense, to perpetually lock up valuable property rights on the donor land in return for transferable lot entitlements calculated according to the clear set of criteria provided in Table 2. The essence of the applicant's argument is summarised in the following extract from his submissions:[10]

> There was no indication in Rule 22 that the resource consent required for a subdivision *creating* Lot Entitlements under Rule 22.11.2 was also required to

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further two lots Mr Soroka had also obtained.

6 HC judgment, above n 2, at [52]–[55].

7 At [70] and [76].

8 CA judgment, above n 1, at [95].

9 At [105].

10 Emphasis in original.

> be contemporaneous with any decisions about where and when such Lot Entitlements would be *utilised*. Nor was there a rational need for any such contemporaneity, and the consequent exclusion of a "two-stage process". Later subdivision of any "receiving" land area would require a consent for the use of relevant Lot Entitlements in the particular context.
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> Accordingly, once the Council had accepted that the Trust's property included land appropriate to be protected, and the Trust had permanently covenanted that land under the QEII National Trust legislation, the purpose and requirements of Rule 22.11.2 had been satisfied by what can properly be described as a "bargain". That is, the Council had achieved a major enhancement of protected areas of biodiversity significance in its territory; and the Trust had achieved a valuable subdivision benefit in the form of transferable Lot Entitlements, calculated as per Table 2.
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> As noted earlier, in February 2013 the Trust registered the QEII National Trust covenant against 191 ha of its land. On 11 June 2013, the Council's planning team advised the Trust as follows:
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> > Based on the provisions of Plan Change 14, a feature of 175 ha would in effect qualify for 59 "rights". However Table 2 of Rule 22.11 restricts the maximum number of lots on [a] lot to 20. This in effect would mean that you could transfer the remaining 39 rights from the donor property, which is what is envisaged by PC14 to restrict effects from development at the donor property …

[21] In response, the Waikato District Council supports the Court of Appeal's reasoning. It argues a two-step process is envisaged under PC 14 in which the Council has first to decide, by reference to the quality of biodiversity on the land, whether environmental lots were permitted, and then to decide how they could be utilised—either fixed in situ or transferred as TRLRs. The Council submits: "For this second consideration, the question of how the Lots were to be utilised naturally included a consideration of their intended location." This, it is submitted, requires the performance criteria in r 22.11 to be applied in the wider context of rr 22.18 and 22.19. Further, it is argued, the Council has expressly reserved to itself the discretion to consider this wider context, as the creation of TRLRs was either a restricted discretionary activity if transferred to a site within the relevant area or a fully discretionary activity if transferred outside the area. The Council rejects the suggestion that the terms of r 22 amounted to a "bargain" with Mr Soroka by which, in return for protecting the Klondyke Block, he would be automatically entitled to 59 TRLRs. Finally, the Council submitted that the Court of Appeal's conclusion that Table 2 permitted a maximum of 20 lots whether in situ or TRLRs was correct for the reasons explained in the judgment.

Submissions as to s 74 criteria

[22] Mr Soroka submits that it is a matter of general and public importance that public authorities adhere to commitments promulgated in rules when private parties surrender valuable land-use rights in reliance on those commitments. The Council in response submits that the applicant's underlying premise is flawed as recognised by concurrent findings in the Courts below. Further, the Council submits that it is relevant that the Pakau Trust application and the Variation 13 consent order dealt with the lot entitlements derived from the Klondyke Block. And finally, the Council advises that TRLR management areas have been replaced by environmental enhancement overlay areas with their own rules for intra- and inter-area use of TRLRs. This, it is submitted, reduces further the general and public importance of the issues raised.

Our view

[23] Nothing put forward by the applicant suggests there is reason to depart from concurrent findings in the Courts below on the key issue of whether donor and receiver properties must be considered together in a single application. In any event the dispute in this case is very much confined to its facts. As the Council advised, the relevant environmental lot scheme is no longer in place. And the circumstance in which the Pakau Trust finds itself arises in part because Mr Soroka opted to resolve his appeal against Variation 13 by consent for fewer TRLRs than he now claims was his entitlement.

[24] No issue of general or public importance or general commercial significance thus arises;[11] nor is there any appearance of a miscarriage of justice, as that term is used in the context of civil proceedings.[12]

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

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

Solicitors:
Molloy Hucker, Auckland for Applicant
Brookfields Lawyers, Auckland for Respondent

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11 Senior Courts Act 2016, s 74(2)(a) and (c).

12 Section 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].