Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

20 SEPTEMBER 2024

MEDIA RELEASE

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHERS v NGĀTI IRA O WAIŌWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) AND OTHERS

(SC 121/2023, SC 123/2023, SC 124/2023, SC 125/2023, SC 126/2023, SC 128/2023, SC 129/2023)

[2024] NZSC 119

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Embargo

Publication of the judgment and the media release, and any information therein including the result, is prohibited until after the judgment is delivered at 10.30 am on 20 September 2024.

What this judgment is about

This judgment concerns an application for a prospective costs order (PCO) against the Crown, brought by Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (Te Kāhui). The PCO sought here would require costs be paid by the Crown in advance of the merits of the appeal being determined. A PCO may be made only in exceptional circumstances where necessary in the interests of justice. The issue is whether that test is met in this case.

Background

Te Kāhui is a group of four hapū who, along with several other appellants, are bringing appeals to this Court concerning recognition of customary marine title (CMT) and protected customary rights (PCRs) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). The appeals will be heard in November and are the first time the Supreme Court

will consider the interpretation and application of the Act. While the Crown was only an interested party in the Courts below, it has now appealed in its own right, challenging the Court of Appeal's approach to CMT and PCRs.

In 2013, the Takutai Moana Financial Assistance Scheme was established to support applicant groups with the cost of seeking recognition of their customary rights under the Act. The funding was only a partial contribution, which the Waitangi Tribunal concluded was a breach of the Crown's duty of active protection under the Treaty of Waitangi. The scheme was revised in 2022 to provide full, uncapped funding for actual and reasonable court costs.

Shortly after this Court granted leave to appeal to the present applicants in April 2024, the Crown advised the High Court that Cabinet had not approved additional funding for the hearings in that Court scheduled in the 2024/2025 financial year (or for subsequent years). Te Kāhui then sought an assurance from Crown Law | Te Tari Ture o te Karauna that the Crown would cover the actual and reasonable costs of the Māori claimants in the Supreme Court appeals, but no such assurance of full funding was given.

On 5 July 2024, after the November fixture was set down in this Court, Te Arawhiti | The Office for Māori-Crown Relations issued a pānui to all CMT and PCR applicants advising that from 1 July 2024 all applicants would have to work to a budgeted work plan agreed to by Te Arawhiti before funding was provided, with reduced funding levels and funding caps for appeals of $30,000 per applicant. On 12 July 2024, in response to that pānui, Te Kāhui filed the present PCO application.

Hearing

The application was heard on 26 August 2024. Te Kāhui submitted that a PCO was required in the circumstances to remedy injustice arising from the Crown's unilateral and last-minute change to the funding arrangements. The Crown emphasised that there was no precedent in New Zealand for granting a PCO for advance costs in these circumstances and submitted that this was not an appropriate case to do so.

Following the hearing the Court issued a minute asking Te Kāhui to clarify the approaches they had made to their relevant iwi and hapū authorities seeking funding to continue the conduct of these appeals, along with any other information relevant to the Court's assessment of their financial capacity to continue the conduct of the appeals.

Supreme Court decision

The Court has unanimously granted a PCO of $97,500 in favour of Te Kāhui.

After surveying the current approach to PCOs in New Zealand and the approach taken overseas, the Court noted that granting a PCO for advance costs in public-interest litigation is exceptional and will depend on it being necessary in the interests of justice. The Court concluded that necessity will likely depend on five considerations. It then applied these considerations to the facts of the present case.

Five considerations and their application

First, the Court noted that the case must raise an issue of very significant general or public importance. Here, it was plain that the proper construction of the Act raises issues of general and public importance, for which this Court has given leave to appeal. The present appeals will be the first test at Supreme Court level of Parliament's most recent attempt to provide for customary marine rights. The importance of the issues could be measured by the Crown's prior recognition of an obligation to fund the participants' legal costs on an indemnity basis.

Secondly, the applicant's stance on the relevant issue or issues must be seriously arguable. The Court found this consideration had been met, particularly given the fact the Court of Appeal had divided over key issues on appeal.

Thirdly, the applicant must be genuinely impecunious, in that it is unable with reasonable diligence to raise the funds required to make its argument effectively on those issues, and therefore unable to do so without the order being made. The affidavit evidence filed established clearly that Te Kāhui lacks access to sufficient funding of its own (or otherwise obtainable with reasonable diligence) to meet its reasonable needs to pay for legal representation at the forthcoming appeals in November. The revised $30,000 contribution to each applicant would not remotely meet the likely level of legal costs reasonably incurred.

Fourthly, in standing back to consider whether an order is necessary to avert injustice, the position of the respondent is relevant, including its conduct in the litigation, any broader responsibilities it may have, and any unjust advantage it may receive if the order is not made. Here, relevant factors were the Crown's full funding of the applicants in the Courts below, the Crown's recent decision to appeal in its own right (regarding issues that will consume a significant proportion of the hearing) and the sudden change of funding at the eleventh hour.

This alteration represented a substantial disadvantage in effect now imposed by one litigant upon another, at the final stage of proceedings, despite that litigant having previously recognised the responsibility to ensure all sides of the argument before the courts could be advanced with full and adequate funding. Having regard to the combined effect of advantage to the Crown, the subject-matter concerning customary rights, and the disadvantage to the Te Kāhui applicants who cannot now make alternative funding provision, the Court considered this an exceptional case in which it was necessary in the interests of justice to make a PCO for advance costs, the burden of which the Crown should justly bear.

The fifth and final consideration is of reasonable alternatives to the making of the order, and any appropriate limits on its extent and duration. The amount awarded should be no more than is necessary to avert injustice. The Court first recognised that Ngāti Ruatākenga, the Te Kāhui applicant that has engaged Ms Feint KC, will of necessity undertake the heaviest lifting given her leading role in the appeals. The Court considered that the great public significance of the issues Ms Feint will be dealing with, in response to the Crown's arguments, meant a PCO for advance costs was required, for three-quarters of the amount a successful party would receive after the event if they had engaged senior and junior counsel for an eight-day appeal. The Court then determined that the other three Te Kāhui applicants, having individual party status but essentially supporting the arguments advanced by Ms Feint, required a PCO no more than two-thirds of costs after the event, but based on single counsel. This led to a combined gross figure of $217,500. The Court deducted the $120,000 which the

Crown has undertaken to provide to the four applicants collectively. This led to a PCO in the sum of $97,500 for the applicants collectively.

Other parties to the substantive appeals

The Court noted that other parties to the substantive appeals had indicated support for the application, on the evident premise that they too might be treated in the same fashion. However, formal orders require an application, and would depend upon the extent to which further funding beyond the orders made in this judgment is necessary to ensure the primary issues are ventilated. The Court noted that any other parties seeking PCOs should address their concerns first to Crown counsel. The Court had no doubt the Crown would act responsibly, in accordance with the principles set forth in this judgment. Where the threshold is met, consent orders are to be encouraged.

Orders

The formal orders of the Court are as follows:

(a) The application by Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea for a prospective costs order against the Attorney-General is granted.

(b) The respondent must pay the applicants prospective costs of $97,500, collectively.

(c) The respondent must pay the applicants costs on the application of $7,500 together with usual disbursements.

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