



Greenhouse Gas Contributors Face Trial

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On 7th February the Supreme Court released its decision on the highly anticipated *Smith v Fonterra* case.

Mr Smith, who is tangata whenua and has interests in land in Northland, brought claims against seven of New Zealand's biggest greenhouse gases (GHG) contributors on the basis of damage to the whenua and moana. The issue the Supreme Court considered is a procedural one, relating to whether Mr Smith's claims can proceed to be heard or whether they are doomed to fail and should be

struck out. The claims relate to public nuisance, negligence, and a new tort, “climate system damage”. Mr Smith seeks declarations that the respondents have unlawfully breached duties owed to him or to the public and that their activities have or will cause him loss. He also seeks injunctions requiring the respondents to reduce emissions by specified amounts.

The Supreme Court has reinstated Mr Smith’s claims after they were struck out in the High Court and Court of Appeal on the basis that they were not reasonably arguable. The case will now return to the lower courts for consideration.

Two particular areas of interest arising from the Supreme Court’s decision relate to tort law (particularly nuisance) in a climate change context, and tikanga. The Court found that where tikanga related interests are involved, it is necessary to address these interests through a hearing of evidence. Tikanga was the “first law of New Zealand, and it will continue to influence New Zealand’s distinctive common law as appropriate according to the case and to the extent appropriate in the case”.

The Supreme Court was also clear that there is no basis to conclude that Parliament has displaced the law of torts in relation to climate change in New Zealand (for example, through the Climate Change Response Act or the Resource Management Act). Rather, it has left “a pathway open for the common law to operate, develop and evolve amid a statutory landscape that doesn’t displace the common law”.

In assessing Mr Smith’s public nuisance claim, the Supreme Court took both an orthodox and a more novel approach. It upheld the Court of Appeal’s finding that climate change issues do give rise to public rights which can be the subject of a civil legal action, and that it is unnecessary to prove the respondents’ actions (or inactions) are “independently unlawful”. However, it took a different approach to the question of whether “special damage” and a “sufficient connection” between the damage and the respondents’ activities are required. The Supreme Court held that the climate change and tikanga focus required reconsideration in a 21st century context and therefore Mr Smith had an arguable claim. The Court was not convinced that the common law is incapable of addressing the tortious aspects of climate change.

In light of the Supreme Court’s findings, it remains arguable that GHG emitters (or contributors) must take responsibility for activities which potentially cause harm,

both to the wider public and to particular individuals. However, whether the respondents' actions in this case meet the threshold of substantial and unreasonable interference with public rights remains a key issue for trial. The Supreme Court's decision focuses on the "nuisance" claim and does not give detailed consideration to the proposed new "climate system damage" tort, or the negligence claim. However, those claims have also been given new life, to be argued at trial alongside the nuisance claims.

As can be expected in a strike out decision, the Supreme Court was careful not to provide commentary on whether or not the substantive claims will succeed at trial. But "Mr Smith now gets his day in court".

If you have any questions about the case, please contact our Team