Supreme Court gives green light to climate change case

On 7 February 2024 the Supreme Court allowed a novel climate change case to proceed to trial. It is a case that follows on from a number of climate change cases around the world where Courts have been prepared to:

a) Make factual findings that climate change is related to anthropogenic CO2 emissions.
b) Be creative about remedies.
c) Address problems associated with climate change themselves rather than defer to Parliament.
d) Find a basis for intervention by expanding the "duty of care" in the torts of negligence or nuisance, and in human rights.

It is important to stress at the outset that the judgment concerns an appeal from a strike out application and the question the Court had to determine was whether the case should be allowed to proceed to trial not whether the claim would ultimately succeed.

The background

The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum.

In 2019 he filed a claim in the High Court against seven companies - Fonterra, Genesis Energy, Dairy Holdings, New Zealand Steel, Z Energy, Channel Infrastructure NZ and BT Mining - each is alleged to be involved in an industry that either emits greenhouse gases or supplies products which release greenhouse gases when burned. Mr Smith says that they have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, food gathering and spiritual significance to him and his whānau.

Three causes of action in tort were raised: public nuisance, negligence and a proposed new climate system damage tort.

Mr Smith seeks a declaration that the seven companies have unlawfully either breached the duty owed to him or caused or contributed to a public nuisance and have caused or will cause him loss through their activities. In addition to declaratory relief, he also seeks injunctive relief which would require the company's to either reduce their emissions by specified amounts over a defined period of time, or immediately cease omitting (or contributing to) net emissions.

Procedural history

When the claim was filed in the High Court back in 2019, the seven companies applied to strike out the proceeding arguing that Mr Smith's statement of claim raised no reasonably arguable cause of action.

The companies argued Mr Smith's claim would skew the law and introduce "open-ended liability for defendants and dramatically disrupt economies". All the companies submitted evidence that they were operating within the relevant statutory and regulatory requirements.

The High Court determined that the claims in public nuisance and negligence were not reasonably arguable and struck them out. However, the High Court declined to strike out the claim based on the new proposed climate system damage tort. Mr Smith appealed, and the seven companies cross appealed. The Court of Appeal struck out all three causes of action finding that Mr Smith's statement of claim raised no reasonably arguable cause of action.

Mr Smith was then granted leave to appeal to the Supreme Court. The question the Supreme Court had to determine was whether the Court of Appeal was correct to dismiss the appeal and allow the cross-appeal.

Supreme Court decision

The Supreme Court unanimously allowed Mr Smith's appeal and reinstated his statement of claim. The Court held that Mr Smith's claim should be allowed to proceed to trial, rather than being struck out pre-emptively.

The Supreme Court noted that if a claim was founded on seriously arguable non-trivial harm, then the common law should lean towards testing and evaluating the claim based on evidence and argument at trial rather than pre-emptively disposing of it.

The Supreme Court found there was no basis to conclude that the law of torts (in particular public nuisance) in the realm of climate change in New Zealand had been displaced by statute. The Climate Change Response Act 2002 and the Resource Management Act 1991 do not displace the law of torts. Parliament has left a pathway open for the common law to operate, develop and evolve amid the statutory landscape.

The Court then considered whether Mr Smith's public nuisance claim was bound to fail and found it was not. On the remaining two causes of action (negligence and the new climate system damage tort) the Court held that where the primary cause of action is not struck out, the authorities generally discourage striking out remaining causes of action. It was thus unnecessary for the Supreme Court to traverse the remaining claims and they too were reinstated.

Mr Smith has pleaded his claims in part based on tikanga Māori. The Supreme Court found that addressing and assessing matters of tikanga at trial could not be avoided. The trial judge will need to consider the potential effect of tikanga on any special damage requirements in public nuisance (if in fact special damage is required) and, generally, whether tikanga-related harm is a legally cognisable form of loss. In more recent times, the common law has re-engaged with tikanga and in 2003, citing extensive authority, the Supreme Court found that Māori land rights derived from tikanga were cognisable at common law and this had been the position since the common law's arrival in New Zealand in 1840. The analytical methodology of assessing tikanga outlined in *Ellis (Continuance)* [2022] NZSC 114 will assist the trial judge in determining tikanga concepts of loss that are neither physical nor economic.

Finally, the Court noted that the refusal to strike out, and the reinstatement of Mr Smith's claim, is not an assessment that the claim is bound to succeed at trial. Rather, it is a finding that it cannot be said, at a preliminary stage, that it is bound to fail.

Thoughts

The judgment of the Supreme Court does not answer any of the novel and important questions the case raises. We do not know:

a) The scope of the public nuisance cause of action.
b) How the Courts will tackle the novel climate system damage tort.
c) The scope of any duty of care owed in negligence.
d) Whether the plaintiff needs to suffer particular damage caused by the acts or omissions of the defendants.
e) The role of tikanga in formulating the claims.

The one thing we can take away from this judgment is that the law in this area is uncertain. Uncertainty can be a friend or foe for those operating in the murk.

What is of particular note for local government is the unanimity of the Supreme Court in its decision and its willingness to entertain climate litigation.

We know from the leaky building crisis that New Zealand courts had no difficulty finding that local government was, pursuant to the Building Act, meant to "ensure" building work complied with the Building Code. The responsibility translated into a duty of care to building owners. This was in contrast to other jurisdictions, most notably the UK. The cost to local government and its insurers here has been huge.

Local government faces serious litigation risk from emerging common law climate change claims. That is because local government is required to plan and act to meet the current and future needs of local, district and regional communities. It controls lots of infrastructure much of which is situated in coastal areas which are at risk of sea level rise.

It is likely there will be claims brought for allowing development in areas where arguably houses should not have been built and for failing to implement climate adaptation measures (e.g. from homeowners suffering the physical and economic consequences of flooding, landslips etc, as a result of climate change).

In the New Zealand statutory context, it is up to local government to carefully consider the consequences of decisions to take, or not take steps, such as controlling development and protecting coastal regions. As the law develops and changes, it is not difficult to imagine that local government will face a barrage of climate litigation in due course.

The full judgment is linked here

Thanks to Frana Divich (Partner) for writing this article