IN THE COURT OF APPEAL OF NEW ZEALAND

CA286/2008
[2008] NZCA 250

	BETWEEN	THE FRIENDS OF PAKIRI BEACH Applicants
	AND	AUCKLAND REGIONAL COUNCIL First Respondent
	AND	SEA-TOW LIMITED Second Respondent
	AND	MCCALLUM BROS LIMITED Third Respondent

Hearing: 15 July 2008

Court: William Young P, Chambers and Ellen France JJ

Counsel: N R W Davidson QC, J A Carnie, and L Tran for Applicants
J K MacRae for Second and Third Respondents

Judgment: 18 July 2008 at 3 pm

JUDGMENT OF THE COURT

A An extension of time for applying for special leave to appeal is granted.

B Special leave to appeal is granted. The question of law to be determined is whether the High Court erred in holding the grounds of appeal struck out were not arguably questions of law arising from the Environment Court's decision.

C Costs are reserved pending the outcome of the appeal.

REASONS OF THE COURT

(Given by Chambers J)

Application for special leave to appeal

[1] The Friends of Pakiri Beach seek special leave to appeal from a decision of Winkelmann J, *The Friends of Pakiri Beach v Auckland Regional Council* HC AK CIV2006-404-3546 2 March 2007. In that decision, Her Honour struck out a number of prospective grounds of appeal on the basis that they did not disclose questions of law. The application is opposed by Sea-Tow Ltd, the second respondent, and McCallum Bros Ltd, the third respondent.

Procedural background

[2] This application has an unusual procedural background, which we think it important to relate, even if in abbreviated form. The regrettable history of this litigation has significantly influenced our decision to grant special leave.

[3] Sea-Tow and McCallum Bros, "the dredgers" as we shall call them, had resource consents to extract sand from near-shore areas of the Mangawhai-Pakiri embayment on the east coast of the North Island. When those consents expired, they applied for new ones. The applications were notified. A committee of the Auckland Regional Council, the first respondent, refused their applications.

[4] The dredgers appealed to the Environment Court. Those appeals were strongly opposed by, among others, The Friends of Pakiri Beach, an unincorporated society of residents and landowners at Pakiri Beach. The dredgers' appeals were successful. The Environment Court granted them resource consents.

[5] The Friends and the Auckland Regional Council were dissatisfied with the Environment Court's decision. They lodged appeals in the High Court under s 299 of the Resource Management Act 1991. The Friends sought the quashing of the resource consents. The dredgers then applied to strike out the Friends' appeal on the

ground that a number of what were said to be points of law in the notice of appeal were not points of law at all. Section 299 permits appeals only on points of law. The dredgers did not seek to strike out the council's appeal, which, at least on its face, appears more limited in its scope.

[6] As we have said, the strike-out application came before Winkelmann J. She struck out all but two grounds of appeal. No appeal based on those remaining grounds has yet been heard, because the Friends have wanted to challenge Winkelmann J's strike-out decision and have the struck-out grounds reinstated before the appeal proper is heard.

[7] The Friends were uncertain how to challenge Winkelmann J's decision. They considered they had a right of appeal from that decision to this court under s 66 of the Judicature Act 1908. They accordingly filed an appeal under CA116/07.

[8] In case they were wrong about that, however, they also adopted a fallback position of seeking leave to appeal to this court under s 308 of the Resource Management Act. Section 308 incorporates by reference s 144 of the Summary Proceedings Act 1957. That section permits appeals to this court by leave of the High Court or, if that court refuses leave, by special leave of this court. The application for leave to appeal came on for hearing in the High Court before the appeal CA116/07 came on for hearing in this court. Andrews J heard the High Court application. She held, in a reserved decision delivered on 3 December last year, that there was no jurisdiction to grant leave under s 308 because, in her view, Winkelmann J's decision was not "a decision of the High Court under section 299". It was perhaps no surprise that she came to that conclusion as that was the stance adopted by both counsel for the dredgers and, somewhat surprisingly, counsel for the Friends.

[9] The purported appeal under CA116/07 came before this court on 13 March this year. This court delivered its decision on 16 April: [2008] NZCA 87. The court dismissed the purported appeal on the basis that neither leave nor special leave to appeal had by then been obtained. The court held the Friends had no right of appeal under s 66 of the Judicature Act. The court held, however, that Winkelmann J's

decision "should be treated as "a decision of the High Court under section 299", with the consequence that it is amenable to appeal, but only if leave is granted under s 308": at [20]. Andrews J had declined such leave on jurisdictional grounds. At that stage, the Friends had not sought to bring an application for special leave.

[10] This court went on to observe that all the Friends could now do was apply for special leave from this court. The court said at [43]:

> [The Friends] are out of time, but s 144(3) of the Summary Proceedings Act (as incorporated into s 308) makes provision for the Court of Appeal to extend time. Whether the Friends want to make a late application is a matter for them. We make no comment as to its chances of success, although the Friends' not unreasonable reliance on *Smiturnugh* would be a strong factor in support of excusing the lateness of application. The dismissal of appeal CA116/07 would not prevent special appeal being granted.

[11] The reference to *Smiturnugh* was a reference to a High Court decision, *Smiturnugh Limited v Auckland City Council* HC AK AP39SW/00 5 September 2000, on which the Friends had relied. That High Court case had suggested that a strike-out decision was not "a decision of the High Court under section 299", with the consequence that it was not amenable to appeal under s 308. In this court's decision of 16 April, we overruled *Smiturnugh*.

[12] Following this court's decision, the Friends did seek special leave to appeal. Because the application is out of time in terms of s 144(3), the Friends also need this court to extend time in which to bring that application.

Why special leave is being granted

[13] We deal first with the application to extend time. Mr MacRae, for the dredgers, did not take any point about the timing. That was an appropriate stance. The Friends had, after all, commenced appeal CA116/07 and brought the application for leave under s 308 in a timely way. Had this court been able to hear appeal CA116/07 before the leave application was heard, we would have been able to clarify the law and, in particular, to clarify that Winkelmann J's decision was potentially appealable under s 308. The hearing of the leave application would then have taken quite a different course from that which it did take before Andrews J. It

would have been concerned with the merits of the proposed appeal rather than the jurisdictional question. There would have been no timing difficulties, as that application was in time.

[14] As it happens, the High Court was able to accommodate the hearing of the leave application before this court was able to hear CA116/07. This meant that the leave hearing went off on a tangent, both sides believing that *Smiturnugh* was the controlling authority. Once this court had clarified the uncertain state of the law by its 16 April decision, the Friends moved promptly to seek an extension of time for applying for special leave. In the unusual circumstances of this case, we have no hesitation in granting the extension of time.

[15] We now turn to the application for special leave. We begin by observing that, because of the procedural course this litigation has followed, this hearing for special leave has *not* been preceded by an application for leave *determined on the merits*. Andrews J declined the application for lack of jurisdiction. Effectively, therefore, in the special circumstances that have arisen, we need to look at the matter afresh.

[16] We think there is an arguable question of law arising on the proposed appeal. It is whether the High Court erred in holding the grounds of appeal struck out were not arguably questions of law arising from the Environment Court's decision. That proposed question is broad enough to encapsulate both of the questions Mr Davidson QC postulated. We do not propose to go into greater detail on that, as it is not normal in this court to give reasons why leave applications are granted: see Court of Appeal (Civil) Rules 2005, r 27(2)(b). We have no doubt that the overall subject-matter of the appeal and of the underlying dispute between the Friends and the council on the one side and the dredgers on the other meets the general and public interest requirements of s 144(3).

[17] It will be for this court on the appeal itself to determine whether any of the grounds struck out by Winkelmann J did contain arguable questions of law. This court on that appeal will *not* be determining, however, whether the Environment Court did make errors of law. If this court determines that some or all of the

Friends' questions were arguably questions of law, then such of them as meet that criterion will be reinstated as questions for the High Court's consideration on the s 308 appeal itself. On that appeal, it would still be open to the dredgers to argue the questions were not questions of law. In short, this court on the next round will simply be determining whether the s 308 appeal will be in its current truncated form or in the somewhat wider form the Friends seek.

[18] The convoluted course this litigation has taken shows graphically why the strike-out jurisdiction in the appeal setting is one "to be very sparingly exercised, and only in very exceptional cases": [2008] NZCA 87 at [16]. The dredgers would have been much better advised to get on with the appeal itself. They after all still faced an appeal from the Auckland Regional Council. This is a classic case where the short-cut has proved to be the long road home.

[19] The dredgers may, even at this late stage, want to give consideration to consenting to the Friends' appeal to this court being allowed, with the express rider that, when the s 308 appeal is finally heard in the High Court, it would be open to the dredgers to argue that the grounds of appeal were not questions of law. (That rider would be, as explained, implicit in the potential outcome of the appeal to this court, if it succeeds, anyway.) It was always open to the dredgers on the s 308 appeal to argue the questions were not questions of law; it would have saved both sides considerable money and time had the appeal simply been allowed to run its normal course. Appellants in resource management appeals frequently advance grounds of appeal which are not questions of law: where that is clear, the High Court gives such grounds short shrift – *but in the context of the appeal itself*. Whether the dredgers decide to adopt the course we suggest is, however, a matter for them.

Costs

[20] We reserve costs pending the outcome of the appeal: Court of Appeal (Civil) Rules, r 53G.

Solicitors:
Clendons, Auckland, for Applicants
DLA Phillips Fox, Auckland, for Second and Third Respondents