**CLIMATE CASE SUMMARIES – *Smith v Fonterra* [2024] NZSC 5**

**Landmark New Zealand decision on tort liability for greenhouse gas emissions**

**Summary**

The New Zealand Supreme Court has delivered a landmark decision on a case brought by Māori elder, Mike Smith, against seven of New Zealand's largest greenhouse gas emitters.

Prior to this decision, the common law had entrenched the prevailing orthodoxy that tort claims could not be used to challenge or address climate change and that the regulation of greenhouse gas emitters was best left to the other branches of government through statutory regulation.

This case is significant as it marks one of the first decisions where a court has recognised that tort law can be used to challenge the greenhouse gas emissions of a private entity.

**Facts**

Mr Smith is an elder of the Ngāpuhi and Ngāti Kahu people. In 2019, Mr Smith, along with a climate change spokesperson for the Iwi Chairs Forum (a national forum for tribal leaders), filed a statement of claim in the High Court of New Zealand, against seven New Zealand companies involved in an industry that emitted greenhouse gases (‘**GHGs’**) or supplied products that released GHGs when burned (‘**the Respondents’**).

Mr Smith claimed a traditional connection to the coastal land and said that the land has been threatened by the Respondents who have contributed materially to the climate crisis and have damaged, and will continue to damage, places of customary, cultural, historical, nutritional and spiritual significance to him.

The claim raised three causes of action in tort, including public nuisance, negligence, and a proposed new tort involving a duty, cognisable at law, to cease materially contributing to climate change.

Mr Smith sought a declaration that the Respondents have unlawfully breached a duty of care owed to him in addition to an injunction requiring the Respondents to:

1. reduce or cause peaking of their emissions by 2025, a particularized reduction in their emissions by the end of 2030 and 2040, and zero net emissions by 2050; or alternatively
2. immediately cease emitting net emissions.

The Respondents applied to strike out the proceeding on the basis that the claim raised no cause of action and was related to complex policy matters that were better addressed by Parliament.

The Respondents argued that:

* parliament had already addressed the situation and settled upon a detailed legislative response such that intervention from the common law would create a parallel and inconsistent regulatory regime;
* it was not possible to link emissions to the harm suffered by Mr Smith; and
* Mr Smith’s claim would open the floodgates to open-ended liability for greenhouse gas emitters which would dramatically disrupt economies.

In 2020, the High Court struck out Mr Smith’s public nuisance and negligence claims but declined to strike out the proposed new tort claim for climate change damage. Mr Smith appealed and the Respondents cross-appealed.

In October 2021, the Court of Appeal concluded that all claims should be struck out and that the response to climate change was best left to other branches of government. The Court's overarching view was that “*the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts…”.*

The Court of Appeal said that the claim should be struck out because private litigation could result in emitters being required to *“comply with requirements that are more stringent than those imposed by statute”.* Mr. Smith appealed to the Supreme Court of New Zealand and the Court was asked to consider whether the claim should be allowed to proceed to trial.

**Decision**

In a unanimous judgment, the Supreme Court overturned the Court of Appeal’s decision to strike out all three claims against the Respondents and allowed Mr Smith’s claims in negligence, public nuisance, and his proposed new tort claim regarding ‘climate system damage’ to proceed to trial.

In summary:

* The Court noted there was indisputable evidence that climate change threatens human well-being and planetary health, and that the opportunity to ensure a livable and sustainable future is rapidly closing.
* The Court dismissed the argument that claims in tort relating to climate change are excluded by statute. The Court considered the interrelationship between statute and the common law and referred to the *Resource Management Act 1991* (**RMA**), which is responsible for governing how people interact with natural resources and policing the environmental effects of emissions.

The Court held that Parliament did not exclude a common law response to damage caused by GHGs by ensuring the RMA expressly preserved access to common law rights of action under s 23, which reads:

*“Other Legal Requirements not affected*

1. *Compliance with this Act does not remove the need to comply with all other applicable legislation and other rules of law.”*

The Court concluded Parliament had not displaced the law of torts in the realm of climate change in New Zealand but rather it had “…*left a pathway open for the law to operate, develop and evolve amid a statutory landscape that does not displace the common law.”.*

* The Court ordered that the matter proceed to trial in order to determine whether the Respondents' actions amount to substantial and unreasonable interference with public rights. Interestingly, the Court dismissed the Respondents’ argument that it was not possible to directly attribute the harm claimed by Mr. Smith to the Respondent’s GHGs.
* Lastly, the Court accepted that Mr. Smith had brought the claim as a kaitiaki (whose role is to look after the environment) acting on behalf of wai (freshwater), whenua (land), and moana (sea). The Court acknowledged that the tikanga conceptions of loss (neither physical nor economic) could impact the special damage rule in public nuisance and potentially impact aspects of the tort claim.

**Commentary**

This decision from New Zealand’s highest court is significant as it opens the door for common law tort claims against private sector GHG emitters to proceed to trial. The outcome of the upcoming trial and any further appeals will have significant implications for the prospects of future similar claims.

While there remains several unanswered questions regarding the scope of such claims, Mr. Smith’s claim will now return to the High Court and proceed to trial where the Court will address these questions in the trial process.

This summary was prepared by Clyde & Co.