IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-000384
[2022] NZHC 1693

BETWEEN	MICHAEL JOHN SMITH Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing:	29-30 March 2022 Further submissions: 10 May 2022
Appearances:	D M Salmon QC, M Heard, S J Humphrey for the Plaintiff J M Prebble and K F Gaskell for the Defendant
Judgment:	15 July 2022

JUDGMENT OF GRICE J
(Strike out Application/Further Particulars)

Contents

Acronyms

[1]

BIA	Building Industry Authority
CCC	Climate Change Commission
CCRA	Climate Change Response Act 2002
COP	Conference of the Parties under the UNFCCC and Annual Meeting
ECHR	European Convention on Human Rights
ECHR	European Court of Human Rights
ETS	Emissions Trading Scheme
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
IPCC	Intergovernmental Panel on Climate Change
NAP	National Adaption Plan
NCCRA	National Climate Change Risk Assessment
NDC	Nationally Determined Contribution
NZBORA	New Zealand Bill of Rights Act 1990
RMA	Resource Management Act 1991
RMECCAA	Resource Management (Energy and Climate Change) Amendment Act 2004
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNFCCC	United Nations Framework Convention on Climate Change
Zero Carbon Act	Climate Change (Zero Carbon) Amendment Act 2019

Introduction

[2] This is an application to strike out the plaintiff's claim and, in the alternative, for further particulars.

[3] The claims are against the government represented by the Attorney-General alleging various failures to act more quickly to mitigate or avert climate change in New Zealand. They claim that the Government has taken no or inadequate climate change mitigation measures since it had become aware of the causes and effects of climate change down to the present.

[4] The breaches of the Government's obligations are pleaded under various heads. The essential allegation is that the effects of climate change on New Zealand and its citizens, particularly Māori, have not been properly addressed by successive governments and the present legislative and policy response is inadequate given the catastrophic consequences wrought by climate change.

[5] The first statement of claim pleaded only one cause of action based on breach of duty. This was formulated as a new legal obligation. Following orders for further particulars made by Johnston AJ in May 2020,[1] the plaintiff amended the claim to plead three causes of action. The breach of duty cause of action remained, but additional claims based on breaches of ss 8 and 20 of the New Zealand Bill of Rights Act 1990 (the NZBORA)[2] and te Tiriti o Waitangi | the Treaty of Waitangi (te Tiriti or the Treaty) were added.[3]

[6] Further particulars were set out in the amended statement of claim following the Associate Judge's determination. The Crown says these remain inadequate.

[7] The plaintiff says the claims should not be struck out and should be left to the trial Judge to determine the claim after hearing all the evidence.

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1 *Smith v Attorney-General* [2020] NZHC 836.

2 A list of acronyms used in this judgment can be found in the front of this judgment.

3 There are two versions of te Tiriti o Waitangi | the Treaty of Waitangi, a Māori text (te Tiriti) and an English text (the Treaty). In this judgment, I use "the Treaty" as a generic term to capture both texts. However, it is widely accepted that te Tiriti, the Māori text, should be regarded as the primary source of the commitments made between the Crown and Māori in 1840 and I use "te Tiriti" where appropriate to reflect this accordingly.

Background

[8] Mr Smith is an elder of Ngāti Kahu descent and the climate change spokesman for the iwi. He chairs its forum and has customary interests in land and other resources situated in and around Mahinipua, Northland. Mr Smith pleads that climate change resulting from the release of greenhouse gases into the atmosphere from human activities will result in an additional warming to the Earth's surface and atmosphere which will adversely affect natural ecosystems and humankind. He pleads that it is necessary to limit warming caused by climate change to 1.5 degrees Celsius to avoid dangerous anthropogenic interference with the climate system and to minimise the long-term and irreversible effects of climate change. He further pleads that the increasing adverse effects on humankind as climate change progresses has caused, and continues to cause, increases in temperature, loss of biodiversity and biomass, which result in risks to water and food security and increasing weather events. This, in turn, results in geopolitical instability and population displacement, adverse health consequences and resultant economic losses. These pose "[a]n unacceptable risk of social and economic collapse and mass loss of human life and civilisation".

[9] Mr Smith further pleads that not later than June 1992 the Crown knew that continued greenhouse gas emissions would cause the climate change and consequent harm to the environment and human welfare. It knew that if deep cuts to greenhouse emissions were to be made globally, then developed nations such as New Zealand needed to take the lead on emissions reductions. New Zealand was a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement and incorporated obligations under these instruments into domestic law.[4]

[10] Mr Smith further pleads that some of New Zealand's emissions are caused by activities of the Crown, including by its Crown entities and State enterprises. The emissions by the Crown have contributed to global warming and climate change and will continue to have adverse impacts.

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[4] Kyoto Protocol to the United Nations Framework Convention on Climate Change UNTS (opened for signature 16 March 1998, entered into force 16 February 2005); and Paris Agreement (signed 22 April 2016, entered into force 4 November 2016).

[11] Mr Smith says in his amended statement of claim that since the signing of the UNFCCC, the Crown has failed or refused to measure and monitor Crown emissions. Mr Smith says Māori communities will be disproportionately burdened by the adverse effects of climate change. Those communities' interests in land and customary interest in resources will be irreparably damaged. Māori communities have already suffered disposition and displacement from their traditional lands. In addition, those communities suffer higher levels of poverty and more health issues than the general population. They reside in areas more likely to suffer loss or damage as a result of inundation and extreme weather events, as well as having greater reliance on reliable access to customary lands. Māori communities also face particular cultural vulnerabilities associated with loss of sites of cultural, historical, customary and spiritual significance.

[12] In particular, Mr Smith pleads he has an interest in Mahinipua C Block located at Mahinipua, north-east of Kaeo, an area which will suffer particular damage.

[13] There is no contest between the parties about the fact of climate change and, in general terms, its causes and effects. The Paris Agreement is a legally binding international treaty on climate change reached by the Conference of Parties (COP)[5] adopted by New Zealand and 195 other countries on 12 December 2015 (effective 4 November 2016).[6] Its goal is to limit global warming to well below 2, preferably to 1.5 celsius compared to pre-industrial levels. This goal was formulated in order to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.

[14] Shortly after the hearing the Intergovernmental Panel on Climate Change (IPCC) released the Working Group III contribution to its Sixth Assessment Report, entitled *Climate Change 2022: Mitigation of Climate Change* (the Working Group III Report).[7] The IPCC comprises 195 member governments, all of whom approved the

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5 Conference of the Parties under the United Nations Framework Convention on Climate Control (UNTCCC).

6 Paris Agreement, above n 4.

7 Intergovernmental Panel on Climate Change *Climate Change 2022: Mitigation of Climate Change – Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (4 April 2022) [Working Group III Report]. Counsel brought this to the Court's attention.

Summary for Policymakers of the report.[8] The Working Group III Report provides an updated global assessment of climate change mitigation progress and pledges, and examines the sources of global emissions. It also outlines developments in emission reduction mitigation efforts, assessing the impact of national climate pledges in relation to long-term emissions goals.

[15] The report documents the evolution of global science and policy since the previous report (the Fifth Assessment Report) and the three special reports of the Sixth Assessment cycle.[9] It says the long-term temperature goal in the Paris Agreement will require accelerating decline to "net zero", which is impossible without urgent and ambitious action at all scales.[10] It notes the transition in specific systems can be gradual or can be rapid and disruptive. This depends on "existing physical capital, institutions, and social norms".[11] The report says that attention to and support for climate policies and low-carbon societal transitions has generally increased as the impacts have become more salient.[12] As well as calls for accelerating emission reductions, the report notes the decline of global emissions due to the effects of the COVID-19 pandemic in 2020,[13] and notes multiple low-carbon technologies have shown rapid progress enhancing the feasibility of rapid energy transactions.[14]

[16] The Working Group III Report was released with a statement by the United Nations Secretary-General António Guterres on 4 April 2022, in which he warned:[15]

> We are on a fast track to climate disaster. Major cities under water. Unprecedented heatwaves. Terrifying storms. Widespread water shortages. The extinction of a million species of plants and animals.

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8 The parties filed a joint memorandum indicating the report and related documents could be admitted by consent updating material.

9 Working Group III Report, above n 7.

10 At TS-2

11 At TS-7.

12 At TS-7.

13 At TS-14.

14 At TS-25.

15 António Guterres "Secretary-General Warns of Climate Emergency, Calling Intergovernmental Panel's Report 'a File of Shame', While Saying Leaders 'Are Lying', Fuelling Flames" (press release, 4 April 2022).

[17] Mr Guterres went on to say that high-emitting countries' governments and corporations were adding fuel to the flames. The science was clear that to keep the 1.5 degrees Celsius limit agreed in Paris within reach, global emissions needed to be cut by 45 per cent this decade. Mr Guterres said that the current climate pledges would mean a 14 per cent increase in emissions. Most major emitters were not taking the steps needed to fulfil even these inadequate promises. His statement concluded with the ultimatum that the choices made by countries now will "make or break" the commitment to 1.5 degrees Celsius.

The amended statement of claim

[18] The pleadings point to the inadequacy of responses by successive governments, including legislative responses in the form of the Climate Change Response Act 2002 (CCRA), as well as the Resource Management (Energy and Climate Change) Amendment Act 2004 (RMECCAA), which was intended to complement the CCRA and amend the Resource Management Act 1991 (RMA). The RMA explicitly precludes local authorities from having regard to the emissions implications of projects when deciding whether to grant resource consents or from regulating activities based on their emissions implications.[16]

[19] Mr Smith further referred to the Climate Change (Zero Carbon) Amendment Act 2019 (Zero Carbon Act), the Emissions Trading Scheme (ETS) which operated between 2002 and 2020, and the amendment to the CCRA by the Climate Change (Emissions Trading Reform) Amendment Act 2020 (ETS Reform Act). In addition, Mr Smith pointed to the Climate Change (Options, Limits and Price Controls for Units) Regulations 2020 (ETS Reform Regulations).

[20] Mr Smith pleads that the emissions cap introduced under the ETS Reform Regulations is too high and the emission subsidies are too great. The agricultural exemption results in people and entities responsible for a substantial quantity of New Zealand emissions not being subject to the ETS. He pleads that since 2020, the ETS has been and will continue to be ineffective in mitigating New Zealand's

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16 Resource Management Act 1991, s 70A.

emissions, which have not reduced at all since 1992 but have increased year-on-year since then.

[21] The three causes of action are premised on the fact that the Crown has known since 14 June 1992 about climate change and the risks associated with it.

First cause of action — breach of duty

[22] The first cause of action is entitled "breach of duty". It pleads there is a duty owed by the Crown which derives from its authority over the territory of New Zealand, It covers the activities occurring there and includes the atmosphere above New Zealand's territory. It must actively exercise that authority in a manner that:

> … protects the plaintiff and future generations of his descendants from the adverse effects of climate change, including, without limitation, the loss of: life; health; culture; economic and social wellbeing; spirituality; lands; fisheries; forests; sites of cultural, customary, historical or spiritual significance; and taonga …

[23] The pleading says the duty has existed since no later than 6 May 1840.

[24] The standard of care said to be required of the Crown is to "take all necessary steps to reduce NZ emissions and to actively protect the plaintiff and his descendants from the adverse effects of climate change".

[25] The sources of the duty are said to include: the responsibilities owed by the Crown to Māori and to all persons; the interest the public have under the *jus publicum* in air, sea, and running water; the public trust placed in the Crown to preserve and safeguard them by providing for a habitable atmosphere and environment; the rights affirmed in the NZBORA; existing common law rights, freedoms and duties; tikanga Māori; and New Zealand's obligations under international law, including under the United Nations Declaration on the Rights of Indigenous Peoples (the UNDRIP), the UNFCCC, and according to customary international law.

[26] Mr Smith pleads that the Crown is required to take various steps in pursuance of that duty. He says the specific pathway it chooses is a matter for the Crown, but available and necessary actions include to:

(a) measure and monitor emissions;

(b) use public powers to prevent emissions from increasing at all and reducing them in accordance with the best available science;

(c) have particular regard to the implications of decisions on levels of emissions and actively seek alternatives that will reduce or at least not increase emissions;

(d) revoke and cease allowing any new licences for exploration, extraction and/or export of fossil fuels;

(e) prioritise investment and infrastructure away from fossil fuels and towards a low-emissions economy;

(f) neither invest in nor facilitate any development of infrastructure or industry that will result in increased Crown emissions;

(g) undertake risk assessments of areas or populations at higher risk of harm from climate change and take steps to prevent or mitigate harm to them; and

(h) undertake risk assessments of interests protected under the Treaty, and then to take active steps to protect those interests from harm.

[27] The particulars of breach were pleaded following directions requiring particulars made by the Associate Judge.[17] The Crown is said to have known of the foreseeable and serious risk that the rights-holders will be deprived of life in the future in "a manner that is not established by law or consistent with the principles of fundamental justice". It has created those risks by being responsible for all Crown emissions, all New Zealand emissions and failing to take steps, including risk assessments and mitigation of the emissions.

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17 *Smith v Attorney-General*, above n 1, at [43].

[28] The plaintiff says the specific steps the Crown has taken in breach of the duty include:

(a) enacting the CCRA, which prescribes targets for the reduction of emissions of greenhouse gases and permits actual emissions reductions to be deferred for decades, are set on the basis of irrational assumptions involving not yet invented or unproven technology, do not recognise the offshore emissions implications of exported products offshore and have not been coupled with any plan or framework including any legal obligations to achieve emissions reductions enforceable by the courts;

(b) establishing the ETS, which did not include an effective cap on emissions until 2021, and continues to exclude agriculture emissions entirely, fails to recognise the offshore emissions implications of exported products and provides free units to major emitters;

(c) enacting the RMECCAA;

(d) implementing high greenhouse gas emission road building schemes;

(e) failing to prioritise active and public transport modes over private vehicles;

(f) failing to reduce and decarbonise New Zealand's vehicle fleet;

(g) bypassing any or proper consideration of climate change implications of proposed roads;

(h) issuing oil and gas exploration permits;

(i) supporting the draft Minerals and Petroleum Resource Strategy;

(j) allowing the Accident Compensation Corporation (ACC) to invest nearly $1 billion into fossil fuel-producing companies;

(k) allowing Meridian Energy Ltd to contract to supply electricity to the Tiwai Point aluminium smelter;

(l) failing to reduce the extent and intensity of agriculture-related emissions; and

(m) failing to control the legislative programme to implement measures to protect the plaintiff and his descendants from climate change;

[29] The plaintiff says Parliament's lack of a legislative response to climate change has constituted a knowing failure to reduce emissions adequately or at all, for which it can be sued.

[30] The relief sought is a declaration that the Crown owes a duty which it has breached and will continue to be in breach of unless and until it protects the plaintiff and his descendants from the adverse effects of climate change and reduces New Zealand and Crown emissions to "less than half of their 2010 levels by 2030 at a linear rate" and to zero "by sooner than 2050 at a better than linear rate between 2030 and 2050".

[31] In earlier proceedings a novel breach of duty in relation to the cause and effects of climate change was brought as a tortious claim in negligence by Mr Smith against Fonterra Co-Operative Group Ltd (Fonterra) and other named companies which produced emissions which were said to contribute to climate change. The proposed new tort and was struck out by the Court of Appeal in *Smith v Fonterra Co-Operative Group Ltd*.[18]

[32] The duty in the present case has not been described in submissions as a tort but rather appears be a hybrid public law/private law claim. The plaintiff pointed to underlying constitutional imperatives which he said should allow the development of this novel duty of care.

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[18] *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 [*Smith v Fonterra* (CA)] at [125]-[126]. A nuisance claim was struck out in the High Court and on appeal the novel tort claim was also struck out in te Kōti Pīra | the Court of Appeal. Leave has been granted to appeal that decision to te Kōti Mana Nui | the Supreme Court in *Smith v Fonterra Co-Operative Group Ltd* [2022] NZSC 35 [*Smith v Fonterra* (SC)].

Second cause of action — the New Zealand Bill of Rights Act 1990

[33] Mr Smith pleads breaches of the NZBORA under s 8 (deprivation of life) and s 20 (denial of the right to practise culture). The claim is that the Crown is responsible for emissions and it has enacted and amended the CCRA and the RMECCAA, which lack sufficient regulation of emissions. The plaintiff says the Crown has therefore failed to put in place an effective legislative and administrative framework properly designed to provide effective mitigation against the climate change risk in accordance with the best available science and New Zealand's international and domestic legal obligations.

Third cause of action — te Tiriti o Waitangi | the Treaty of Waitangi

[34] The third cause of action is based on breaches of the Treaty and consequent fiduciary duties owed to the plaintiff and those he represents. These include duties to perform the commitments undertaken by the Crown in the Treaty and to take active steps to ensure those commitments are honoured and act in good faith. The Crown is said to have breached these duties by its failure or inadequate response to mitigate climate change.

Application to strike out/particulars

[35] The defendant has filed an application to strike out the proceeding on the grounds that the amended statement of claim discloses no reasonably arguable cause of action. The Crown says that the duty pleaded in the first cause of action does not exist and the matters raised by the amended claim are non-justiciable.

[36] In relation to the second cause of action under the NZBORA, the Crown says that s 8 is not engaged and does not give rise to a positive obligation on the Crown that measures adopted in the climate change context be protective of life. In relation to s 20, the Crown says the plaintiff is unable to establish that his right to enjoy his culture has been interfered with, let alone denied.

[37] In relation to the third cause of action, the breach of the Treaty, the Crown says that the cause of action cannot succeed because while the Treaty is recognised for

many purposes including specifically in legislationas an aid to interpretation, it does not give rise to an independent actionable claim. In the climate change context, where the Crown is required to represent and balance competing interests, it cannot owe fiduciary duties to particular individuals or groups.

Approach to strike out

[38] In *Smith v Fonterra Co-Operative Group Ltd* the Court of Appeal set out the principles to be applied in approaching a strike out application as follows:[19]

> [38] We [address each cause of action] through the lens of well-established strike out principles.[20] That is to say, we assume the pleaded material facts are true save for those that are entirely speculative and without foundation and we also bear in mind that the strike out jurisdiction is to be exercised sparingly and only in clear cases. We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law. The fact a claim involves a complex question of law which requires extensive argument should be no bar provided we have the requisite materials and assistance to determine the matter.[21] We must also be mindful of the well established principle that if any deficiencies can be cured by an amendment to the pleadings, allowing the claim to proceed on condition the necessary amendments are made, is preferable to strike out.[22]

[39] In developing areas of the law, the courts are slow to strike out claims, for example where a duty of care is alleged in a new situation.[23] The plaintiff says the present case has close parallels to *Wallace v Commissioner of Police*, where an application to strike out a claim alleging breach of positive duties to protect the right to life under s 8 of the NZBORA was dismissed.[24] Brown J emphasised the need for caution given the fundamental importance of the right to life and the fact the law on positive obligations was still "in a state of early development".[25] The claim went to a full trial where Ellis J upheld Mrs Wallace's claims as to the scope of s 8, finding that

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19 *Smith v Fonterra* (CA), above n 18.

20 The authority for the Court to strike out a pleading or cause of action derives from r 15.1 of the High Court Rules 2016 and under its inherent jurisdiction which is unaffected by r 15.1. See *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) at 323.

21 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267, endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] and *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146].

22 *Marshall Futures Ltd v Marshall*, above n 20, at 324; and *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [66].

23 *Couch v Attorney-General*, above n 21, at [33] per Elias CJ.

24 *Wallace v Commissioner of Police* [2016] NZHC 1338 [*Wallace No 1*].

25 At [66].

the positive duty to conduct an effective investigation into the death of her son, Steven Wallace, had been breached.[26]

[40] Mr Smith says that while there may be arguments about the future breaches given the present framework, there is no doubt that past breaches have occurred. Even if the present and future position is not within the ambit of the Court, the past breaches must be. He says I must take the pleading as proven in that regard for the purposes of the strike out application. Since 1992, the Government should have known about the issue of climate change and the ramification for the New Zealand population, but it did nothing. The Crown's various arms, including the ACC, Meridian Energy Ltd and Waka Kotahi NZ Transport Agency, continued to act as if climate change was not an issue in the ways described above.

The Crown's position

[41] The Crown set out the framework that had already been put in place by the Government to deal with climate change domestically.

[42] The CCRA was originally enacted to enable New Zealand to meet its obligations under the UNFCCC and the Kyoto Protocol. Since that time there have been a number of amendments to the CCRA, including the Zero Carbon Act, which enacted a target of reducing net omissions of greenhouse gases in a calendar year (excluding biogenic methane) to zero by 2050.[27] In terms of biogenic methane, the target required that emissions be 10 per cent less than 2017 levels by 2030, and 24–47 per cent less by 2050.[28]

[43] The Zero Carbon Act also inserted an additional purpose into the CCRA as follows, to:[29]

> (aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that—

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26 *Wallace v Attorney-General* [2021] NZHC 1963 [*Wallace No 2*].
27 Climate Change Response Act 2002 [CCRA], s 5Q(1)(a).
28 Section 5Q(1)(b).
29 Section 3(1).

(i) contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and

(ii) allow New Zealand to prepare for, and adapt to, the effects of climate change:

[44] The Crown pointed to the explanatory note to the Zero Carbon Bill, which commented on its purpose as follows:[30]

> The overarching purpose represents a balance of the guiding principles agreed by Cabinet to frame the development of climate change policy: leadership at home and abroad; a productive, sustainable, and climate-resilient economy; and a just and inclusive society.
>
> The Bill sets out a durable framework, and stable and enduring institutional arrangements, for climate change action that will help keep New Zealand on track to mitigate and adapt to climate change. It also contains mechanisms for increasing transparency of decisions relating to climate change. This includes processes, time frames, reporting obligations, monitoring, and considerations to take into account.
>
> The Bill seeks to strike a balance between flexibility and prescription in New Zealand's long-term transition, as well as building in considerations for how impacts are distributed.

[45] The Crown says the Zero Carbon Act provides a "calibrated framework" for a just transition to New Zealand to a low emissions and climate-resilient future. The Zero Carbon Act also included detailed provision for Māori and the application of the Treaty in decision-making under the Act.[31]

[46] The Crown pointed to the key aspects of the updated regime as being:

(a) the establishment of an independent Climate Change Commission (CCC),[32] which provides expert advice on mitigating climate change, including through reducing emissions and adapting to its effects. It will monitor and review successive governments' progress towards emissions budgets, the 2050 target and adaption goals;[33]

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30 Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note).
31 CCRA, s 3A.
32 Part 1A.
33 Sections 5B, 5J and 5ZJ–5ZL.

(b) five-yearly emissions budgets, which act as "stepping stones" to the 2050 target and contribute to the global effort to limit global temperature to 1.5 degrees Celsius;[34]

(c) emissions reductions plans informed by advice from the CCC and government agencies, which set out the policies and strategies to be followed for meeting the emissions budgets;[35]

(d) a national climate change risk assessment (NCCRA), which assesses risks to New Zealand's economy, society, environment and ecology from the current and future effects of climate change and identifies significant risks based on urgency and consequences;[36] and

(e) a national adaption plan (NAP), which sets out objectives, strategies, plans and policies for climate change adaption, including timeframes for meeting those strategies and monitors to enable regular monitoring.[37]

[47] The Crown says the CCRA ensures accountability for successive governments through the CCC's regular monitoring and reporting, the setting of budgets and the Act's overall target. Under the Act, the CCC must produce an annual progress report which is presented to the House of Representatives,[38] and must provide regular reporting on the progress of each NAP,[39] and there is also provision for the Court to make a declaration in case of failure to meet the 2050 target or an emissions budget.[40]

[48] The Crown also points to the ETS as a key mechanism for reducing emissions and meeting international commitments. The Crown says the ETS has undergone a number of legislative reforms, which have introduced a cap to align with emissions

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34 Sections 5W–5Z. The explanatory note to the Zero Carbon Act, above n 30, described the purpose of the emissions budgets as "a valuable tool for tracking progress and determining whether New Zealand is on track to meet the emissions reduction target ... creat[ing] accountability across successive governments": at 3.

35 Section 5ZG–5ZI.

36 Sections 5ZP–5ZR.

37 Sections 5ZS–5ZT.

38 Sections 5ZJ–5ZK.

39 Section 5ZU.

40 Section 5ZM.

budgets and will provide for emissions from agriculture to incur a carbon price from 2025 at the latest.

[49] Another aspect of the framework for responding to climate change that the Crown points to is the advice of the CCC. In May 2021, the CCC produced its first report, having received more than 15,000 submissions, advising on the first three emissions budgets, the policy direction for the first emissions reduction plan, New Zealand's 2030 NDC, and biogenic methane reductions required to keep global average temperature rise to 1.5 degrees Celsius.[41] The Crown says the Government proposes to broadly accept the CCC's advice on emissions budgets, with some modifications.

[50] Finally, the Crown says the Government has committed to reducing emissions through its NDC. In October 2016, the Government communicated its first NDC under the Paris Agreement, which committed to reducing net greenhouse gas emissions to 30 per cent below 2005 gross levels by 2030. The Government updated the NDC in November 2021 to a commitment to reduce net emissions to 41 per cent below 2005 gross levels by 2030.

[51] The Crown rejects the plaintiff's assertion that it lacks an adequate framework dealing with the effects of climate change.

First cause of action — breach of duty

Nature of the claim

[52] The plaintiff bases the duty on the fact that climate change is a unique "collective action" problem which risks catastrophic harm to fundamental interests protected by the common law. The plaintiff says the risks threaten the continued existence of New Zealand as a democratic state and that humans and social order will cease to exist unless action is taken. It follows, the plaintiff says, that none of the branches of government will be able to fulfil their constitutional roles so no other

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41 He Pou a Rangi | Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa – Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022 – 2025* (31 May 2021).

rights which the courts must protect will have meaning or be capable of being enforced.

[53] The plaintiff says the State is uniquely placed to mitigate these risks and it alone is able to address the problem of "systemic domination" by major individual emitters who, by their emissions, exert their will over others thereby limiting freedoms.

[54] The plaintiff pleads a strict liability standard for the new duty — to avoid dangerous interference with the climate system. That, the plaintiff says, is required because of the catastrophic nature of the consequences of non-compliance with the duty.

The duty

[55] The plaintiff says the necessary conditions for the existence of a duty of care flow from Lord Atkinson's famous exposition in *Donoghue v Stevenson*:[42]

> I owe a duty of care to persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[56] In this case, the argument is that reasonable foreseeability and appropriate proximity to a class of person to whom the duty of care is owed is established by evidence pointing to the knowledge by the Crown of the dangers of climate change and the risks it brings to all persons and their property in New Zealand.

[57] The content of a duty of care has been analysed at a doctrinal level as a duty to be mindful of the interests of persons placed at reasonably foreseeable risk by one's actions, where those other persons have a correlative right that one be so mindful.[43] The duty of care together with the standard of care results in a duty not to subject

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42 *Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

43 Steven Perry "Torts, Rights, and Risk" in J Oberdiek *Philosophical Foundations of the Law of Torts* (Oxford University Press, Oxford, 2014) 38 at 44.

persons whom one's actions place at reasonably foreseeable risk to unreasonable or undue levels of such risk.[44]

[58] The plaintiff says the duty in the present claim carries with it strict liability. Unlike the tort of negligence, strict liability does not involve a duty of care. This is because in a case of strict liability, the defendant has no duty, not even a derivative one, not to create unreasonable risks, but instead has a duty not to cause to reasonably foreseeable persons or classes of persons sufficiently proximate physical harm as a result of engaging in a certain type of activity.[45] Therefore, whether or not one has complied with the standard of reasonable care is neither here nor there.[46]

[59] There are few civil causes of action that are based on a pure right not to be put at risk at all. An example is the tort of false imprisonment, which is an intentional tort justified in quite different ways to the tort of negligence.[47]

[60] Mr Smith says that given the existential threat to human life posed by climate change, the dictum of Cooke J in *Taylor v New Zealand Poultry Board* that "[s]ome common law rights presumably lie so deep that even Parliament could not override them" applies.[48] He says that the wider Crown has completely failed to reduce its own or national emissions from 1992, which invokes a comparison with the examples given by Cooke J of a matter beyond the constitutional power of the legislature, such as laws purporting to disenfranchise women or strip Jewish people of their citizenship or property".[49] The plaintiff says the evidence is there and climate change is already occurring. He says recent reports of the IPCC illustrate in stark terms the risk for human society if the rate of change is not immediately and sharply reduced by more effective means than those undertaken by the Government at present. Mr Smith says the evidence of that is a matter for trial and this application must be determined as if the evidence established the factual basis of the claim.

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44 At 44.
45 At 52.
46 At 52.
47 At 59.
48 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke J.
49 Robin Cooke "Fundamentals" [1988] NZLJ 158.

[61] It is these factors that the plaintiff says compels the recognition of a novel duty on the State to take necessary steps to avoid dangerous interference leading to climate change.

Development of novel duties

[62] The plaintiff points to the development of novel duties such as that recognised in *Hosking v Runting* (interference with privacy)[50] and *C v Holland* (invasion of privacy and "intrusion upon seclusion" to protect interests in dignity, autonomy and privacy),[51] among others.

[63] In the context of a strike out application, the Court of Appeal has noted that a Court would be slow to strike out a novel negligence claim. In *Attorney-General v Body Corporate 200200* the Court said:[52]

> *Strike out principles as applied in public law negligence contexts*
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> [50] In all cases the threshold for a strike out application is rigorous and the courts are especially slow to strike out claims in negligence which assert novel duties of care; this in recognition of the factually sensitive nature of the inquiry and what will often be the need for evidence, including expert evidence, and the testing of such evidence in a trial setting. In a proper case, however, a determination may be made on the existence of a duty of care on a strike out application. The difficulty of the associated legal issues does not preclude the granting of the application. As to these considerations see the remarks of Richardson P in *Attorney-General v Prince and Gardner* at 267.
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> [51] Such cases throw up competing considerations of policy. On the one hand, the courts should not lightly deny plaintiffs the opportunity to proceed to trial on novel issues of law. Moreover, a trial will present a more favourable forum to assess the issues involved in establishing a duty of care. On the other hand, however, defendants ought not to be subjected to the substantial costs, much of which is usually unrecoverable, in defending untenable claims.

[64] The Court of Appeal in *Hosking v Runting* recognised the tort of invasion of privacy as existing in New Zealand.[53] It reviewed the state of privacy law in various jurisdictions as well as in New Zealand. It looked at the policy in respect of the protection of privacy and whether the statutory protections already enacted amounted to a comprehensive treatment which might preclude the existence of the novel cause

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50 *Hosking v Runting* [2005] 1 NZLR 1 (CA).
51 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.
52 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [50]–[51].
53 *Hosking v Runting*, above n 50.

of action.[54] It noted that the Privacy Act 1993 did not confer on any person legal rights enforceable in a court of law in relation to privacy.[55] The Broadcasting Act 1989 and Harassment Act 1997 also left gaps in the law.

[65] The Court of Appeal in *Hosking v Runting* said that while the introduction "of any high-level and wide tort of invasion of privacy should be a matter for the legislature" that was not what it envisaged but, rather, it was "taking developments that have emerged from cases in New Zealand and in the larger British jurisdiction and recognising them as principled and an appropriate foundation on which the law may continue to develop to protect legitimate claims to privacy".[56]

[66] The Court went on to note that the scope of the newly established cause of action should be left to incremental development by future courts.[57] The primary remedy would be the award of damages and in some cases injunctive relief.

[67] Tipping J, in a separate judgment, referred to the "traditional common law method … of incremental development".[58] He also noted that the NZBORA would inform the development of the common law in its function of regulating relationships between citizens, and the rights and values it represents should be given appropriate weight when developing the common law.[59]

[68] Further "incremental" developments in the area of privacy recently occurred in *Peters v Attorney-General*.[60] The Court of Appeal noted that in developing the law in the new torts:[61]

> … it is appropriate for courts to proceed with care, paying close attention to countervailing rights and interests, when formulating the criteria that will be used to gauge reasonable expectations of privacy. The courts must also recognise their institutional limitations, which dictate that law should be developed incrementally and by reference to specific facts.

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54 At [97].
55 At [99].
56 At [110].
57 At [149].
58 At [251].
59 At [229].
60 *Peters v Attorney-General* [2021] NZCA 355, [2021] 3 NZLR 191 at [114].
61 At [114] (footnotes omitted).

[69] Mr Smith argues that by the same process of reasoning that led to the development of new torts such as invasion of privacy, the proposed duty can be recognised — albeit on a bigger scale — and so provide a remedy for much more serious interferences with fundamental interests.

[70] Mr Smith says that recognition of such a duty would not be contrary to any existing statutory schemes because there is no legislative provision which purports to preclude common law claims against the Crown. Mr Smith says the Court has a general jurisdiction to review legislation or policy.

[71] Claims in negligence based on public duties may be advanced against the Crown. The recent Court of Appeal decision in *Attorney-General v Strathboss* dealt with an appeal from a determination that the Crown was liable in negligence for failing to properly manage the biosecurity risk in relation to an import permit granted for kiwifruit pollen.[62] The High Court found a duty of care which had been breached and held the Crown was liable to the defendants in damages.[63] The Court of Appeal allowed the appeal, primarily on the basis that the Crown immunity operated to prevent the claim. In finding that the duty of care had not been established it also made some observations in relation to the claim in negligence against the Crown which are relevant.

[72] The Court of Appeal noted that where a duty is imprecisely formulated, a duty of a technical or operational nature may be distinguished from one which relates to policy matters.[64] That distinction had been made by Lord Wilberforce in *Anns v Merton London Borough Council*.[65] Public policy and political considerations are less likely to be justiciable.

[73] In this case the duty is imprecisely formulated and could be said to target technical and operational matters as well as policy matters.

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62 *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247.
63 *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559.
64 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 62, at [184].
65 At [184], citing *Anns v Merton London Borough Council* [1978] AC 728 (HL).

[74] In *Strathboss*, the Court of Appeal observed that a significant factor against the finding of a duty of care was that the potential losses from a breach of that duty would have been immense.[66] It said the ordinary requirements for success in negligence would not be a sufficient control for the extent of the liability that could flow from the breach of that duty and that the possible claims would be complex and of a significant scale. This was a significant reason not to recognise the duty at law. Such a duty should be introduced by legislation.[67]

[75] The Court of Appeal in *Strathboss* also pointed out that in cases where a public body is performing a role for the benefit of the community as a whole and where the actions of a third party, rather than the defendant, are the immediate cause of the loss of harm suffered by the plaintiff, the courts are wary about imposing a duty to act.[68] The Court of Appeal pointed out that the principle had been emphasised recently by the United Kingdom Supreme Court in a series of cases.[69] The Court of Appeal agreed with the Judge at first instance that the duty of care propounded in *Strathboss* did not cut across other available proceedings in the legal framework for claims relating to failures in public decision-making, such as the tort of breach of statutory duty, misfeasance in public office, declaratory judgments or judicial review. However, policy considerations, particularly given the indeterminate liability, weighed strongly against the imposition of a duty of care in relation to pre-border conduct in *Strathboss.*[70]

Previous climate change claims

[76] Here the novel duty is said to be owed by the Crown. Mr Smith previously pleaded novel duties concerning climate change as the plaintiff/appellant in *Smith v Fonterra Co-Operative Group Ltd.*[71] That was a claim against Fonterra and six other companies, each of whom was either involved in an industry which released

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66 At [253].
67 At [257]–[260].
68 At [198], citing *Couch v Attorney-General*, above n 21, at [80].
69 At [199]–[200], citing *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736; and *N v Poole Borough Council* [2019] UKSC 25, [2019] 2 WLR 1478.
70 At [270]–[274].
71 *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [*Smith v Fonterra* (HC)]; and *Smith v Fonterra* (CA), above n 18.

greenhouse gases into the atmosphere or manufactured and supplied products which released greenhouse gases when burned.[72]

[77] Mr Smith there pleaded the effects of climate change and their devastating effects as a starting point. He pleaded three causes of action of action: public nuisance, negligence and a proposed new tort described as breach of duty.[73] In respect of each cause of action, the remedies sought were declarations that each of the respondents had unlawfully caused or contributed to the effects of climate change or breached duties said to be owed to Mr Smith. Mr Smith was also seeking injunctions against each of the defendants which would require them to produce or cause zero net emissions from their respective activities by 2030.[74]

[78] In the High Court, Wylie J had no difficulty striking out the first and second causes of action (public nuisance and negligence) on the basis they were untenable.[75] On the third cause of action, that the defendants owed a duty cognisable at law to cease contributing to damage to the climate system, Wylie J refused the strike out application noting that on appropriate occasions, the common law evolved by creating new principles and causes of action.[76] By way of example, he pointed to the new tort of intrusion into seclusion which had been recently recognised.[77]

[79] His Honour noted the common law method proceeds through the methodological consideration of the law that has been applied in the past and the use of analogy.[78] The common law method provides stability but may not allow for the injection of new ideas and for the creation of new responses. Wylie J noted the comments of Lord Reid in *Myers v Director of Public Prosecutions*:

> "The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this house in old cases. But there are limits to what we can or should do.

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72 *Smith v Fonterra* (CA), above n 71, at [3].
73 At [6].
74 At [6].
75 *Smith v Fonterra* (HC), above n 71, at [73] and [100].
76 At [101].
77 At [101], citing *C v Holland*, above n 51.
78 At [101].

> If we are to extend the law it must be by development and application of fundamental principles."[79]

[80] His Honour there noted that Mr Smith had made no attempt in the pleading of the third cause of action to refer to recognised legal obligations, nor incrementally identify the new obligation by analogy to existing principles.[80] Such an attempt could not readily be made as the claimed duty of care was not obviously analogous to any existing duty of care and its recognition could not be described as a gradual step-by-step expansion of negligence liability.[81] The Judge also commented on the public policy reasons he had identified. The proposed duty of care in negligence would extend the law. The Judge noted this could create significant hurdles for Mr Smith in trying to persuade the Court that a new duty should be recognised.[82]

[81] Nevertheless, the Judge was reluctant to strike out the head of claim as he did not want to foreclose on the possibility of the law of tort recognising a new duty which might assist Mr Smith.[83]

[82] On appeal, the Court of Appeal unanimously dismissed Mr Smith's appeal against the striking out of the first two causes of action and allowed the cross-appeal, striking out the "breach of duty" third cause of action.[84]

[83] For the Court, French J said that to recognise the proposed novel cause of action would be contrary to the common law tradition which is one of incremental development and not of radical change. A major departure from "fundamental principles" such as that proposed would "subvert doctrinal coherence".[85]

[84] Her Honour also said the magnitude of the climate change crisis could not be appropriately or adequately addressed by common law tort claims pursued through the

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79 At [101] n 88, citing *Myers v Director of Public Prosecutions* [1965] AC 1001 (HL) at 1021 per Lord Reid.
80 At [102].
81 At [102].
82 At [102].
83 At [103].
84 *Smith v Fonterra* (CA), above n 18, at [129]–[130].
85 At [15].

courts. Her Honour said it was "quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination."[86]

[85] French J then went on to examine the particular difficulties with an action in negligence. The first was that no other claim had been recognised by the courts which involved a scenario in which every person in New Zealand (or in the world) was to varying degrees responsible for causing the harm and simultaneously the victim of the harm.[87] A subset of those responsible for the harm had been singled out as the defendants on no principled basis.[88] In addition, it would follow that every entity and individual in New Zealand responsible for net emissions was committing the same tort and so each was acting unlawfully. Presumably, they could be restrained from doing so.[89]

[86] Her Honour noted the second fundamental conceptual problem arose from the fact that each of the defendants would be required to produce emissions that were fully offset.[90] In order to determine claims of this kind, the Court would need to establish a mechanism for assessing the adequacy of offsets in determining which of those a defendant could claim as their own. To remain a lawful activity, it would need to comply with certain conditions established by an appropriate regulatory framework to be fashioned by the courts.[91] This would be an assessment parallel to the statutory regime and would be unworkable and beyond the capacity of the courts to develop.[92] The Court commented that that was not the domain of tort law.[93]

[87] The third, and closely related point, was that there was not a remedy available to the Court in civil private proceedings which could meaningfully address the harm complained of.[94] Damages were not appropriate and the Court took the view that injunctive relief illustrated the ineffectiveness of an orthodox tort remedy.[95]

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86 At [16].
87 At [18].
88 At [19].
89 At [19].
90 At [23].
91 At [24].
92 At [24].
93 At [24].
94 At [25].
95 At [25].

[88] The fourth reason identified by the Court of Appeal as being a hurdle to recognition of the tort was that proceedings against subsets of emitters was an inherently inefficient and ad hoc way of addressing climate change. It would result in arbitrary outcomes and ongoing litigation that would last many years.[96]

[89] The Court of Appeal said for those reasons, among others, the issue of climate change could not be effectively addressed through tort law.

[90] Her Honour went on to discuss the relevant international agreements and the CCRA as amended. The CCC had been established and a process was provided for the Commission to prepare a draft report on emissions, budgets and other matters, and to engage in consultation on the draft and provide a final report to the Minister. The Minister would then set the emissions budget.[97] The Court went on to note the substantial amendments brought in by the ETS Reform Act.[98]

[91] The Court said the claims made in the proceeding were not consistent with the policy goals and the scheme of the legislation and, in particular, the goals of ensuring this country's response to climate change is effective, efficient and just.[99] French J also noted that striking out claims against commercial entities would not be a breach of the Treaty, as the Treaty underlines the need for shared action and a common approach paying attention to distributional effects, not a piecemeal one.[100]

[92] At the same time, her Honour noted:[101]

> [35] All of that is not to suggest the courts have no meaningful role in responding to the exigencies of climate change. They do in fact have a very important role in supporting and enforcing the statutory scheme for climate change responses and in holding the Government to account. *Our point is simply that it is not the role of the courts to develop a parallel common law regulatory regime that is ineffective and inefficient, and likely to be socially unjust.*

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96 At [27].
97 At [30].
98 At the time of hearing, the emissions trading regime was in operation and the Commission process underway.
99 At [33].
100 At [34].
101 Emphasis added.

[93] The Court of Appeal went on to point out that similar claims to those of Mr Smith had been advanced in the United States but not upheld for essentially the same reasons, and in any case were not consistent with the fundamental conceptual framework of the common law of tort.

[94] The Court of Appeal then examined in detail each of the causes of action in that case. On the public nuisance claim, the Court of Appeal concluded that while it did not agree with the reasons given for the strike out of that head of claim in the High Court, nevertheless a claim of public nuisance was doomed to fail and should be struck out due to a lack of a sufficient connection between the pleaded harm and the respondents' activity.

[95] The Court of Appeal then went on to consider the second cause of action in negligence. The formulation of the duty was that the defendant companies owed to Mr Smith (and persons like him) "a duty to take reasonable care not to operate its business in a way which would cause him loss by contributing to dangerous anthropogenic interference in the climate system".[102]

[96] The duty of care as pleaded was a novel one which French J assessed against the primary two-stage proximity and policy enquiry to decide whether it would be "just, fair and reasonable to recognise the duty".[103] On the first part of the enquiry, the Court concluded that there was no physical or temporal proximity and no direct relationship or causal proximity, so it failed on reasonable foreseeability and proximity.[104] The Canadian formulations of a "material contribution to risk" test or a "market share" liability approach were attractive at a superficial level. Mr Smith's claims had some similarity to the cases relied upon in as they also involved a single causative agency (and multiple tortfeasors).[105]

[97] However, the Court of Appeal said the similarities ended there. In all the cited cases, as in the public nuisance cases, the individual tortfeasors making up the group were known or readily identifiable and all were before the Court as defendants. In

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102 At [94].
103 At [96].
104 At [103].
105 At [108]–[110].

addition, any one or more of them was responsible for the harm.[106] In contrast, French J noted the class of possible contributors in that case was virtually limitless and it could not be said that Mr Smith would not have been injured but for the negligence of the named defendants viewed globally.[107] The Court found the inability to join all material contributors or a substantial share of contributors to the proceeding was insuperable. It was not a trial issue, nor a pleading one, and could only be overcome by the Court agreeing to abolish the relational underpinnings that are fundamental to tort law.[108] The Court concluded that it was not something it would countenance, in the interests of preserving the coherent body of law.[109]

[98] The Court then looked at the second stage of the duty enquiry and concluded that recognition of a duty would create a limitless class of potential plaintiffs as well as potential defendants, leading to the defendants being embroiled in highly problematic and complex contribution arguments on an unprecedented scale, potentially involving overseas emitters as well as those based in New Zealand.[110]

[99] Another crucial factor the Court found telling against this duty was the existence of international obligations and a comprehensive legislative framework. The Court said:[111]

> … To superimpose a common law duty of care is likely to cut across that framework, not enhance or supplement it. Further for the reasons already canvassed we consider the courts are in any event ill-equipped to address the issues that the claim raises. Finally, there is the impact on the coherence of the law generally.

[100] The Court of Appeal noted that all of those factors had been identified by the Judge in the High Court. It agreed that the duty of care alleged by Mr Smith would have wide effects on society and the law generally. The Court of Appeal found Mr Smith would be unable to establish a duty of care in the terms alleged and that the negligence claim was clearly untenable.[112]

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106 At [111].
107 At [112].
108 At [113].
109 At [113].
110 At [116].
111 At [116].
112 At [117].

[101] The final cause of action was the new tort of duty. It had been formulated as a duty owed by the defendants, cognisable at law, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change through their emission, production, supply or exportation of greenhouse gases, coal or fossil fuels.[113]

[102] The Court of Appeal noted the remedies sought in respect of the new tort were the same as sought in relation to the public nuisance and negligence claims.[114] The Judge had noted in the High Court that the pleading made no attempt to refer to existing legal obligations, nor to incrementally identify a new obligation by analogy to an existing principle.

[103] The Court of Appeal concluded that the High Court's refusal to strike out the third statement of claim and thereby preclude recognition of a new tortious "duty" which makes corporates responsible to the public for their emissions as "untenable" was irreconcilable with the reasoning in relation to the other two causes of action.[115] The Court said:

> [124] We agree with the respondents. The bare assertion of the existence of a new tort without any attempt to delineate its scope cannot of itself be sufficient to withstand strike out on the basis of speculation that science may evolve by the time the matter gets to trial. Yet that is the effect of the decision. The purpose of the strike-out jurisdiction is to ensure that parties are not put to unnecessary expense and precious court resources are not squandered by claims that have no chance of success. It demands an element of rigour in the interests of justice. The mere fact of novelty cannot be enough. Otherwise any claimant would be able to proceed to trial simply by asserting a new tort.

[104] The Court of Appeal went on to say that the fundamental reasons "for not extending tort law to a claim of the kind pleaded by Mr Smith apply equally to the claims in nuisance and negligence and to the proposed new tort".[116] The Court therefore allowed the cross-appeal and struck out the breach of duty cause of action.[117]

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113 At [118].
114 At [119].
115 At [121] and [123].
116 At [125].
117 At [126].

Public law overtones

[105] In response to the Crown submission that the common law must develop "incrementally", Mr Smith says it develops "iteratively" not incrementally. He says that on rare occasions, the facts of a case may require the Court to interpret a statutory or common law principle in a way that reshapes the law.

[106] The plaintiff says that the courts must, on occasion, assess the actions of the legislature because the core function of the Court is to uphold the rule of law by determining disputes between parties according to the law. Since the legislature and the executive are subject to the law, the courts must assess the performance of the functions of both, and when they fail may be determined in the context of a dispute.

[107] Mr Smith also responds to the Attorney-General's submission that there are limits to the institutional competence of the courts to decide the type of claims that Mr Smith has pleaded. He says his claim is not that the Court should assess legislation or policy without reference to law. Rather, he pleads that the Crown has breached specific legal duties.

[108] The plaintiff says the Attorney-General appears to subtly invoke the concept of non-justiciability without doing so expressly. He comments that the courts have moved away from the approach of saying that the subject matter alone may make a matter inherently inapt for review so that such claims should be dismissed at a preliminary stage without the Court hearing and determining the merits.

[109] Mr Smith says the modern approach is contextual — if the plaintiff pleads a proper cause of action, the Court should hear and determine the merits, applying the requisite onus and standard of proof in considering the evidence adduced in support.

[110] While the claim is framed as a novel private law cause of action with public law overtones, it is strongly suggestive of seeking the Court's intervention in its public law supervisory jurisdiction. This would ordinarily involve a proceeding for judicial review. However, the plaintiff has been clear that he does not seek a judicial review. No doubt that would be problematic given the fact that the judicial review jurisdiction is intended to be a "comparatively simple process of testing that public powers have

been exercised after a fair process, and in a manner which is both lawful and reasonable."[118]

[111] Mr Smith says the claim is neither a judicial review, nor is pleaded as a negligent claim. Rather, it has elements of a private law as well as a public law claim. To the extent that the claim is framed as a private law claim, it invokes tortious principles of duty and breach with a strict liability element as framed by the plaintiff.

[112] Private law tort is bilateral in that there is a claimant and a respondent. Liability depends on the balance struck between the respondent's "'freedom to' act" against the claimant's "'freedom from' interference".[119]

[113] Public concepts of duty and private law concepts of duty are informed by different rationales.[120] The difficulties of introducing public law principles into the law of negligence have been articulated in various cases.[121] The Court of Appeal discussed the overlap between a duty of care in public law and private law duty considerations in *Attorney-General v Body Corporate 200200.*[122] William Young J for the Court said:

> *Overlap with public law principles*
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> [47] It has been suggested that public law considerations have a role to play in determining whether a duty of care should be imposed. This emerges, for instance, from the speech of Lord Hoffmann in *Stovin v Wise* at p 953:
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> > "In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised."
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> Such approach would avoid conflict between the imposition of a duty of care and the due performance by public bodies of their statutory function by

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118 *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance* [2020] NZHC 1012 at [13], citing *BRZ Investments Ltd v Commissioner of Inland Revenue* HC Te Whanganui-a-Tara | Wellington CIV-2006-485-697, 7 December 2006.

119 Christine Beuermann "Tort Beyond the Forms of Action" in James Goudkamp and others (ed) *Taking Law Seriously* (Hart Publishing, London, 2021) at 12–13.

120 Stephen Todd and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 351.

121 See commentary at 351.

122 *Attorney-General v Body Corporate 200200*, above n 52, at [47].

> confining the imposition of a duty of care to circumstances in which the public body has acted in a way which was not contemplated by the legislature.
>
> [48] The public law approach, however, is problematical. It would introduce into the law of negligence public law principles which have been developed for different purposes. As well, it does not provide a convincing explanation for the existing pattern of authorities. For instance, many situations in which duties of care have been imposed (for example, in respect of building inspectors or in the child welfare context) do not have a significant public law overlay, whereas statutory powers which are most commonly subject to judicial review tend to involve the sort of quasi-judicial or quasi-legislative functions which are off limits in terms of the imposition of a duty of care.
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> [49] On this point, we respectfully adopt the approach taken by McHugh J in *Crimmins* at p 35:
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> > "With great respect … I am unable to accept that determination of a duty of care should depend on public law concepts. Public law concepts of duty and private law notions of duty are informed by differing rationales. On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires."
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> Reference can also be made to *X (Minors) v Bedfordshire County Council* at p 736 per Lord Browne-Wilkinson, *Barrett v Enfield London Borough Council* [2001] 1 AC 550 at pp 571 – 572 per Lord Slynn, and Bailey and Bowman "Public Authority Negligence Revisited" [2000] 59 CLJ 85, p 113 and following.

[114] In *Attorney-General v Body Corporate 200200*, the Body Corporate was seeking to advance a claim against the Government-owned Building Industry Authority (the BIA), based on a duty of care to exercise reasonable care in connection with its statutory responsibilities as a statutory Crown Entity to provide advice and undertake functions in relation to building controls and regulations. The relevant issue related to buildings with monolithic cladding systems. The defects in the building systems and their application had led to the widespread problem of leaky buildings referred to as the leaky building crisis. There had been wide-ranging failures in the building regulatory framework overseen by the BIA.

[115] In that case, the claimant said the BIA should have foreseen that adoption by the building industry of defective building systems had the potential to cause substantial economic loss. It would have been open to the BIA (in the sense of it being within its functions provided in the relevant legislation) to investigate practices in the industry and take steps which would have been effective to put an end to, or at least

limit, the practices which were producing the outcomes which did not conform to the Building Code.[123] The Court recognised that it was at least arguable that the BIA was negligent as widespread leaky building problems had already been evident in overseas jurisdictions.[124] It may well be that the BIA could and should have acted more promptly. However, the Court was satisfied there was no such duty.[125]

[116] While that decision dates back to 2007 and it was a separate government agency established under a statute which faced the claim, nevertheless the comments in relation to the public law overtones in a private law claim apply here. Indeed, the fact that that case relied on specific statutory obligations may arguably has made it a stronger case for a novel duty than the present case.

Approaches in other jurisdictions

[117] The parties also referred to a number of overseas decisions touching on similar issues. The Crown pointed out that in *Minister for the Environment (Cth) v Sharma*, the Full Court of the Federal Court of Australia recently struck out a claim against the Commonwealth Minister for the Environment based on an alleged duty of care to Australian children to protect them from the physical harm of climate change which may occur if a coal mining licence approval was given to the extension of a coal mine.[126] The alleged duty was to take reasonable care to avoid causing personal injury or death arising from emissions. However, the Court ruled that the Minister did not owe such a duty of care to Australian children to protect them from the physical harm from climate change which may arise in granting environmental approvals for fossil fuel projects.[127]

[118] In so deciding, the Court applied the criteria against which novel claims were evaluated in Australia, the "salient features" approach.[128] The Court found that a duty of this kind did not exist under Australian law for a number of reasons: it was unsuitable for judicial determination as it involved "core government policy

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123 At [58].
124 At [59].
125 At [60].
126 *Minister for the Environment (Cth) v Sharma* [2022] FCAFC 35, (2022) 400 ALR 203.
127 At [7] per Allsop CJ, [748] per Beach J and [757] per Wheelahan J.
128 At [121] and [207] per Allsop CJ.

considerations";[129] it would be inconsistent and incoherent with the legislation under which the Minister was required to make a decision;[130] it was not appropriate given the Minister's lack of control over the harm caused by climate change;[131] it did not arise in the conventional sense of the law of negligence given that questions of "breach, causation and damage" were yet to arise;[132] and when applied it would overlap with New South Wales planning determinations and slide into political considerations and it would require making a value judgment, which was not appropriate for resolution by judicial determination.[133]

[119] The Court accepted that the threat of climate change to humankind existed but its reasoning made it clear that there were limitations to the way in which the Australian courts and the common law would respond to that threat.

[120] Relatedly, in the United Kingdom, in *Plan B Earth v Prime Minister* the claimants sought by judicial review to challenge the lawfulness of the policies of the United Kingdom Government relating to climate change.[134] In particular, they alleged that the Government had failed to "take practical and effective measures to align UK greenhouse gas emissions to the Paris Temperature Limit".[135] The remedies sought were a declaration that the Government's failure to take practical and effective measures to meet its climate change commitments under the Paris Agreement and related legislation breached the claimants' rights under the Human Rights Act 1998 (UK), and a mandatory order that the Government "implement, with appropriate urgency, a legal and regulatory framework sufficient to meet those commitments."[136]

[121] The High Court of England and Wales refused permission for judicial review to be brought on a number of grounds. First, it said that unincorporated treaties such as the Paris Agreement "do not form part of domestic law, and domestic courts cannot

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129 At [7], [260] and [262] per Allsop CJ.
130 At [7], [267] and [272] per Allsop CJ.
131 At [7], [343], [344] and [346] per Allsop CJ.
132 At [358] per Allsop CJ.
133 At [868] per Wheelahan J.
134 *Plan B Earth v Prime Minister* [2021] EWHC 3469 (Admin).
135 At [3].
136 At [4].

determine whether the United Kingdom has violated its obligations under an international treaty".[137]

[122] Secondly, the claimants, even if their contentions had factual merit, had not established at "face value" a breach of the statutory duties contained in the Climate Change Act 2008 (UK) (the 2008 Act). This Act sets out statutory duties to prepare proposals and policies and to lay a programme before Parliament. On their face, the Court said they were not duties to achieve specific outcomes, save perhaps to meet the carbon budgets which are set out under the Act.[138] Therefore, any argument that the Act had been breached did not get off the ground.[139] The Court commented that the 2008 Act created an independent expert body corporate to be known as the Committee on Climate Change (the CCC) which had statutory duties to advise the Secretary of State on the level of carbon budgets and how to achieve them. It was required to provide an annual report on the progress towards meeting the carbon budgets in the 2050 target and whether they were likely to be met. The CCC was required to provide the national authorities with advice on request in connection with their functions, the progress made towards meeting the statutory objectives, adaption to climate change or any other matter relating to climate change.[140] The High Court took the view that the criticism relied on by the claimants in the CCC reports demonstrated that the 2008 Act was working as Parliament intended.[141] It had contemplated the periodic provision of reports and responses which would feed into an evolution of policy "over many years while successive Governments grapple with the vast and unprecedented challenge of climate change."[142] The Court concluded there was nothing in the 2008 Act to suggest a critical report by the CCC should be a foundation for the courts to declare that the Government's policies were unlawful. It therefore was not arguable that the claimants had identified a breach of the 2008 Act.[143]

[123] Under a further head, the grounds were based on the state's positive obligations under the Human Rights Act, which incorporated the European Convention on Human

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137 At [25].
138 At [32].
139 At [34].
140 At [15].
141 At [36].
142 At [36].
143 At [37]–[38].

Rights (ECHR) into domestic British law. Of import were ECHR arts 2 and 8.[144] The positive obligations arising under art 2 were described as:[145]

> (1) A duty to put in place an administrative framework designed to provide effective deterrence against threats to the right to life. In the context of road traffic in *Tanase*, that meant an obligation "to have in place an appropriate set of preventive measures geared to ensuring public safety and minimising the number of road accidents".
>
> (2) An obligation to take preventive operational measures to protect an identified individual from a "real and immediate risk" to life posed by another individual.
>
> (3) An obligation to have in place an effective judicial system to investigate deaths and provide appropriate redress for victims.

[124] The claimants relied on the first obligation above, described as a "framework" duty. They pointed out that this was not subject to proving "real and immediate risk" to an individual, which was a precondition for the second obligation, the operational duty. The claimants said where there was a situation which presents a risk to life such that it was necessary to have a practical and effective framework to deter that threat, and where the existing framework was not effective and the Government was "systematically failing to heed the expert advice of the CCC", if the present situation did not infringe the 2008 Act, that itself showed the Act was not an effective part of the framework, leaving a gap in protection.[146]

[125] The claimants said the lack of an effective framework was demonstrated by the Government-wide failure to take practical and effective measures to meet the Paris Agreement targets and to adapt and prepare for the impacts of climate change.[147] The claimants said that the failures posed a direct threat to life.[148]

[126] The Court found that the "insuperable problem" with the art 2 claim (and any art 8 claim based on the physical or psychological effects of climate change on the complainants) was that there was an administrative framework to combat the threats posed by climate change in the form of the 2008 Act and all the policies and measures

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144 At [39].
145 At [40].
146 At [41].
147 At [3] and [42].
148 At [43].

adopted under it.[149] As Bourne J noted, the framework consisted of high level economic and social measures involving complex and difficult judgements for which, as the Supreme Court had recently explained in *SC v Work and Pensions Secretary*, the State enjoys a wide margin of appreciation.[150] While all circumstances must be taken into account, the decision of the executive or legislature in such judgments would "generally be respected unless it is manifestly without reasonable foundation".[151] Bourne J noted this approach respected the constitutional separation between the courts, the legislature and the executive and also reflected the fact the Court was not well-equipped to form its own views on and assess the correctness of the matters in question.[152]

[127] Bourne J said that the claimants had explained they were not trying to enforce an unincorporated international treaty in the United Kingdom Court,[153] but rather were relying on the Paris Agreement as evidence of fact that a failure to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels posed threat to life, and further, that there was international consensus to that effect.[154]

[128] The Court said, nevertheless, the claimants were still using compliance with the Paris Agreement temperature limit as the test for compliance with art 2 (and art 8). This in effect meant that the Court was being asked to enforce the Paris Agreement, which was contrary to the recent Supreme Court guidance in *SC v Work and Pensions Secretary*.[155] In any case, the claims invited the Court to venture beyond its sphere of competence.[156] In Bourne J's view, the framework established by the 2008 Act should be allowed to operate.[157] The legislation contained provision for debate, which debate occurs in a political context with democratic, rather than litigious, consequences.[158]

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149 At [48].
150 At [50], citing *SC v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223.
151 At [50], referring to *SC v Work and Pensions Secretary*, above n 150, at [158].
152 At [51].
153 At [52]. As Bourne J noted, such an attempt would fall foul of the Supreme Court's ruling in *SC v Work and Pensions Secretary*, above n 150.
154 At [52].
155 At [53], referring to *SC v Work and Pensions Secretary*, above n 150.
156 At [54].
157 At [54].
158 At [54].

[129] The Court then considered the decision of the Dutch Supreme Court in *The State of the Netherlands v Urgenda Foundation*, in which the Dutch Supreme Court directed the Dutch State to reduce greenhouse gases in the Netherlands by at least 25 per cent by the end of 2020 compared to 1990.[159] In that case, the Dutch State had lowered its target from 30 per cent to 20 per cent, and the Dutch Supreme Court based its decision on the absence of an explanation from the State as to why the reduction had been decreased to below original targets which were broadly supported internationally and considered necessary. Bourne J noted he had not been given any comparison with the constitutional laws in play or the differences between the powers of the Dutch and English courts in such matters but noted that in *Urgenda* the challenge was not to a framework of laws.[160] He concluded he did not need to decide whether a similar challenge would have been viable in his jurisdiction.[161]

[130] The Court in *Plan B Earth* also considered the decision of the Supreme Court of Ireland in *Friends of the Irish Environment v The Government of Ireland.*[162] In that case, the claimants challenged a plan required to be adopted under the Climate Action and Low Carbon Development Act 2015, for the purposes of enabling the State to pursue and achieve the objective of transitioning to a low carbon climate, resilient and environmentally sustainable economy by the end of 2050. The Supreme Court of Ireland declared that the plan was ultra vires the Act because it did not contain a sufficient level of specificity so that a reasonable person could judge whether it was realistic and whether they agreed with the specified policy option.

[131] The Court in *Plan B Earth* noted that this case depended on the terms of the Irish legislation.[163] It was open to the courts there, as it would be in the United Kingdom, to decide whether measures adopted by the Government were within or without those terms.[164] In *Plan B Earth*, any criticism on the generality of the measures or lack of measures adopted by the Prime Minister did not make it a suitable

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159 *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (Supreme Court of the Netherlands, 13 January 2020).

160 *Plan B Earth v Prime Minister*, above n 134, at [55].

161 At [55].

162 *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49.

163 *Plan B Earth v Prime Minister*, above n 134, at [57].

164 At [57].

case or an arguable case for judicial review. Nor was it arguable that a legal and administrative framework had not been put in place in response to the threats posed by climate change.[165]

[132] The Court then went on to state that art 8 of the ECHR, which requires respect for private or family life, was not engaged. The complainants said the article particularly affected them as they were young and had family members who lived outside the United Kingdom in regions of the world that may be affected more profoundly and/or sooner by climate change. This was rejected, first on the basis that only in exceptional circumstances would the courts in the United Kingdom hold a local public authority liable for breach of ECHR rights outside the United Kingdom.[166] Secondly, a claim under art 8 depended on establishing a "significant impairment" on a claimant's ability to enjoy "family life", breach of which could extend to relations with more distant relatives only in unusual cases where they played a considerable part in family life.[167] The Court held that the difficulties of establishing the ties with relations who live overseas was not arguable on the evidence.[168] The Judge was also not convinced that "a generalised future risk of harm to the global community is arguably sufficient to establish victim status" in relation to art 2.

Analysis

[133] The plaintiff in this proceeding points to a comprehensive failure by Government, both Parliament and the Executive. The plaintiff seeks that failure be remedied by the intervention of the Court declaring that the Crown owes the duty alleged, which it has breached and must take all necessary steps to protect the plaintiff and his descendants from the adverse effects of climate change and reduce New Zealand and Crown emissions to specified levels, as well as any such relief as the Court determines appropriate.

[134] In effect, the plaintiff invites the Court to intervene in the parliamentary and executive responses to climate change due to the inadequacy of those responses.

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165 At [58].
166 At [66].
167 At [67].
168 At [71]–[74].

Mr Smith said it is the role of the Court to intervene because the Government's response opens the door to the annihilation of the democratic state, its inhabitants and the social order through the effects of climate change should the steps proposed in the pleading not be taken. The plaintiff said this is such a considerable threat to New Zealand that basic common law rights will not exist given the absence of a democratic state, New Zealanders or the social order.

[135] Mr Smith says this threatens those basic common law rights that lie so deep the failure to act to avert the crisis takes the legislature and the executive outside their constitutional powers in relation to their response to climate change. Therefore, the Court must intervene as Cooke J said it would in such an extreme contravention of basic common law rights.[169]

Policy considerations/deference

[136] However, the Crown submitted that there were limits to the institutional competence of the courts to decide the claims that Mr Smith has pleaded. The Crown submitted that the courts are "not the correct body, nor have the resources, to balance competing social, economic, political and scientific considerations necessary to determine policy – climate change or otherwise". The Crown went on to note that the courts retain supervisory jurisdiction using judicial review but they are not in a position to review "polycentric decisions".

[137] The Crown said that the issues under consideration are essentially political, involved matters of policy and required multifaceted responses and expertise beyond that of the court. That courts should not rely on considerations of "policy" and of community welfare in determining whether a notional duty ought to exist.

[138] In general the reasons advanced against a Court analysing policy include that Judges are not qualified or mandated to balance policy considerations as they lack political legitimacy and do not have the required information. The argument is that policy is most appropriately dealt with by a democratically elected parliament and not by the judiciary. It is for the community to determine what is in its best interests and

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169 See [60] above.

what policies it wishes for the law to reflect. A democratically elected legislature is, the argument goes, the best way of achieving this.[170]

[139] The argument continues that Judges lack the technical competence to rely on policy-based reasons as they do not have the necessary training nor educational background to properly assess the legitimacy of policy-based concerns or know how to implement them. On the other hand, Parliament employs and is able to rely on specially trained policy advisors. Considerable effort and taxpayers' money is expended in setting up ministries containing expert policy analysts in order to ensure that Ministers get the best advice possible.[171] In addition, setting policy requires the balancing of incommensurables. Judges may end up having to weigh considerations of interpersonal justice against considerations of community welfare. These are fundamentally different and as such incommensurable.[172]

[140] Mr Smith responded that the policy argument was a "strawman to knock down". He says he does not plead that the Court has general jurisdiction to assess legislation or policy, without reference to the law. As he says, the claims are not applications for judicial review but general proceedings. For instance, under the NZBORA, the courts have developed a robust legal methodology for assessing policy and legislation. This involves identifying the purposes of the law or policy, assessing the reasonableness of the policy as a means of achieving that objective, and assessing the overall proportionality of the impact of the law on policy of rights against the importance of the objective.

[141] The trial would include viva voce evidence with cross-examination. Mr Smith said it was well within the institutional competence of the courts to hear and consider evidence, including expert evidence, and make findings of fact and apply the law to those facts.

[142] Mr Smith says while the courts recognise some degree of deference, such deference can only extend so far. The courts cannot abdicate their constitutional

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170 At 153.
171 At 154.
172 At 158 and 162.

responsibility assessing the Crown's conduct against the standards of rationality, reasonableness and proportionality required under s 5 of the NZBORA. Further, Mr Smith says the courts have moved away from the concept of "non-justiciability" based on subject matter alone.[173]

[143] I accept that it is a matter of context as to how far the courts can go in considering policy. Most of the policy arguments can be met by the response that the courts often consider policy, particularly in relation to matters such as human rights. The courts also often receive and consider expert evidence.

[144] However, the courts already take policy considerations into account.[174] In general terms they are not out of bounds for the courts. For example, in the evolution of the "novel" duties, such as invasion of privacy, the courts have looked to social policy, among other things, to ensure that the developing law reflects the requirements and views of society.

[145] This was the view taken by this Court in *Thomson v Minister for Climate Change Issues*.[175] That case concerned decisions by the Minister for Climate Change and Cabinet to set emission reduction targets under the CCRA to decide the Nationally Determined Contribution (NDC) of a percentage reduction of greenhouse gas emissions for Aotearoa/New Zealand under the Paris Agreement. Mallon J rejected the Crown's submission that the decisions were inherently "non-justiciable", noting that the subject matter may make a review ground more difficult to establish but it should not rule out any review by the Court.[176] She said:[177]

> … The importance of the matter for all and each of us warrants some scrutiny of the public power in addition to accountability through Parliament and the General Elections. If a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials

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173 Pointing to comments of Elias CJ and Arnold J in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [89] that courts have been more willing to review decisions in areas previously regarded as inappropriate for review.

174 The debate about the appropriate role of policy-based reasoning is not new but, according to one commentator, it has risen in prominence in recent years due to the increased influence of rights-based theories of private law, most of which tend to reject the recent policy-based reasoning: James Plunkett *The Duty of Care in Negligence* (Hart Publishing, Oxford, 2018) at 152.

175 *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160.

176 At [134].

177 At [134].

> on constitutional grounds, and because the Court may not be well placed to undertake that weighing.[178] …

[146] Overall, I am satisfied the policy and justiciability arguments raised by the Crown are relevant but not determinative by themselves of whether or not a new duty should be recognised.

[147] However, or other and additional reasons I consider this claim is untenable.

[148] There is no reference in these pleadings to any recognised legal obligations, nor to incrementally identifying a new obligation by analogy to existing principles. As noted above, the Court of Appeal in *Smith v Fonterra* identified those difficulties as reasons for not recognising the proposed novel duties.[179] In addition, the Court of Appeal pointed out the magnitude of the climate change crisis could not be appropriately addressed by common law tort claims. It was one that required a sophisticated regulatory response at a national level supported by international coordination.[180]

[149] The plaintiff seeks a wide-ranging role for the Court to monitor the Government's climate change measures. This was rejected as a role for the Court in the Court of Appeal in *Smith v Fonterra*. A Court would not have the expertise nor the democratic accountability to address the polycentric issue of climate change. As the Court said in that case:

> [26] In effect Mr Smith is seeking a court-designed and court-supervised regulatory regime. The design of such a system requires a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process. Courts do not have the expertise to address the social, economic and distributional implications of different regulatory design choices. The court process does not provide all affected stakeholders with an opportunity to be heard, and have their views taken into account. Climate change provides a striking example of a polycentric issue that is not amenable to judicial resolution.[181]

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178 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.
179 *Smith v Fonterra* (CA), above n 18.
180 At [16].
181 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353. See also *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZCA 64, [2010] 3 NZLR 486 at [211]–[212] per Arnold J.

[150] The plaintiff in his oral submissions said that the relief sought could be severed from the claims as it is up to the Court upon hearing the substantive claims to consider the appropriate relief if the claims were to succeed.

[151] However as French J for the Court in *Smith v Fonterra* pointed out, the design of any effective relief such as monitoring by the Court would require a "level of institutional expertise, democratic participation and a democratic accountability that cannot be achieved through a court process".[182]

[152] That position has not changed. Climate change has been described as an "intersystemic systemic risk" which "indubitably" involves "a high degree of complexity and dynamism" as well as significant impact uncertainty and potentially far-reaching legal and regulatory implications.[183] As one commentator writes, the benefit of early intervention for such intersystemic systemic risks as climate change "underscores the need for integrated and joined-up decision making in risk governance. Building responsiveness to the intersystemic and globalised dimensions of risk is a challenge for risk regulation."[184] Unlike the ministries and other entities within the executive, the courts have neither the technical capacity nor the political mandate to co-ordinate in an integrated way to mitigate the effects of climate change. In contrast, the government's response to climate change is dynamic. The steps it takes will depend on the environment and ongoing developments. There is already a legislative framework in place designed to respond to the threats.

[153] The IPCC's Sixth Assessment Report presents a detailed and critical evaluation of the Government's response. This indicates the CCC is doing exactly what it is intended to do. It also illustrates the multi-factorial nature of managing climate change risk, recognising that governmental responses will change over time.

[154] I therefore conclude that the first cause of action is untenable and should be struck out.

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182 *Smith v Fonterra* (CA), above n 18, at [26].

183 See for example Veerle Heyvaert "Governing Intersystemic Systemic Risks: Lessons from Covid and Climate Change" (2022) 85 MLR 938 at 954, 958 and 964.

184 At 963.

Conclusion

[155] Mr Smith has not attempted to delineate the scope of the new duty, nor orientate it within the taxonomy of current private law duties. The duty has public law overtones in that it calls on overarching rights and values. The comments the Court of Appeal made in *Smith v Fonterra* apply equally here, that "[t]he bare assertion of the existence of a new tort without any attempt to delineate its scope cannot of itself be sufficient to withstand strike out on the basis of speculation" alone.[185]

[156] The novel duty claim has been formulated without reference to existing case law, nor has it developed incrementally from that case law. In the context of the development of a novel duty, the iterative process of building, refining and testing a preposition does not occur in isolation from an incremental development from existing law. As noted, the lack of incremental development of the novel tort duty advanced by Mr Smith in *Smith v Fonterra* was one of the reasons that the Court of Appeal struck out that cause of action.

[157] While common law's flexibility enables it to develop and adapt, the Court must ensure there is balance between stability and change. Lord Bingham described this balance as "preclud[ing] excessive innovation and adventurism by the judges. It is one thing to alter the law's direction of travel by a few degrees, quite another to set it off in a different direction."[186]

[158] As Winkelman, Glazebrook and France JJ, writing extra-judicially on climate change and the law, put it:[187]

> This is an area of high policy; where the need for a speedy response is balanced in policy terms with preserving economic stability and legitimate policy choices as how reduction targets may best be met.

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185 At [124].

186 Lord Bingham "The Rule of Law" (2007) 66 CLJ 67 at 71 (footnotes omitted), cited in Gavin Phillipson and Alexander Williams "Horizontal Effect and the Constitutional Constraint" (2011) 74 MLR 878 at 888.

187 Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper presented to the Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) at [137].

[159] The relief sought by Mr Smith includes declarations that the Crown owes the duty alleged,[188] that it has breached the duty and that the Crown will continue to be in breach of the duty unless and until it takes all endeavours to protect the plaintiff and his descendants from the adverse effects of climate change and reduce New Zealand and Crown emissions to "less than half of their 2010 levels by 2030 at a linear rate", and to zero "by sooner than 2050 at a better than linear rate between 2030 and 2050". However, not only is the relief sought inconsistent with the policy goals of the Government, but even if granted the declarations would be ineffective.[189]

[160] The IPCC's earlier Working Group II report, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (the Working Group II Report) in its Summary for Policymakers noted "[v]ulnerabilities and climate risks are often reduced through carefully designed and implemented laws, policies, processes, and interventions that address context specific inequities such as based on gender, ethnicity, disability, age, location and income".[190]

[161] The relief sought here seeks to constrain consideration of the competing issues relating to climate change identified in the legislation. The targets for limiting warming sought in the relief are inconsistent with and likely to undermine the government's response which, involves "[i]nstitutional frameworks, policies and instruments that set clear adaptation goals and define responsibilities and commitments and that are coordinated amongst actors and governance levels, strengthen and sustain adaptation actions".[191]

[162] As in *Smith v Fonterra* any relief, if it were available, would be an ineffective and piecemeal way to deal with climate change issues. Every person in New Zealand would be entitled to sue the Government under the novel duty. While not every emitter would be a possible defendant, as would have been the case in *Smith v Fonterra*, every Crown company and entity in which those organisations invested in or contracted with

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188 To actively exercise its authority in a manner that protects current and future generations of Māori from the adverse effects of climate change.

189 *Smith v Fonterra* (CA), above n 18, at [33].

190 Intergovernmental Panel on Climate Change *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (27 February 2022) at [SPM.C.5.6].

191 At [SPM.C.5.2].

would be the responsibility of the Crown and it could face a claim in relation to the activities of an unknown number of such entities. In addition, a declaration such as the one sought would cut across the governance structures of companies in which the Crown has a shareholding and ignore the role of their boards and directors.

[163] Commentators have cautioned that regulatory interventions on such intersystemic systemic risks as climate change must be carefully calibrated.[192] The formulation of a new private law duty, albeit with public law overtones, is not an appropriate vehicle to address the multi-factorial issues raised by climate change.

[164] The novel duty claim as pleaded is untenable.

[165] I have considered whether it would be possible to amend the claim by allowing it to be repleaded or further particulars directed. However, further particulars have already been directed and provided, and these have not assisted. The plaintiff made no submissions as to appropriate amendments or particulars that might make the claim tenable. None are apparent.

[166] Accordingly, the novel duty claim is struck out.

Second cause of action — claims under the NZBORA

The claim

[167] As noted, Mr Smith brings claims for breach of two provisions of the NZBORA: s 8 (deprivation of life) and s 20 (denial of the right to practise culture).

[168] Section 8 relates to a right that no one be deprived of life unless according to law and consistent with the principles of fundamental justice.

[169] Mr Smith points to his life and those of his iwi and hapū and future generations as the relevant lives.

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192 Heyvaert, above n 184, at 967.

[170] The claim pleads that "life" includes the right to a "dignified and meaningful life" and a "sustainable climate system". The "deprivation" caused by the Crown is that contributing to emissions will endanger lives in the future. It is pleaded the Crown has also failed to put in place a framework to promote effective mitigation in terms of the best science and failed in its international obligations. This failure, it is pleaded, was not prescribed by law, nor was it reasonably justifiable for the purposes of s 5 of the NZBORA.

[171] Mr Smith separately alleges a right, pleaded under s 20 of the NZBORA, that Māori not be deprived of their culture by the effects of climate change.

[172] The relief sought is a declaration the Crown has acted and is acting in a manner incompatible with ss 8 and 20 of the NZBORA and a declaration that the CCRA is incompatible with those sections.

[173] A further declaration is sought that the RMECCAA is incompatible with ss 8 and 20 of the NZBORA. The plaintiff further seeks reporting orders that a further hearing be allocated within one year of this judgment, and that the Crown file and serve, at a date suitably in advance of the hearing, affidavit evidence updating the plaintiff and the Court on the steps it has taken to bring itself into a position of compliance with the NZBORA. The Court is to remain available to grant further relief as it sees fit.

Section 8

[174] Mr Smith says the Crown has already deprived him of the right to life by failing to reduce emissions, thereby contributing to climate change. Secondly, he says s 8 imposes positive duties on the Crown in relation to taking effective measures in relation to climate change.

[175] Turning to the elements of the s 8 claim, Mr Smith says a purposive interpretation of "deprivation of life" includes conduct which either causes death or increases the risk of another person's death.[193] For this point, Mr Smith cites *Seales v*

[193] Citing *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556; and see *AR (India) v Attorney-General* [2021] NZCA 291 at [35].

Attorney-General.[194] However, *Seales v Attorney-General* does not support a proposition that the Crown guarantees a right not to be deprived of life from all causes. Rather, s 8 guarantees that the State will not deprive a person of life other than on grounds established by law.[195]

[176] The Court of Appeal in *AR (India) v Attorney-General* noted that the New Zealand courts have taken a relatively narrow approach to the scope of s 8. This reflects the intention of the drafters of the NZBORA.[196]

[177] The Court of Appeal in that case rejected the proposition that the right to life included a right to dignity.[197] Mr Smith sought to limit the application of the Court of Appeal's determination in that regard because, he said, the facts of *AR (India)* indicated that the threats concerned were "vague". However, this was a reference to the facts supporting the appellant's claim to likelihood of physical harm and as such deprivation of life per se. It did not form a basis for the Court of Appeal rejecting a reading into s 8 of a right to dignity.

[178] The Attorney-General pointed out that in *Teitiota* the United Nations Human Rights Committee (HRC) ruled that climate change did not present a threat to life such as would be covered by art 6 of the International Covenant on Civil and Political Rights (ICCPR). That provided for the right to life and prohibition of arbitrary deprivation of life which involved interference that was not prescribed by law, not proportional to the end sought and not necessary in the particular circumstances of the case.[198]

[179] The Tribunal in that case accepted that the right to life involves a positive obligation on the part of the State to fulfil that right by taking programmatic steps to provide for the basic necessities for life.[199] The very specific threats pointed to by Mr Teitiota, a national of Kiribati, were rejected by the Tribunal as being not sufficient

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194 *Seales v Attorney-General,* above n 193.
195 At [167].
196 *AR (India) v Attorney-General*, above n 193, at [38].
197 At [47] and [57].
198 Human Rights Committee *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016.* UN Doc CCPR/C/127/D/2728/2016 (23 September 2020).
199 At [2.9].

to engage the right to life. Despite the fact that the effects of climate change on Kiribati, which included loss of land and resulting land conflict, were high, these risks did not establish a risk of "an imminent, or likely, risk of arbitrary deprivation of life".[200] The Tribunal said the victim's situation was not materially different to every other resident of Kiribati.[201] Even though the threat was current and included present threats to health with a need to ration potable water, it found that the threats presented by the effects of climate change were not sufficient to amount to a "reasonably foreseeable threat of a health risk" or a threat of death or even a threat to dignity.[202]

[180] Mr Smith argued that *Teitiota* was concerned with the risk presented by the actions of the Government of Kiribati, not of New Zealand, and that the argument in that case was different. Here Mr Smith said the threat was posed by emissions, not the type of specific risks faced by Mr Teitiota on Kiribati.

[181] However, the HRC decision related to the general effects of climate change. The Committee noted the risks might be managed by intervening acts by the Government, with the assistance of the international community and that a framework was already in place in Kiribati.[203] The risk was not sufficiently imminent to trigger the protection of the right to life.

[182] In relation to causation, Mr Smith says the right to life might be engaged even where no death occurs, but where there is an increased risk of death. He says it is sufficient for the purposes of a strike out application.

[183] However, even a human rights forward-thinking approach, rather than the backward analysis of causation which occurs in tort law, requires the identification of a "real and identifiable risk".[204] The risk to life posed by climate change may be identified in general terms but it is not sufficiently proximate to meet the test to be described as "real". As the HRC noted, climate change mitigation and management

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200 At [9.6].
201 At [9.6].
202 At [9.8].
203 At [9.12].
204 *Wallace No 2*, above n 26, at [544]. .

of risks are likely to be managed by adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms over time.[205]

[184] For Mr Smith to succeed would require an interpretation of s 8 as including a guarantee by the Crown that it will prevent the effects or manage the risks of climate change in a prescribed manner or to "provide a stable climate system". This points to a future risk which is dependent on the effects of climate change not being managed either now or in the future.

[185] Mr Smith further pointed to the decision of Ellis J in *Wallace,* holding that the right not to be deprived of life necessarily implied the existence of certain positive duties on the Crown.[206] In that case, which involved an examination of the investigation into the death of Mr Wallace, who was shot by police officers, the duty was said to be a duty to conduct rights-compliant investigations into deaths for which the Crown was responsible (investigative duties) and to plan and control potentially dangerous operations in a way that reduced the risks to life to a reasonable minimum (planning and control duties).[207]

[186] Mr Smith pointed out that Ellis J, in reaching these conclusions, held that:

(a) these positive duties were consistent with the purposes of the NZBORA[208] and the fundamental importance of the right to life,[209] noting "[t]he prohibition on depriving others of life is toothless without a parallel obligation to interrogate and test the circumstances in which such a deprivation has occurred in the individual case";[210]

(b) they were also consistent with the established scope of art 6(1) of the ICCPR and the jurisprudence of the European Court of Human Rights

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205 Human Rights Committee, above n 198, at [9.12].
206 *Wallace No 2*, above n 26.
207 At [550].
208 Including protecting and promoting rights.
209 At [382].
210 At [382].

(ECtHR) under art 2 of the ECHR, which were fairly comparable to s 8 of the NZBORA;[211] and

(c) the duties did not intrude on the Court's constitutional function as the duties allowed for a degree of deference to be afforded to the Crown when assessing compliance.[212]

[187] Mr Smith also pointed to Ellis J's obiter comments that the concept of planning and control duties was "distinct from, although broadly connected to, the positive protective duties that the ECHR has also found to be encompassed by art 2 [of the ECHR]".[213]

[188] The plaintiff further says that s 8 implies the positive protective duties recognised by Ellis J being "a positive obligation to have legal and administrative frameworks that are protective of life".[214] Mr Smith then drew on the legal duties as recognised by the ECHR in its jurisprudence:

(a) the duties are only engaged where a member state knows or ought to know of a real and immediate risk to life;

(b) the duties require the state to take positive steps to put in place legal and administrative frameworks which address and reduce the specific risk to a reasonable minimum; and

(c) in assessing reasonableness, the Court must consider whether the range of reasonable responses being considered would impose a "disproportionate burden" on the member state and must allow the member state some margin of appreciation, but ultimately the task of assessing compliance with the standard is for the Court.

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211 At [281].
212 At [550] in principle and [639]–[642] in application.
213 At [517] and n 178.
214 At n 178, citing *Keenan v United Kingdom* [2001] ECHR 242; *Öneryildiz v Turkey* [2004] ECHR 657 (Grand Chamber); and *Makaratzis v Greece* [2004] ECHR 694 (Grand Chamber).

[189] Mr Smith said whether s 8 implies positive protective duties had arisen tangentially in other claims. He gave the examples of *Re J (An Infant)* where the High Court considered the scope of the rights to life of vulnerable children in the context of a challenge to a decision to make "J" a ward of the Court.[215] The Court of Appeal, upholding the decision in the High Court, observed that intervention by it to protect the child was "not a denial of rights [of parents] by the state but the securing of a right of a child."[216]

[190] Mr Smith also referred to *S v Midcentral District Health Board*.[217] In that case, the Court considered a claim by a patient that the DHB had breached her right to life by failing to take protective steps to protect her from risks from other patients. The claim was struck out. The Court in that case noted s 8 is framed negatively. It refers to a right not to be deprived of life, rather than a positive clause stating that the right "shall be protected by law" as appears in art 6(1) of the ICCPR and art 2 of the ECHR. The Attorney-General submitted that these were material differences which suggested a narrower interpretation than was being advanced by Mr Smith. Mr Smith replied that S's claim was not struck out on the basis that s 8 did not impose protective duties or was not engaged, therefore the case offered little guidance.

[191] Mr Smith pointed out that in *Wallace* Ellis J held the negative framing of s 8 was not material and that she had observed that the right to life was the most fundamental of all human rights.[218] Therefore a purposive interpretation of the right would support the recognition of positive duties.[219] Otherwise, Mr Smith argued, s 8 would be "toothless" if it prohibited the taking of life on one hand, but allowed the Crown to ignore a "real and immediate risk to life" on the other. Mr Smith referred to *Öneryildiz v Turkey*, which recognised that art 2 of the ECHR provides positive protective duties,[220] and suggested that by analogy, therefore, so should s 8 of the NZBORA.

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215 *Re J (An Infant)* [1995] 3 NZLR 73 (HC).
216 *Re J (An Infant)* [1996] 2 NZLR 134 (CA) at 146.
217 *S v Midcentral District Health Board* HC Te Whanganui-a-Tara | Wellington, CP237/02, 18 March 2003; and *S v MidCentral District Health Board* [2004] NZAR 342 (HC).
218 *Wallace No 2,* above n 26, at [277]–[281] and [600], citing with emphasis *R v Director of Public Prosecutions, ex p Manning* [2001] QB 330, [2000] 3 WLR 463 at [33] per Lord Bingham.
219 At [384].
220 *Öneryildiz v Turkey*, above n 214, at [71], [89]–[90] and [118].

[192] However, Ellis J said her comments were limited to an obligation to investigate a death that has occurred at the hands of a State actor.[221] The Court indicated it was not necessary to consider generally whether there was an obligation to plan and control potentially dangerous operations in a way that minimises the risk to life,[222] even in the face of knowledge of "a real and identifiable risk to the life of an individual".[223]

[193] In this case, as I have indicated, there is no "real and identifiable" risk to the life of a specified individual or even a class of individuals. It is a general threat that may eventuate as a result of the effects of climate change to all New Zealanders. It is not analogous to a dangerous situation created by the police involving an identifiable class of persons put at risk which called for a positive protective intervention as in *Wallace*. In this case there is already a multifocal legislative and monitoring framework in place managing the climate change risks to the whole population.

[194] Mr Smith also relied on *Urgenda.*[224] I have already referred above to the comments in *Plan B Earth* of Bourne J in the High Court of England and Wales on *Urgenda*, and the difference between the Netherlands jurisdiction and that of the United Kingdom.[225] Similar comments apply here. There was no detailed analysis of the differences between the Dutch and New Zealand jurisdictions nor the provisions being applied. In addition, as the Crown pointed out, the Court in *Urgenda* relied on arts 2 and 8 of the ECHR to find the Dutch State was required to "do its part" in circumstances where the State had backed away from previous commitments. The decision was based on a combined reading of arts 2 and 8 (being the expanded right to life (protected law) and the right to respect for family and private law). The NZBORA does not include a right such as that in art 8 (respect for private and family light) which has been interpreted as including a right to protection from environmental hazards.[226] The combined effects of those rights in *Urgenda* allowed the Court to find

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221 *Wallace No 2*, above n 26, at [384] and [517].
222 At [517].
223 At [544] and [546].
224 *The State of the Netherlands v Urgenda Foundation*, above n 159.
225 See above at [129].
226 European Court of Human Rights *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (31 August 2021).

environmental hazards to an entire region required protection to the citizens of that area.[227] The decision in *Urgenda* must be treated with caution.

[195] The claim under s 8 of the NZBORA is untenable for the reasons set out above.

Section 20

[196] Mr Smith says that there is a positive protective duty under s 20 engaged by the emissions complained of within New Zealand and globally, given the impact of these emissions on climate change and therefore the enjoyment of their cultural rights by Māori.

[197] Section 20 of the NZBORA reads as follows:

> **20 Rights of minorities**
>
> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

[198] Mr Smith says that destruction or degradation of whenua represents an existential threat to Māori identity and wellbeing. He also points to IPCC advice that effective mitigation and adaptation "*depends* on targeted plans and policies aimed at protecting the rights of vulnerable minority populations, including minority indigenous populations".

[199] Mr Smith says that for the right to enjoy his culture to be real, the Crown must have positive obligations to take reasonable steps to respond to real and immediate threats to the enjoyment of that right. Those threats include the impacts of climate change. Therefore, there is a positive protective duty on the Crown.

[200] Mr Smith says the Crown has breached its obligations under s 20 in two main ways. The first is that it has failed to reduce its own and national emissions. Secondly, and specific to s 20, he says the Crown has failed to carry out any comprehensive assessments of the impacts of climate change on the cultural rights of Māori and/or to

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[227] *The State of the Netherlands v Urgenda Foundation*, above n 159, at [5.3.1].

take these specific assessments into account when setting emission reduction targets and emission budgets under the CCRA and otherwise. In addition, he says the Crown has failed to put in place a specific adaption plan that ensures that Māori cultural rights are actively protected from climate change. He says that the positive duties under s 20 require something to be done and these duties are reinforced by the guarantee of rangatiratanga over taonga in art 2 of te Tiriti.

[201] The Crown says s 20 does not give rise to a positive obligation to prevent interference. In addition, there must be a denial of a person's right to practise their culture in community with other members of the community. It says the right in s 20 is formulated in the negative and requires the Crown to refrain from removing the rights of minorities and does not encompass positive duties.

[202] The Crown points to the Court of Appeal decision in *Mendelssohn v Attorney-General*,[228] which was an appeal from a strike out of a statement of claim.[229] Insofar as the claim under s 20 of the NZBORA is concerned, it involved an allegation that the claimant's freedom of religion, protected under the NZBORA, required the Attorney-General to take positive steps to protect that freedom.

[203] However, the Court of Appeal said that rather than imposing a positive duty on the State, the provision affirmed freedoms of the individual which the State is not to breach.[230] As the Court found, s 20 is an obligation not to deny the ability of a right-holder to enjoy their culture.[231] The Crown says that this reflects the White Paper which described the scope and attention of s 20 as being aimed at "oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which will go to the heart of their very identity – their language, culture and religion".[232] The Court of Appeal speculated that the State would only be under a positive obligation in "exceptional" circumstances, for instance where the right has been targeted by private oppression or coercion.[233]

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228 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14]–[17].
229 At [20] and [24].
230 At [14].
231 At [14]–[17].
232 Department of Justice *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) at 87.
233 *Mendelssohn v Attorney-General*, above n 228, at [20] and [24].

[204] The Crown also referred to the observations of Professor Paul Rishworth, writing on this issue, that there was overlap between what the right in s 20 seeks to protect and the protections from Treaty jurisprudence and principles in New Zealand as applied in the courts and Waitangi Tribunal.[234]

[205] The Crown points to art 27 of the ICCPR, which has incorporated similar concepts to those contained in s 20 of the NZBORA.[235] That article provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

[206] The HRC in its general comment on art 27 says that although the article is expressed in negative terms, it nevertheless recognises the existence of a "right" and requires it shall not be denied, which means that positive measures of protection are required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[236]

[207] The Crown submits that art 27 does not entail a free-standing obligation to promote and affirm rights to culture, religion and language. Rather, the HRC suggests the obligation is to ensure minority rights are not denied and it is in the service of that obligation that positive acts may be required by the State.[237]

[208] The Crown says the Government is taking steps to address climate change and not denying the existence of Māori culture. There is no private oppression or coercion

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234 Paul Rishworth "Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights" (paper presented to International Center for Law and Religion Studies Australia Conference, Canberra, 13–15 August 2009) at 2.

235 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

236 Office of the High Commissioner for Human Rights *CCPR General Comment No 23: Art 27 (Rights of Minorities)* UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at [6.1].

237 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) at 404.

and there are existing mechanisms and protections in place to respond in the Crown's current legislative and policy settings.[238]

[209] In addition, the Crown says there is no specific activity by it (either by an act or an omission) that can be said to create any denial of the s 20 minority rights. Mr Smith does not identify steps being taken, or actions arising, within the control of the Government that are having a material impact on the plaintiff, his hapū, his iwi or his right to culture.

[210] The Crown says climate change is caused by countless emitters and the majority of these emitters are individuals and entities spread globally. The Crown says it is unable to exercise any control over those emitting activities.

[211] The claim asserts that impacts have already occurred and are continuing to occur. However, the primary concern is with future impacts. The claim does not particularise any existing breach of the s 20 rights. The Crown says it is taking steps to address climate change and to provide for impacts of climate change on Māori. To that end, it has undertaken and continues to undertake consultation with Māori. These measures exist alongside the domestic regulatory framework in the context of climate change, which includes statutory provisions that provide for Māori. For instance, ss 3A(ab), (ac) and 5H(d)(ii) of the CCRA provide for membership for Māori and iwi representative organisations, and skills and expertise relevant to the Treaty and te ao Māori on the CCC. The Crown points to provisions for consultation with iwi and Māori to determine membership of the CCC and the content of emission reduction plans,[239] and protection of Māori interests, including the economic, social, health, environmental and ecological and cultural effects of climate change on iwi and Māori.[240] The Crown says that while the defendant has said these measures are not sufficient, they go to the question of balancing interests that the State is equipped to determine. It says to find that the Crown has breached s 20 in these circumstances would push the provision well beyond its available scope.

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238 The Crown refers by way of example to the Treaty of Waitangi Act 1975 and the ability to lodge a claim before the Waitangi Tribunal and the application of the Treaty in the Resource Management Act.

239 Sections 3A(ad) and 5G(2)(b).

240 Sections 3A(ad), (ae), 5M(f) and 5ZT(iv).

[212] *Mendelssohn* is Court of Appeal authority for the proposition that s 20 does not impose positive duties on the State except in exceptional cases.[241] No specific breaches are alleged here. Instead, the claim is based on a claim that an existing legislative and policy framework is inadequate to protect Māori. There is no allegation of opposition or coercion targeting Māori that fits within that exceptional category here.

[213] This claim under s 20 of the NZBORAis untenable.

Conclusion

[214] The claims under both s 8 and s 20 of the NZBORA are untenable. Therefore, the second cause of action is struck out.

Third cause of action — claims under te Tiriti o Waitangi | the Treaty of Waitangi

[215] The plaintiff invites the Court to recognise a claim separately based on a breach of the Treaty.

[216] Mr Smith says there are two different bases for the third cause of action. The first is that the Crown has breached the guarantees in the Treaty, and the second, that it has breached legal duties arising from the Treaty. He notes the claims share some similarities and three general points apply to both.

[217] First, the claims invite the Court to assess the Crown's conduct for consistency with the Treaty. Secondly, Mr Smith says the Treaty has become part of the domestic constitutional law of New Zealand and on the pleaded agreed facts, the Crown's duties under the Treaty are actionable. Thirdly, he argues that the statutory jurisdiction of the Waitangi Tribunal to enquire into Treaty grievances under the Treaty of Waitangi Act 1975 does not bar common law claims against the Crown in relation to the Treaty.

[218] The relief sought is a declaration that the Crown has committed and is committing a breach of art 2 of the Treaty and a declaration that the Crown has acted and is acting in breach of the Treaty duty.

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241 *Mendelssohn v Attorney-General*, above n 228, at [14] and [24].

[219] Mr Smith pointed to the fundamental constitutional significance of the Treaty, noting that over time the Crown had publicly committed and recommitted itself to complying with the specific obligations in the Treaty as constitutional norms or standards. For instance, the Executive has developed policies which ensure Ministers and Parliament give effect to the Treaty, including Guidelines for Engagement with Māori, formal guidance for public servants published in 2019,[242] and Legislation and Design Advisory Committee Guidelines published in 2021,[243] as well as establishing and settling claims by Māori for breaches of the Treaty.[244] In addition, the legislature had enacted legislation requiring the Crown to act consistently with the Treaty and its principles and established the Waitangi Tribunal with jurisdiction to report on historic and current breaches of the Treaty and make, in the main, non-binding recommendations. Mr Smith also pointed to legislation recognising the existence and extent of Māori rights to land, fisheries and water, including rights under the Treaty.[245]

[220] Mr Smith addressed the case law, in particular *Te Heuheu Tukino v Aotea District Maori Land Board*, which is long-standing authority that a claim to enforce the Treaty directly is not separately actionable.[246] He said things had moved on from this.

[221] Mr Smith also pointed out that the courts had recognised that customary interests in fisheries, land and water are capable of recognition and protection by the common law.[247] The courts had also recognised that the Treaty can be an aid for interpretation of legislation even when not mentioned in the legislation;[248] assessments for compliance with the Treaty can be mandatory relevant considerations when decision makers are exercising public powers;[249] and, in an appropriate case, it may

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242 Cabinet Office Circular "Treaty of Waitangi guidance" (21 October 2019) CO 18/4.

243 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 28–32.

244 Te Arawhiti | Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti ō Waitangi me ngā Whakaritenga ki te Karauna | Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2018).

245 Marine and Coastal Area (Takutai Moana) Act 2011.

246 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

247 *Attorney-General v Ngati Apa* [2003] 3 NZLR 343 (CA); *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31; and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

248 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.

249 *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA).

be possible to argue the courts may declare conduct by the Crown to be inconsistent with the Treaty.[250] Mr Smith pointed out that all these developments had occurred since the decision in *Te Heuheu Tukino* in 1941.

[222] In addition, Mr Smith submitted that the Crown-Māori relationship gave rise to fiduciary obligations on the Crown which were engaged by the emission of greenhouse gases and climate change. He said there has been no judicial authority concerning whether the Treaty could give rise to fiduciary obligations on the Crown directly. Any consideration to date, Mr Smith pointed out, had been obiter dicta and some of the discussion had been supportive while other discussions had been more doubtful or concluded that the Crown-Māori relationship was not fiduciary.[251]

[223] Mr Smith submitted that the threat represented by climate change was a threat to the ongoing stewardship by Māori of their whenua and, indeed, their lives and very existence. In Mr Smith's case, it was a direct threat to his customary interest in Mahinipua C Block. This was a breach of art 2 of the Treaty and its fiduciary obligations by omission. The omission is a failure by the Crown to take any steps to reduce its own emissions or national emissions. According to Mr Smith, the Crown has failed to exercise its authority generally in the setting of the NDC and in the exercise of any executive or legislative authority to require the assessment of impacts of climate change on iwi or establish in mitigation an adaption plan specifically to address impacts on iwi.

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250 *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683; and *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, (2021) 13 HRNZ 22.

251 Mr Smith footnoted the following cases as relevant to this point: *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655 per Cooke P, *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24–25 per Cooke P; *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [182]–[196] per McGrath J and at [272]–[277] per William Young J; and *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [340]–[391] per Elias CJ. For more doubtful statements see *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [62]-[82], although note *New Zealand Māori Council v Attorney-General* SC 49/2007, 4 November 2008, recording (at [2](b)) that appeals against the Court of Appeal's decision had been withdrawn and that the parties had acknowledged that "the comments of the High Court and Court of Appeal in their judgments, of 4 May 2007 and 2 July 2007 respectively, concerning the Crown's fiduciary obligations to Māori under the Treaty of Waitangi are *obiter dicta*"; and *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [102]–[104] per Hammond J for the Court.

[224] Mr Smith further submitted that to the limited extent the breaches may have arisen through legislation, it was open to the Court to declare that these legislative actions amounted to breaches of the fiduciary duties, in that legislation was simply another form of Crown action.

[225] The Crown pointed to the fact that the Privy Council decision in *Te Heuheu Tukino* had been confirmed by more recent cases. The position remained that the courts to date have recognised that breaches of the Treaty are justiciable but only if associated with a claim based on a breach of some other actionable wrong. The Crown accepted the Treaty was relevant in administrative law as an aid to statutory interpretation in judicial review proceedings, as a relevant consideration and potentially a basis for legitimate expectations.[252] However, it was fundamental that neither the executive nor the judiciary could declare international instruments as domestic law without express action of the legislature and that remained the settled position for the status of the Treaty in New Zealand's legal system.[253]

[226] The Crown pointed out that there had been a deliberate removal of the references to the Treaty from the NZBORA and that was significant. It said the Waitangi Tribunal remained the appropriate forum for Treaty grievances, rather than expanding the negative duty in s 20 of the NZBORA beyond its intended meaning.

[227] The Crown also submitted that while a declaration of inconsistency has now been made wider under the NZBORA as a remedy for where legislation constituted an unjustified infringement of rights, that was not applicable to the Treaty.[254]

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252 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [248], citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 223; and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184. See also *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands*] at 672–673; and *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319.

253 Referring to *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [65], where parts of the claim for declaration is that particular decisions were made inconsistently with the Treaty and its principles and rights affirmed in the United Nations Declaration on the Rights of Indigenous Peoples was struck out as problematic in terms of the principle of parliamentary non-interference.

254 Referring to the decision in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [107].

[228] The Crown said that while the Treaty of Waitangi Act did not bar common law claims against the Crown in relation to the Treaty, the climate change legislative frameworks had been imposed in reliance on the common understanding of the position of the Treaty in New Zealand that it was not directly enforceable.

[229] There is no New Zealand authority finding an enforceable fiduciary duty arising between the Crown and Māori based solely on the Treaty relationship. In fact, as the Crown pointed out, the authority is to the contrary. It noted that in conceptualising the Treaty relationship, the courts have recognised its nature as one that is fiduciary by analogy only.[255] It also pointed to the comments of Elias CJ in *Proprietors of Wakatū v Attorney-General*, namely that "[n]one of [the foregoing analysis] is to suggest that there is a general fiduciary duty at large owed by the Crown to Māori."[256]

[230] The Crown submitted it remained necessary to apply the usual test for establishing the existence of a fiduciary duty owed by one party to another.[257] The Crown also said it could not owe a fiduciary duty based on a treaty, particularly in a situation as complex as climate change. It had duties to the public as a whole, even when dealing with its Treaty partner.

[231] Mr Prebble, for the Crown, pointed to the comments of the Court of Appeal in the 2007 *New Zealand Māori Council v Attorney-General* case as follows:[258]

> … we see difficulties in applying the duty of fiduciary not to place itself in a position of conflict interest to the Crown, which in addition to its duty to Māori under the Treaty, has a duty to the population as a whole. The present case illustrates another aspect to this problem: the Crown may find itself in a position where its duty to one Māori claimant group conflicts with its duty to another.

[232] Mr Smith's approach to use the Treaty relationship to find a fiduciary duty would lead to the Treaty being directly enforceable by a backdoor route. As Mr Prebble noted, the Canadian authorities cited by Mr Smith in support of a fiduciary obligation arising from the Treaty were taken from a different constitutional context,

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255 Referring to *Lands*, above n 252, at [644].
256 *Proprietors of Wakatū v Attorney-General*, above n 251, at [390]–[391].
257 Referring to *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [52].
258 *New Zealand Māori Council v Attorney-General*, above n 251, at [337].

a feature of which was that Canada had entrenched treaty rights through s 35 of its Constitution Act 1982, which was supreme law.[259]

[233] Given the wide-ranging nature of this claim and the complex nature of climate change, any fiduciary obligations arising from the Crown would be owed to the public in general. This alone makes the claim untenable.

[234] In addition the High Court has recently again recognised that the Treaty of Waitangi does not give rise to free-standing obligations in and of itself, although it can bear directly on the interpretation of a statute and can sustain judicial review for the treatment of tikanga on the grounds of, for example, illegality, failure to consider a relevant consideration or unreasonableness.[260] Therefore, on the present state of the law a stand-alone claim based on the Treaty would not succeed. However, it is arguable that a claim based on the Treaty might be tenable if coupled with other claims. There are also suggestions that it may be time for the decision in *Te Heuheu Tukino* to be reconsidered. However, the difficulty with the claim as formulated here is that the claim based on the Treaty rests in general terms on the breach of the general duty advanced in the novel claim pleaded as the first cause of action. I have already found that is untenable and, moreover, a claim that such a duty is owed to only a subsection of New Zealanders, Māori, as opposed to the public in general, is a further reason that it cannot be tenable. Therefore even if otherwise available a Treaty based claim would be untenable.

[235] Accordingly, the claims under the Treaty and associated fiduciary obligations in the third cause of action are untenable and are struck out.

Further submissions following the hearing of this case to decisions

[236] For completeness, I note counsel referred to the decisions of *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* and *Muaūpoko Tribal Authority Inc v Minister*

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259 Mr Smith referred to the decision in *Southwind v Canada* 2021 SCC 28.

260 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [68]. The comments in that judgment indicate that the position may be revisited in an appropriate case.

for Environment decided after this hearing.[261] I have referred to the former judgment but I do not consider either case materially affects the matters at issue in this judgment.

Conclusion

[237] The statement of claim is struck out in its entirety.

Costs

[238] If the parties cannot agree on costs, submissions should be filed by the applicant for costs within 10 days from the issue of the judgment and any response within a further 10 days.

Grice J

Solicitors:
Lee Salmon Long, Auckland
Crown Law, Wellington

[261] *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 260; and *Muaūpoko Tribal Authority Inc v Minister for Environment* [2022] NZHC 883.