

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(CIVIL DIVISION)**

**HCA NO. 1/17  
(PLT NO. 18/2015)**

**IN THE MATTER** of Section 66A(3) of the Constitution,  
the Marine Resources Act 2005, and  
Part 1A of the Judicature Act 1980-81

**AND**

**IN THE MATTER** of an Application for judicial review

**BETWEEN** **WILLIAM FRAMHEIN** as Apai Mataiapo  
Komono for the Aronga Mana of Te Au O  
Tonga  
First Applicant

**AND** **TE IPUKAREA SOCIETY**  
**INCORPORATED** an incorporated society  
Second Applicant

**AND** **ATTORNEY-GENERAL** sued on behalf of  
the Crown  
First Respondent

**AND** **MINISTER OF MARINE RESOURCES**  
Second Respondent

**AND** **SECRETARY OF MARINE RESOURCES**  
Third Respondent

Date: 3 February 2018 (NZT), 2 February 2018 (CIT)

Counsel: Mr I Hikaka for Applicants  
Mr D James, Solicitor-General for Respondents

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**JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER**  
(Application for Leave to Appeal)

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[POTT0915]

**Introduction**

[1] By application dated 21 December 2017 the applicants seek leave to appeal against all of the High Court judgment dated 15 December 2017 (“the judgment”). They bring their application under Section 58(3) of the Judicature Act 1980-81 and Section 60(2) of the Cook Islands Constitution.

## **How should this application for leave be determined?**

[2] The Registry referred me to the decision of Savage J in the Land Division of the High Court in *Ben v Samson & Others*<sup>1</sup> where the judge said the Land Court judges had decided it is appropriate for an application for leave to appeal to be heard where possible, by a judge other than the judge whose decision is in question. He said the appropriateness of that approach should be obvious.

[3] I do not intend to follow that approach. This is not the practice adopted in the New Zealand High Court on applications for leave to appeal. The preference in the New Zealand High Court is that the judge who heard the case and delivered the judgment from which leave to appeal is sought, should determine the application for leave to appeal. This ensures that the application for leave to appeal is determined by the judge who best knows the case and avoids the necessity of another judge needing to familiarise herself or himself with the evidence and relevant law. All judges recognise the possibility for error in judicial decision-making and that it is necessary and appropriate from the perspectives of both the litigants and the law that the decision which ultimately binds the parties, and in appropriate circumstances creates precedent, should be the correct one. There is an important safeguard in that if leave to appeal is declined by the trial judge the applicant may appeal to the Court of Appeal against the refusal of leave.

[4] There will be exceptions to this practice when, for example, the grounds of appeal relate to the judge personally and/or the way the trial judge conducted the case and determined the matter, – for example, predetermination, bias, judicial conduct – but these cases will be rare.

[5] In my view the better practice, and that which I propose to adopt in this case, is that I, having a close and detailed knowledge of the very extensive and complex issues involved in this case, should determine the application for leave to appeal.

## **Grounds in support of leave to appeal application**

[6] The applicants say:

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<sup>1</sup> *Ben v Samson & Ors* (App.No's 95/2013 & 230/13), Savage J, Decision dated 9 June 2016

- a) In accordance with Article 60(2)(a) of the Constitution the proceeding involves a substantial question of law as to the interpretation or effect of a provision of the Constitution, being Article 66A.
- b) In accordance with s 58(3)(b) of the Judicature Act the judgment of the High Court is in relation to judicial review.
- c) In accordance with s 58(3)(a) of the Judicature Act and Article 60(2)(e) of the Constitution the issues in the proceeding ought to be submitted to the Court of Appeal because of their general or public importance, or the magnitude of the interests affected, in particular:
  - i) The proceeding relates to decisions by the respondents in relation to the use and management of the fishery resources of the Cook Islands. Those resources play a central role in the food security, family income and social wellbeing of many Cook Islanders.
  - ii) The decisions in question risk serious harm to fishery resources, including stocks of yellowfin tuna, which are subject to overfishing, and stocks of bigeye tuna, which are subject to overfishing and overfished.
  - iii) The proceeding also raises significant issues about the position and role of the Aronga Mana, the obligations of the Cook Islands Government to consult with them, and the meaning and effect of Article 66A of the Cook Islands Constitution.
- d) In accordance with s 58(3)(c) of the Judicature Act the justice of the case requires that leave to appeal be granted for the reasons given in the previous paragraph.

[7] Noting that the respondents do not oppose the application for leave to appeal, the applicants are content that the decision on the application be given on the papers.

### **The respondents' position**

[8] The respondents do not oppose the application in substance but seek security for costs as a condition of leave to appeal being granted, of \$15,000. They also seek costs in the High Court of \$15,000. The submissions of the Solicitor-General point to the lengthy and convoluted history of this matter which commenced with a statement of claim dated 17 November 2015 and went through many iterations before being brought to hearing in May 2017.

### **Conclusion on leave to appeal**

[9] I am satisfied that this is an appropriate case in which leave to appeal should be granted. The issues in the proceeding are of general and public importance and affect major interests of and for Cook Islanders. It is in the interests of justice that the important issues in this case be submitted to the Court of Appeal. Further, a substantial question of law as to the interpretation or effect of Article 66A of the Constitution arises and should properly be submitted to the Court of Appeal for further consideration and interpretation.

[10] On the question of security for costs I refer to [158] of this Court's judgment of 15 December 2017 where I said that there is a significant and genuine public interest component in this proceeding and that I was not inclined to award costs in respect of the High Court hearing. For those same reasons I decline to require the provision of security for costs on appeal as a condition of granting leave to appeal. The issues in this case justify and warrant hearing by the Court of Appeal. It would not be in the public interest or the interests of justice if a requirement for security for costs were to be an impediment in any way, to the case being heard on appeal.

### **High Court costs**

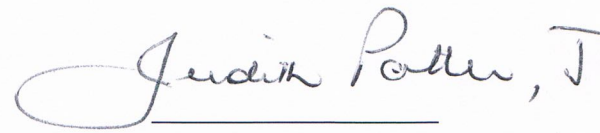
[11] I acknowledge the somewhat tortuous and inevitably time consuming process in this case. It is probable that the quantum of costs sought by the Solicitor-General is not unreasonable. But given the significant and genuine public interest component in the proceeding I decline to award costs.

**Decision**

[12] Leave to appeal is granted.

[13] Security for costs is not required as a condition of leave to appeal.

[14] Costs in the High Court are declined.

A handwritten signature in cursive script that reads "Judith Potter, J". The signature is written in dark ink and is positioned above a horizontal line.

**Judith Potter, J**