

Stephanie Mercer

From: Becky Prebble
Sent: Monday, 12 February 2024 12:53 pm
To: Emily Chan
Cc: Nicolette Butler; Matt Maguire; Rosa Winter
Subject: RE: **CLASSIFICATION** Summary of Supreme Court decision in Smith v Fonterra and implications

That should be accomodateable 😊

One more question – do we have any idea when the substantive hearing will be? We've got the Minister in a few hours and was just thinking that would be a good thing to be able to tell him.

From: Emily Chan
Sent: Monday, February 12, 2024 11:17 AM
To: Becky Prebble
Cc: Nicolette Butler ; Matt Maguire ; Rosa Winter
Subject: RE: **CLASSIFICATION** Summary of Supreme Court decision in Smith v Fonterra and implications
Thanks for letting us know Becky. Nicolette, Matt and I are based in Pōneke so can attend a meeting in person (preferably not a Monday or Thursday due to Matt's working hours). Rosa is also a key person involved in the litigation so would be ideal if she can attend, but we can work around this if not.

Ngā mihi

Emily

Emily Chan (she/her)

Solicitor | Kaitohutohu ā-Ture

Ministry for the Environment | Manatū Mō Te Taiao

9(2)(a) | Emily.Chan@mfe.govt.nz | mfe.govt.nz

From: Becky Prebble <Becky.Prebble@mfe.govt.nz>
Sent: Monday, February 12, 2024 8:47 AM
To: Emily Chan <Emily.Chan@mfe.govt.nz>
Cc: Nicolette Butler <Nicolette.Butler@mfe.govt.nz>; Matt Maguire <Matt.Maguire@mfe.govt.nz>; Rosa Winter <Rosa.Winter@mfe.govt.nz>

Subject: RE: **CLASSIFICATION** Summary of Supreme Court decision in Smith v Fonterra and implications

That's great thanks Emily! OK I'll make the offer at our regular meeting today.

So far we haven't had remote attendees at Watts meetings, but it's something I've been meaning to raise with the office more generally. He might be open to someone dialling in, but I think we'd want the people doing the actual presenting to be in the room with us – it feels like there are a few of you involved so that should be ok, unless I am misunderstanding responsibilities?

From: Emily Chan <Emily.Chan@mfe.govt.nz>
Sent: Friday, February 9, 2024 9:22 AM
To: Becky Prebble <Becky.Prebble@mfe.govt.nz>
Cc: Nicolette Butler <Nicolette.Butler@mfe.govt.nz>; Matt Maguire <Matt.Maguire@mfe.govt.nz>; Rosa Winter <Rosa.Winter@mfe.govt.nz>

Subject: RE: **CLASSIFICATION**] Summary of Supreme Court decision in Smith v Fonterra and implications
Mōrena Becky

Yes that's a good idea, happy to give a more detailed briefing jointly with Crown Law to the Minister on *Smith*. Would remote attendance be possible as Rosa is based in Auckland?

Ngā mihi

Emily

Emily Chan (she/her)

Solicitor | Kaitohutohu ā-Ture

From: Becky Prebble <Becky.Prebble@mfe.govt.nz>

Sent: Thursday, February 8, 2024 11:51 AM

To: Emily Chan <Emily.Chan@mfe.govt.nz>

Cc: Nicolette Butler <Nicolette.Butler@mfe.govt.nz>; Matt Maguire <Matt.Maguire@mfe.govt.nz>; Rosa Winter <Rosa.Winter@mfe.govt.nz>

Subject: RE: **CLASSIFICATION** Summary of Supreme Court decision in Smith v Fonterra and implications

Thanks team this is really useful. We are meeting Minister Watts on Monday, just the regular officials meeting. We can briefly cover this based on your summary, but can we offer up you guys to come and give a more detailed briefing at some point in the next few weeks? I guess post the more detailed analysis.

Becky.

From: Emily Chan <Emily.Chan@mfe.govt.nz>

Sent: Wednesday, February 7, 2024 3:38 PM

To: Hemi Smiler <Hemi.Smiler@mfe.govt.nz>; Katherine Wilson <Katherine.Wilson@mfe.govt.nz>; Melody Guy <Melody.Guy@mfe.govt.nz>; Becky Prebble <Becky.Prebble@mfe.govt.nz>; Lisa Daniell <Lisa.Daniell@climateieb.govt.nz>; Chris Nees <Chris.Nees@climateieb.govt.nz>; Meredith Davis <Meredith.Davis@mfe.govt.nz>; Stephen Goodman <Stephen.Goodman@mfe.govt.nz>; Simon Mandal-Johnson <Simon.Mandal-Johnson@mfe.govt.nz>; Emma Corbett <Emma.Corbett@mfe.govt.nz>; Jane White <Jane.White@climateieb.govt.nz>; Sam Buckle <Sam.Buckle@mfe.govt.nz>; Daire Queenan <Daire.Queenan@mfe.govt.nz>

Cc: Nicolette Butler <Nicolette.Butler@mfe.govt.nz>; Matt Maguire <Matt.Maguire@mfe.govt.nz>; Rosa Winter <Rosa.Winter@mfe.govt.nz>

Subject: RE: **CLASSIFICATION**] Summary of Supreme Court decision in Smith v Fonterra and implications

Kia ora koutou

Below is a summary of the Supreme Court judgment on *Smith v Fonterra* that was released this morning and the implications for the Crown.

Smith v Fonterra

Mr Smith raised three causes of action against seven respondents who are alleged to be involved in an industry that emits GHGs (including Fonterra, New Zealand Steel and Z Energy). Mr Smith alleges that they have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural and spiritual significance to him and his whānau. He seeks a declaration that the respondents have breached a duty owed to him or contributed to a public nuisance, and their activities will cause him loss. In addition, he seeks an injunction for the respondents to reduce their emissions or immediately cease emitting net emissions. The High Court struck out two of the causes of action and allowed one to go to trial, and on appeal, the Court of Appeal struck out all causes of action.

The Supreme Court has released their judgment today allowing Mr Smith's appeal. This means the Supreme Court found the defendants have a case to answer. Whether or not Mr Smith's claim will succeed will be determined at substantive trial in the High Court.

9(2)(h)

Ngā mihi

Emily

Emily Chan (she/her)

Solicitor | Kaitohutohu ā-Ture

Ministry for the Environment | Manatū Mō Te Taiao

From: Nicolette Butler <Nicolette.Butler@mfe.govt.nz>

Sent: Wednesday, February 7, 2024 10:43 AM

To: Hemi Smiler <Hemi.Smiler@mfe.govt.nz>; Katherine Wilson <Katherine.Wilson@mfe.govt.nz>; Melody Guy <Melody.Guy@mfe.govt.nz>; Becky Prebble <Becky.Prebble@mfe.govt.nz>; Lisa Daniell <Lisa.Daniell@climateieb.govt.nz>; Chris Nees <Chris.Nees@climateieb.govt.nz>; Meredith Davis <Meredith.Davis@mfe.govt.nz>; Stephen Goodman <Stephen.Goodman@mfe.govt.nz>; Simon Mandal-Johnson <Simon.Mandal-Johnson@mfe.govt.nz>; Emma Corbett <Emma.Corbett@mfe.govt.nz>; Jane White <Jane.White@climateieb.govt.nz>; Sam Buckle <Sam.Buckle@mfe.govt.nz>; Daire Queenan <Daire.Queenan@mfe.govt.nz>

Cc: Matt Maguire <Matt.Maguire@mfe.govt.nz>; Rosa Winter <Rosa.Winter@mfe.govt.nz>; Emily Chan <Emily.Chan@mfe.govt.nz>

Subject: CLASSIFICATION Coming out at 11am - Supreme Court decision in Smith v Fonterra
9(2)(h)

<https://www.courtsofnz.govt.nz/assets/cases/Case-synopses/NZSC/20220808-Case-Synopsis-Smith-v-Fonterra.pdf>

Background – taken from the Supreme Court summary: [20220808-Case-Synopsis-Smith-v-Fonterra.pdf](https://www.courtsofnz.govt.nz/assets/cases/Case-synopses/NZSC/20220808-Case-Synopsis-Smith-v-Fonterra.pdf)
([courtsofnz.govt.nz](https://www.courtsofnz.govt.nz))

The appellant, Mr Smith, is the climate change spokesperson for the Iwi Chairs Forum. In 2020 he issued proceedings against the respondents, seven major New Zealand companies. He claims that they are substantial emitters of greenhouse gases and therefore contribute materially to climate change. Mr Smith alleges the respondents' emissions have, and continue to, cause damage to his whenua, and sites of cultural and historical significance for him and his whānau. Mr Smith formulated his claim around the following causes of action:

- (1) the respondents' greenhouse gas emissions constitute a public nuisance;
- (2) the respondents are in continuing breach of their duty to take reasonable care not to operate their businesses in a way that contributes to climate change; and
- (3) the court should impose a new legal duty on the respondents to cease contributing to climate change.

In reliance on these causes of action Mr Smith asks the Court to direct the respondents to reduce their greenhouse gas emissions to acceptable levels, or in the alternative, to cease their emissions altogether.

The respondents accept that climate change poses a challenge, and that New Zealand should transition to a lower carbon future. But they say that Mr Smith's claims are legally untenable. They applied to strike out Mr Smith's claims.

In March 2020, the High Court struck out the first and second causes of action, concluding they were untenable. The Court declined to strike out the third cause of action. Mr Smith appealed to the Court of Appeal against the High Court's decision to strike out the first two causes of action. Before that appeal was heard he also proposed to amend his claim to invoke relevant principles of tikanga Māori. The respondents cross-appealed against the High Court's refusal to strike out the third cause of action. In October 2021, the Court of Appeal upheld the High Court's decision to strike out the first two causes of action and allowed the cross-appeal, striking out the third cause of action as well. The Court held that there are strong policy reasons against imposing private law duties on greenhouse gas emitters; matters of this complexity are best dealt with legislatively.

This appeal

Mr Smith applied for leave to appeal to the Supreme Court against the Court of Appeal's decision. He argues that he should be permitted to pursue all three causes of action to trial. In March 2022, the Supreme Court granted Mr Smith leave to appeal against the Court of Appeal decision. **The approved question is whether the Court of Appeal was correct to dismiss the appeal and allow the respondents' cross-appeal. This appeal asks the Supreme Court to consider whether Mr Smith's claims are clearly untenable and should not be allowed to proceed to trial.** Because of the issues raised in this appeal the following organisations have also been granted the right to provide

submissions to the Court: Lawyers for Climate Action NZ Inc, Te Hunga Roia Māori o Aotearoa and the Human Rights Commission.

Nāku noa, nā Nicolette

Nicolette Butler (she/her)

Manager - Legal / Kaiwhakahaere

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