IN THE SUPREME COURT OF NEW ZEALAND

SC 58/2012
[2012] NZSC 85

BETWEEN	TIROA E AND TE HAPE B TRUSTS Applicants
AND	CHIEF EXECUTIVE OF LAND INFORMATION First Respondent
AND	MINISTER OF FINANCE Second Respondent
AND	MINISTER OF LAND INFORMATION Third Respondent
AND	MILK NEW ZEALAND HOLDINGS LIMITED Fourth Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: D J Cooper and T B Fitzgerald for Applicants
D J Goddard QC and H S Hancock for First, Second and Third respondents
B D Gray QC and R A Rose for Fourth Respondent

Judgment: 17 October 2012

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay costs of $2,500 to both Milk New Zealand Holdings Ltd and the Crown respondents.

REASONS

[1] This application for leave to appeal concerns the exercise of powers under legislation which regulates the acquisition by overseas persons of "sensitive New Zealand assets". These include interests in rural land exceeding five hectares in area. Under the Overseas Investment Act 2005, such acquisitions require Ministerial consent, which will be granted if, and only if, certain criteria in the Act are satisfied. The issue in the proposed appeal is whether it was open to Ministers to conclude that a particular criterion was satisfied when giving their consent to an application under the Act.

[2] Milk New Zealand Holdings Ltd is an overseas person which has agreed to buy a group of dairy farm properties known as the Crafar Farms. The agreement is subject to consent being given under the Act. The mandatory criterion for consent that is in issue is the requirement under s 16(1)(a) that the individuals "with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment".

[3] The applicants for leave to appeal are members of a consortium who collectively wish to acquire the Crafar farms. They have brought two proceedings for judicial review of the successive Ministerial decisions consenting to the investment. The first respondent is the Chief Executive of the government department which has responsibility for the Overseas Investment Office. That office advised the responsible Ministers that it was open to them to conclude the s 16(1)(a) criterion was satisfied. The Ministers, who adopted that advice and consented to the investment, are the second and third respondents. Milk New Zealand Holdings Ltd is the fourth respondent.

[4] The issues the applicants wish to address in the proposed appeal are whether the s 16(1)(a) criterion can lawfully be satisfied, first, by generic investment experience of individuals controlling the applicant and, secondly, by business experience and acumen of other corporate entities which are related to the applicant. The third issue is whether the business experience and acumen requirement can be satisfied by the overseas person contracting with outside parties, with those attributes, to manage and operate the dairy farms. Milk Holdings Ltd proposes to engage Landcorp Farming Ltd, a State-Owned enterprise, which undertakes dairy

and other farming operations, for this purpose. The fourth proposed ground of appeal concerns the nature of the information Ministers were required to have to justify a lawful decision that an applicant had the required business experience and acumen.

[5] The High Court accepted that those in control of Milk New Zealand Holdings were astute and experienced managers and investors.[1] Miller J decided it was open to Ministers to conclude that their skills, while not specific to dairy farming or agriculture, would help ensure the business delivered promised benefits. The requirement of possession of the relevant business experience and acumen did not require skills of a narrow or specific kind. The Judge held that the aim of the criterion was to ensure delivery of benefits to New Zealand; therefore a wide range of such skills was covered by the statutory language. The s 16(1)(a) requirement was accordingly satisfied.

[6] The Court of Appeal agreed with the High Court that a range of business experience and acumen could contribute to the success of a particular investment and properly be treated as relevant in terms of satisfying s 16(1)(a).[2] It also agreed that the use by an overseas investor of the experience and acumen of others, as a supplementary means of ensuring the business would succeed, fitted within the broad and flexible language expressing this criterion. Furthermore, the Court held that the Ministers had sufficient material relating to the business acumen and experience of those in control of Milk New Zealand Holdings to justify their conclusion that the requirements of s 16(1)(a) had been met.

[7] For these largely common reasons, both Courts decided it was open to Ministers to decide in this case that those individuals controlling the fourth respondent had been entitled to conclude that s 16(1)(a) was satisfied.

[8] The applicants contend that a further appeal to this Court against the Court of Appeal judgment would address the correct interpretation of s 16(1)(a). We accept that an issue concerning the true meaning of that provision would raise a matter of

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1 *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147.
2 *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZCA 355 at [42].

general or public importance, and also of general commercial significance, so that it would become necessary in the interests of justice for the Court to hear the appeal. But we do not see the present case as being of that nature. The conclusions that the controlling individuals had the requisite business experience and acumen, and that the information before the responsible Ministers was sufficient for them to so conclude, were essentially assessments which turned on the particular circumstances of the applicant and application. As such, they involved matters of fact and degree rather than the true meaning of the statute. The points which the proposed appeal would raise are accordingly too dependent on the specific facts to raise questions qualifying for an appeal to this Court. We also see no obvious error in the careful and common factual assessments made by the High Court and Court of Appeal. Overall, we do not see that it is necessary in the interests of justice for the Court to give leave to the applicants for a further appeal.

[9] The application is dismissed. The applicants must pay costs of $2,500 to both Milk New Zealand Holdings Ltd and the Crown respondents.

Solicitors:
Bell Gully, Auckland for Applicants
Crown Law Office, Wellington for First, Second and Third Respondents
Chapman Tripp, Auckland for Fourth Respondent