Supreme Court of New Zealand
Te Kōti Mana Nui

9 JUNE 2016

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MITA MICHAEL RIRINUI v LANDCORP FARMING LIMITED AND THE ATTORNEY-GENERAL

(SC 47/2015) [2016] NZSC 62

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Landcorp Farming Ltd (Landcorp) is a state-owned enterprise. Its shareholding Ministers are the Minister of Finance and the Minister for State-Owned Enterprises. In 2013, Landcorp began investigating the sale of Whārere, a large block of land which it owned in the Bay of Plenty. In August 2013, Landcorp advised the Office of Treaty Settlements (OTS) of this and asked whether the property was potentially of interest to the Crown for Treaty of Waitangi settlement purposes. Landcorp gave this advice in accordance with a protocol agreed with OTS in 2012, which sets out processes designed to safeguard the interests of Treaty claimants in relation to land that Landcorp wishes to sell. OTS replied that Whārere was not of interest. Although Whārere was included in an area of land in respect of which an iwi, Ngāti Whakahemo, had filed a claim in the Waitangi Tribunal, OTS considered (wrongly, it is now accepted) that all of Ngāti Whakahemo's historical claims had been settled.

In November 2013, Landcorp invited tenders for Whārere. Ngāti Whakahemo became aware of this and wrote to Landcorp, saying that they had a claim in respect of the land. Landcorp sought clarification from OTS and were advised that Ngāti Whakahemo's claims had been settled. Landcorp repeated this erroneous advice to Ngāti Whakahemo. Following this, in late November Ngāti Whakahemo contacted the Minister of Finance's office, stating that they wanted to discuss the

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purchase of Whārere in conjunction with the settlement of their Waitangi Tribunal claim. The response from the Minister's office in December 2013 repeated the view that Ngāti Whakahemo's claim had been settled and stated that Landcorp could not agree to delay or stop the tender process.

At the same time as these events were occurring, there were discussions between OTS and another iwi, Ngāti Mākino, about the sale of Whārere. Ngāti Mākino had expressed an interest in Whārere in the course of negotiating their Treaty settlement with the Crown in 2008. Whārere was not included in their final settlement, as at that time Landcorp considered Whārere to be strategically important. When Ngāti Mākino became aware of the sale, they wrote to the Minister for Treaty of Waitangi Negotiations in late November 2013 asking that the tender be called off. Subsequently, the shareholding Ministers made a request to Landcorp to delay acceptance of any tender in order to allow Ngāti Mākino the opportunity to purchase the property.

The tender closed on 4 December 2013, and Micro Farms Ltd (Micro) was the highest tenderer. However, after discussions with the Crown, on 18 December 2013 Landcorp confirmed it would cancel the tender to give Ngāti Mākino (and any other iwi it chose to involve) the opportunity to purchase Whārere at the market price. The offer was to have a deadline of 28 February 2014. Ngāti Mākino attempted to put together an offer, and in the course of that talked to Ngāti Whakahemo, but nothing eventuated. Ngāti Mākino ultimately withdrew from the process on 27 February 2014. Unaware of the 28 February deadline, Ngāti Whakahemo contacted Landcorp and requested a meeting to see if a way forward could be found. In addition, through their solicitors, they sought an undertaking from Landcorp that it would not enter into an agreement to sell Whārere without giving Ngāti Whakahemo notice of its intention to do so.

On 29 February, Ms Houpapa, a Landcorp board member, offered to meet with Ngāti Whakahemo on 7 March. Over the following days there was email correspondence between Ngāti Whakahemo and Ms Houpapa, in which it was made clear that Ngāti Whakahemo were working on putting together a bid. The responses they received from Ms Houpapa (which included reference to an indicative price) led them to believe that an opportunity to make such a bid still existed.

In reality, on 28 February 2014 the Landcorp board had resolved to re-enter negotiations with Micro. On 3 March 2014, Landcorp's solicitors sent a draft agreement for sale and purchase to Micro's solicitors and advised Ngāti Whakahemo that Landcorp would not give the undertaking sought. Ngāti Whakahemo then wrote seeking an undertaking from the shareholding Ministers. Micro signed the agreement on 4 March, and Landcorp representatives signed on 4 and 5 March. On 6 March Ngāti Whakahemo were advised that Landcorp had concluded a sale and purchase agreement for Whārere and that the shareholding Ministers would not give the undertaking sought from them. Accordingly, on 7 March 2014, Ngāti Whakahemo filed proceedings in the High Court and

sought an interim injunction preventing the sale from settling until the proceedings had been resolved.

In an interim decision in the High Court, Williams J granted the interim injunction in favour of Mr Ririnui as a representative of Ngāti Whakahemo on the basis that OTS's decision under the protocol to disclaim any interest in Whārere was invalid and that the shareholding Ministers had the power to intervene and prevent the sale of Whārere. He ordered the Minister for Treaty of Waitangi Negotiations to reconsider whether Whārere should be dealt with under the protocol and to consult with Ngāti Whakahemo about the possible acquisition of Whārere. Following this, the Minister carried out the necessary reconsideration, and concluded that Whārere was not of interest to the Crown for Treaty settlement purposes. This was not challenged, but in the final hearing in the High Court, Mr Ririnui was granted leave to amend the pleadings to include a bad faith claim on the basis that Ngāti Whakahemo were misled by Ms Houpapa in late February/early March 2014. In his final judgment, Williams J dismissed the bad faith claim.

The hearing before the Court of Appeal addressed various appeals and cross-appeals. The Court held that while the advice given by OTS under the protocol was wrong in law, it was not reviewable. The Court held further that neither the shareholding Ministers nor the Minister for Treaty of Waitangi Negotiations had the power to intervene to prevent the sale of Whārere. It also dismissed the bad faith claim.

The Supreme Court granted leave to appeal on the questions of whether the Court of Appeal was correct to refuse the relief sought by the appellant on the basis of Landcorp's alleged bad faith, the acknowledged error of law by OTS in its advice to Landcorp, and/or the failure of the shareholding Ministers of Landcorp to intervene.

In this Court, the appellant submitted that the agreement for sale and purchase of Whārere was tainted by both bad faith and OTS's erroneous advice, and that the Crown was wrong as a matter of law when it determined that it did not have the power to intervene to delay the sale. Accordingly, the appellant submitted that the agreement for sale and purchase should be set aside.

The Court, by majority, has allowed the appeal in part. Elias CJ, Glazebrook and Arnold JJ have found that Landcorp's decision to sell Whārere was susceptible to judicial review, as were the decisions of the Ministers in December 2013 and March 2014 not to intervene in the tender process on Ngāti Whakahemo's behalf. Because they were based on OTS's error, the decision of the Ministers in December 2013 not to intervene and the decision of Landcorp to sell Whārere constituted wrongful exercises of public power.

The Court was unanimous that the claim in relation to the Ministers' decisions not to intervene in March 2014 and the bad faith claim were not sustainable.

O'Regan J agreed in general terms with the reasoning of the majority; however he was not prepared to conclude that the Ministers' December 2013 decision not to intervene in the sale process was entirely based on OTS's erroneous advice.

William Young J agreed that the decisions of the Ministers not to intervene in the tender process were reviewable. He also agreed that the December 2013 decision was made under a material error of law. However, he disagreed with the breadth of the declaration proposed by the majority. He was also of the view that the decision by Landcorp to sell Whārere was not susceptible to judicial review.

As a result of these findings, the Court has issued two declarations. By majority (Elias CJ, Glazebrook and Arnold JJ) the Court has issued a declaration that the decision of Landcorp's shareholding Ministers and the Minister for Treaty of Waitangi Negotiations not to intervene in the tender process on behalf of Ngāti Whakahemo as they did on behalf of Ngāti Mākino was a wrongful exercise of public power because it was made under a material mistake. Also by majority (Elias CJ, Glazebrook, Arnold and O'Regan JJ) the Court has issued a declaration that the decision by Landcorp on 28 February 2014 to sell Whārere farm to Micro was a wrongful exercise of a public power because it was made under a material mistake.

The majority of the Court (William Young, Glazebrook and O'Regan JJ) declined to grant the other forms of relief claimed by the appellant. Glazebrook and O'Regan JJ held that setting aside the agreement for sale and purchase of Whārere would be inappropriate given the impact of doing so on an innocent third party. William Young J considered that s 21 of the State-Owned Enterprises Act 1986 precluded any challenge to the agreement.

Elias CJ and Arnold J would have granted further relief. They would have referred the matter back to the Ministers to reconsider whether they should request that Landcorp give Ngāti Whakahemo the same opportunity to make an offer to purchase Whārere as was given to Ngāti Mākino, with the further possibility of the agreement for sale and purchase between Landcorp and Micro being set aside if the Ministers concluded that Ngāti Whakahemo should be given that opportunity.

The Court has reserved its judgment as to costs.

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