IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2010
[2011] NZSC 12

BETWEEN	SAXMERE COMPANY LIMITED Applicant
AND	WOOL BOARD DISESTABLISHMENT COMPANY LIMITED Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: D J Chisholm and T P Mullins for Applicant
J S Kos QC and J L Bates for Respondent

Judgment: 9 March 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 to the respondent.

REASONS

[1] The nub of Saxmere's case is that the Wool Board unlawfully refused to differentiate Saxon wool from Merino wool and, in particular, unlawfully declined to assist Saxon growers with promotion and development costs. The Board's levies on Saxon wool were used to fund the marketing of Merino wool by Merino New Zealand Ltd (a joint venture of the Board and a society of Merino growers).

[2] On 20 February 1998 the Board entered into a heads of agreement with the society. That agreement gave Merino New Zealand responsibility for marketing all wool up to 24 microns, which included Saxon wool. It also gave Merino New Zealand a share of the levies generated by Saxon wool. Although in the Courts below Saxmere alleged that some later decisions of the Board were also unlawful, its leave application impugns only the decision of 20 February 1998.

[3] Saxmere's complaint is that in making that decision the Board failed to comply with s 6(6) of the Wool Board Act 1997 which was, until repeal of that Act on 15 September 2003, in the following form:

> (6) The Board must not determine that a function or element of a function is to be performed by a particular mechanism and entity (that is to say the Board, a partnership or joint venture, or some person other than the Board) unless it has –
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> (a) Considered other mechanisms and kinds of entity that might reasonably be expected to be able to perform the function or element efficiently and effectively; and
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> (b) Satisfied itself that the mechanism and entity are likely to be the most efficient and effective means of performing the function or element.

[4] The High Court[1] concluded that the subsection had been complied with. The Wool Board had not done a comparative exercise but at that time Saxmere was not a reasonable alternative to Merino New Zealand even in relation to the marketing of Saxon wool only.

[5] In the Court of Appeal[2], Hammond and Chambers JJ both found that the Board had failed to correctly apply s 6(6). They gave the subsection an interpretation favourable to Saxmere. On the other hand, Ellen France J gave the subsection a different interpretation. In its application for leave Saxmere says that it wishes to challenge her interpretation. However, what Ellen France J said in this connection is not amenable to appeal as it did not represent the view of the Court on the interpretation of the subsection. That interpretation has been given by the majority of the Court on that issue. There is therefore nothing for Saxmere to appeal.

[6] When it came to the application of the subsection as interpreted by the majority, the alignment of the Judges altered. Hammond J considered that the subsection had not been correctly applied.[3] But in this he was in the minority, for both Chambers J and Ellen France J said that the Board had met the requirements of

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1 *Saxmere Company Ltd v The Wool Board Disestablishment Company Ltd* HC Wellington CIV-485-2003-2724 per Miller J.

2 *Wool Board Disestablishment Company Ltd v Saxmere Company Ltd* [2010] NZCA 513 per Hammond, Chambers and Ellen France JJ.

3 At [136].

the subsection. Ellen France J made it clear that this was her view even if, contrary to her interpretation of the subsection, a comparative exercise had been required.[4] Chambers J agreed with her.[5]

[7] The question of the application of the subsection, as interpreted, turns on the view taken by the Judges of the particular facts. It raises no question of public or general importance. In this respect the majority in the Court of Appeal confirmed the view of the High Court. So there are concurrent findings of fact on the point.

[8] Furthermore, any challenge to the decision of 20 February 1998 also faces the difficulty that the decision was clearly tentative. Ellen France J[6] and Chambers J[7] make clear that it did not have the effect of excluding Saxmere's proposals if it were to further develop them.

[9] It is plain that leave to appeal should not be given in relation to either of these grounds. That renders the third proposed ground, whether a declaration should have been made because the Wool Board had breached s 6(6), entirely moot. We are not persuaded that there is any good reason in the public interest for hearing the appeal.

Solicitors:
LeeSalmonLong, Auckland for Applicant
Quigg Partners, Wellington for Respondent

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4 At [226].
5 At [250].
6 At [226] to [229].
7 At [250] to [258].