

**IN THE HIGH COURT OF NEW ZEALAND  
GISBORNE REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TŪRANGANUI-A-KIWA ROHE**

**CIV-2022-416-002  
[2022] NZHC 2996**

BETWEEN                      GISBORNE DISTRICT COUNCIL  
   Appellant

AND                              BUSHMERE TRUST  
   Respondent

Hearing:                      On the papers

Appearances:                H P Harwood and O J V D Maassen for the Appellant  
   T Mijatov and H A Atkins for the Respondent  
   S P Connolly and N B de Lautour for the Valuer-General

Judgment:                    16 November 2022

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**JUDGMENT NO 2 OF PALMER J**

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T Mijatov, Barrister, Wellington

## The judgment

[1] On 22 August 2022, with Mr W Reid as a lay member, I issued judgment in these proceedings.<sup>1</sup> In summary, we held:

[1] The Bushmere Trust (Bushmere) owns a property of 5.859 hectares, northwest of Gisborne, over which it has a licence from Zespri Group Ltd (Zespri) to grow and sell highly valuable kiwifruit known as SunGold, Gold3 or G3 kiwifruit. For rating purposes, the Land Valuation Tribunal (the Tribunal) held that the value of the licence should be deducted from the capital value of the property, valuing it at a level equivalent to a green kiwifruit orchard. In a test case, the Gisborne District Council (the Council), supported by the Valuer-General, appeals. We hold that the capital value of the property, a proxy for fair market value, includes the value of the land as enhanced by the licence, which in practice runs with the land. Accordingly, under the Rating Valuations Act 1998 (the Act), the rateable value of the property includes the value of the SunGold licence. Our interpretation of the text of the Act is consistent with relevant case law and the purpose of the rating regime. We uphold the appeal.

[2] Bushmere now applies for leave to appeal. Its proposed questions for appeal are whether the Court erred in concluding:

- (a) the rateable value of the property includes the SunGold licence;
- (b) the capital value, a proxy for fair market value, includes the value of the land as enhanced by the licence, which in practice runs with the land; and
- (c) the terms “improvements” and “value of improvements” are not relevant to the statutory definition of capital value.

## Submissions

[3] Mr Mijatov, for Bushmere, submits that the decision affects all 49 SunGold growers in Gisborne and potentially all other growers in New Zealand. It also potentially affects other horticultural crops where a licence is used and all law involving the use of capital value in assessing value for rating purposes. The decision turns on questions of law which ultimately need to be determined by statutory

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<sup>1</sup> *Gisborne District Council v Bushmere Trust* [2022] NZHC 2085.

interpretation. It is capable of serious argument. The specialist Land Valuation Tribunal (the Tribunal) reached an opposite conclusion at first instance and undertook quite a different legal analysis. The Court recognised this is a test case. The case is ripe for appellate consideration.

[4] Mr Harwood, for the Council, submits the issue is whether determining capital value requires the value of the SunGold licence to be deducted from the value of the property. The case does not involve any novel questions of law or general principle capable of serious argument. It involves the application of existing legal principles which have been directly considered by the Court of Appeal already. Re-litigating these established principles would be an inefficient use of the Court's scarce resources. The Court of Appeal does not sit with an expert valuer member, which significantly limits its ability to engage in valuation matters. Bushmere does not pursue the Tribunal's view that the Rating Valuation Rules prevent SunGold from being taken into account, which indicates their acceptance that the Tribunal misdirected itself. All cases that involve facts which have not been considered by the Court previously are "test" cases. The actual impact of the High Court's decision on the rates bill for Bushmere is not dramatic. The Valuer-General endorses the Council's submissions.

### **Should leave be granted to appeal?**

[5] Any party dissatisfied with an order of the High Court may appeal to the Court of Appeal, with the leave of either court, under s 18A of the Land Valuation Proceedings Act 1948 (the Act). Under s 18A(2), in determining whether to grant leave, the Court must have regard to:

- (a) whether any question of law or general principle is involved:
- (b) the importance of the issues to the parties:
- (c) the amount of money in issue:
- (d) such other matters as in the particular circumstances the court thinks fit.

[6] In *Chief Executive of LINZ v Luke*, the Court of Appeal held those factors are to be assessed as a whole and in light of that Court's function in second appeals.<sup>2</sup> In

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<sup>2</sup> *Chief Executive of LINZ v Luke* [2008] NZCA 43 at [17].

practice, the outcome of that assessment in most land valuation cases will be the same as that produced by the application of the principles in *Waller v Hider*.<sup>3</sup> That case held a second appeal must at least raise a question of law or fact capable of bona fide and serious argument involving an interest sufficiently important to outweigh the cost and delay of a further appeal.<sup>4</sup> The scarce time and resources of the Court of Appeal are not to be wasted, and the parties put to additional expense, without realistic hope of benefit.<sup>5</sup> A second appeal court's primary function is to "clarify the law and to determine whether it has been properly construed and applied by the Court below".<sup>6</sup>

[7] This is a test case. The issues involved are questions of law and the application of law to the facts regarding SunGold licences. It is not a simple application of the law, as illustrated by the Tribunal's decision and the length of the reasoning in the High Court. The issues are significant to the SunGold kiwifruit industry and potentially more widely in the horticultural industry. At that scale, the amount of money involved is not necessarily insignificant. So the interests at stake are sufficiently important to outweigh the cost and delay of a further appeal.

[8] I do not comment on the merits. But I accept that the issues are capable of bona fide and serious argument, as they were before me. It is desirable that the Court of Appeal further clarify the law and determine whether it has been properly construed and applied by the High Court. That is not an inefficient use of resources. The Court will no doubt take into account the presence of Valuers on the High Court and Tribunal. Although it is not required under s 13(4)(f) of the Act, I have consulted with Mr Reid about this decision, who agrees.

## **Result**

[9] I grant the application for leave to appeal to the Court of Appeal.

Palmer J

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<sup>3</sup> At [16] citing *Waller v Hider* [1998] 1 NZLR 412 (CA).

<sup>4</sup> *Waller v Hider*, above n 3, at 413.

<sup>5</sup> At 413.

<sup>6</sup> At 413.