

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 128/2021
[2022] NZSC 13**

BETWEEN

**HAOYU GAO
First Applicant**

**SMILING FACE LIMITED
Second Applicant**

**XIA XUE
Third Applicant**

AND

**ZESPRI GROUP LIMITED
Respondent**

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: E St John for Applicants
L A O'Gorman QC, S A Barker and L C Sizer for Respondent

Judgment: 1 March 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent costs of \$2,500.

REASONS

Background

[1] Zespri Group Ltd (Zespri) holds the exclusive plant variety rights (PVRs) under the Plant Variety Rights Act 1987 (PVR Act) to propagate for commercial production the G3 and G9 varieties of golden kiwifruit. Between 2013–2014, Zespri granted licenses to grow G3 and sell the fruit produced (the G3 License Agreements) to the applicants, Mr Gao, Ms Xue and their company, Smiling Face Ltd (Smiling

Face). Zespri later commenced proceedings against the applicants alleging that they had engaged in conduct breaching Zespri's exclusive PVRs in New Zealand as well as the G3 License Agreements.

Decisions below

[2] In February 2020, the High Court made a number of factual findings including:¹

- (a) that Mr Gao supplied G3 and G9 plant material to two growers based in the People's Republic of China (PRC), Mr Shu and Mr Yu;
- (b) in 2012, Mr Gao executed a license agreement purporting to authorise Mr Shu to exploit the G3 and G9 varieties throughout the whole of the PRC (the False License Agreement);
- (c) in or about 2014, Mr Gao entered into a joint venture with Mr Yu to commercialise G3 and G9 in the PRC;
- (d) that as a result, G3 and G9 varieties have been established on five orchards in the PRC associated with Mr Shu and Mr Yu with a total land area of 174.2 ha (although not all the land is planted with G3 and G9);²
- (e) Mr Gao offered to sell G3 to another PRC grower, Mr Li, although the deal did not proceed; and
- (f) that Mr Gao's acts in relation to both Mr Shu and Mr Yu were undertaken on behalf of his associated company, Smiling Face.³

[3] Consequently, the High Court awarded damages of \$14,894,100 against Mr Gao and Smiling Face each for acts infringing Zespri's New Zealand PVRs,⁴ as

¹ *Zespri Group Ltd v Gao* [2020] NZHC 109 (Katz J) at [192]–[195].

² Four orchards were associated with Mr Shu (at [85](i)): Chibi, Xianning 1, Xianning 2 and Wuhan. One orchard was associated with the joint venture between Mr Gao and Mr Yu (at [99](a)): Liangshan Yi.

³ At [197].

well as damages of \$10,824,300 against Mr Gao and Ms Xue jointly for acts infringing Zespri's contractual rights.⁵ The Court also granted Zespri a permanent injunction against the applicants restraining them from further infringing Zespri's PVRs with respect to the G3 and G9 varieties.⁶

[4] The applicants' appeal to the Court of Appeal was largely unsuccessful, only succeeding on narrow liability and quantum points.⁷

Grounds of appeal

[5] The five proposed grounds of appeal raised by the applicants are:

- (a) the reliability of hearsay statements attributed to Mr Shu which were adduced by Zespri's witnesses;
- (b) that the Court of Appeal finding that the False License Agreement was irrelevant to liability or quantum should have meant that there was no evidence as to damages;
- (c) there was no 'sale' within the meaning of s 2 of the PVR Act;
- (d) since Zespri's PVRs did not have extraterritorial reach, the licensing of protected varieties in the PRC did not infringe upon those rights; and
- (e) the Court of Appeal's assessment of damages on the basis of a notional purchase price was procedurally unfair and a breach of natural justice.

⁴ At [202](b) and [202](c).

⁵ At [202](d). The High Court had found Ms Xue jointly liable for Mr Gao's breaches because they were in a partnership together and had signed the licenses together: at [180].

⁶ At [202](a).

⁷ *Gao v Zespri Group Ltd* [2021] NZCA 442 (Kós P, Brown and Goddard JJ).

Our assessment

[6] The proposed appeal relates to the particular circumstances of the case. No point of general or public importance arises.⁸ Nor do the submissions of the applicants point to any matters that would suggest that the largely concurrent findings of the Courts below may have been wrong.⁹

Result

[7] The application for leave to appeal is dismissed.

[8] The applicants must pay the respondent costs of \$2,500.

Solicitors:

Heritage Law, Auckland for Applicants

Buddle Findlay, Auckland for Respondent

⁸ Senior Courts Act 2016, s 74(2)(a).

⁹ This means that there is no risk of miscarriage of justice: s 74(2)(b). For a risk of miscarriage of justice in the context of a civil appeal, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].