IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-101
[2012] NZHC 147

UNDER	the Judicature Amendment Act 1972 and the Overseas Investment Act 2005
BETWEEN	TIROA E AND TE HAPE B TRUSTS First Plaintiffs
AND	BAYTOWN INVESTMENTS LIMITED Second Plaintiff
AND	CHIEF EXECUTIVE OF LAND INFORMATION First Defendant
AND	MINISTER OF FINANCE Second Defendant
AND	MINISTER OF LAND INFORMATION Third Defendant
AND	MILK NEW ZEALAND HOLDINGS LIMITED Fourth Defendant
AND	BRENDON JAMES GIBSON AND MICHAEL PETER STIASSNEY Intervenors

Hearing: 3 February 2012

Counsel: A R Galbraith QC and D Cooper for Plaintiffs
H S Hancock and PGW Morgan for First to Third Defendants
A Ross for Fourth Defendant
R B Stewart QC and R J Gordon for Intervenors

Judgment: 15 February 2012

JUDGMENT OF MILLER J

Introduction

[1] Parliament has declared it a privilege for overseas persons to own sensitive New Zealand assets, including farms. Any overseas person wanting to buy a farm must first get Ministerial consent, which will be withheld unless, among other things, the overseas person possesses relevant business experience and acumen and the transaction will likely bring substantial and identifiable benefit to New Zealand.

[2] Milk New Zealand Holdings Ltd ("Milk NZ"), an overseas person, has agreed to buy a group of dairy farms which are known, indeed notorious, as the Crafar farms. The Overseas Investment Office accepted that those who control Milk NZ possess relevant business experience and acumen and the acquisition would benefit New Zealand, so it recommended the acquisition to the responsible Ministers, who approved it.

[3] The plaintiffs want the Court to quash the Ministers' consent on judicial review. They complain that the people who control Milk NZ lack the necessary skills, and that the Ministers' decision was flawed because it attributed to the transaction benefits which any buyer, including a domestic buyer such as themselves, would bring, notably the $14m (approximately) needed to bring the farms into full production. The Ministers and the Overseas Investment Office[1] deny those allegations, and all defendants say that the plaintiffs should be denied standing because they have no interest, or none that the law should dignify, in the Ministers' decision.

[4] I am told that the agreement for sale and purchase of the farms remains conditional on Milk NZ getting Ministerial consent on terms satisfactory to it.[2] Milk NZ and the receivers have responsibly agreed that the agreement will remain conditional for a short time to facilitate this proceeding, which has been brought and heard urgently. I am grateful to all counsel for their co-operation.

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1 Which the first defendant administers.

2 The consent included a number of conditions which Milk NZ must meet.

Background

[5] By dint of energy and debt the Crafar family created one of New Zealand's largest dairy farming businesses, comprising 7,892 hectares in 16 North Island farms.[3] Thirteen of them are working dairy farms and the rest drystock units. Their notoriety results in part from poor compliance with environmental obligations, and in part from the Crafars' well-publicised efforts to hold their creditors at bay. In October 2009 the Crafars succumbed to their indebtedness and their farm-owning companies went into receivership. Since then the receivers, who appear here as intervenors, have been trying to sell the farms, which are in poor condition. Their productivity is unsatisfactory because they have been starved of investment.

[6] The first plaintiffs are Maori trusts which own and operate farms in the central North Island, and the second plaintiff is a company directed by Sir Michael Fay and David Richwhite. All plaintiffs are members of a consortium known as the Crafar Farms Independent Purchaser Group ("CFIPG"). CFIPG wants to buy the farms and distribute them among its members. The receivers have instructed Mr Stewart that CFIPG came late to the sale process and has still to commit itself to a formal offer, but he conceded that it has nominated a price, albeit one that the receivers claim to find unworthy of acknowledgement.

[7] Milk NZ is a Hong Kong-registered company and a subsidiary of Shanghai Pengxin Group Co Ltd, a Chinese company which in turn is a subsidiary of Nantong Yingxin Investment Co Ltd, the ultimate parent company. Nantong Yingxin Investment Co is owned as to 99% by Zhaobai Jiang, a most successful businessman. His brother owns the remaining shares. Neither Mr Jiang nor anyone else who may be said to share control of Milk NZ, namely his fellow directors of Shanghai Pengxin Group Co, is a New Zealand citizen, or ordinarily resident here, or intending to reside here indefinitely.

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[3] The material before me also gives the area affected by the application as 5,990 hectares, but that appears to be the area given over to dairying. I have relied on the affidavit of Annalies McClure of the OIO.

[8] The transaction involves a large area of farm land, which is deemed sensitive when more than five hectares is involved, and it exceeds $100m in value. For these reasons Milk NZ may not acquire the farms without first obtaining official consent under the Overseas Investment Act 2005.[4] The Overseas Investment Office ("OIO") decides some applications under delegated powers, but this decision lay with the Ministers of Finance[5] and Land Information.

[9] Milk NZ and the receivers entered an agreement for sale and purchase on 19 November 2010, and Milk NZ sought consent under the Act in April 2011. On 19 January 2012 the OIO submitted a comprehensive recommendation to the Ministers, and on 26 January the Ministers adopted the recommendation by signing it.

The legislative scheme and the issues

[10] The Act's stated purpose is that of acknowledging that it is a privilege for overseas persons to own or control sensitive New Zealand assets by requiring that overseas investment meet criteria for consent and imposing conditions on such investment.[6] The Act sets no limit on overseas investment. Rather, it relevantly insists that farm land first be offered for sale in New Zealand, that overseas owners possess relevant business experience and acumen, and that the acquisition must benefit New Zealand, or some part of it or group of New Zealanders, in certain ways.

[11] Under s 10, an overseas investment in sensitive land requires consent. An overseas person's acquisition of an interest in such land is an overseas investment. Consent must be secured before effect is given to such investment by acquiring the land.[7] It is an offence to acquire sensitive land without consent,[8] although the Act allows a retrospective application.[9]

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4 There are separate but overlapping criteria for the acquisition of business assets and sensitive land. It is common ground that I need only concern myself with those affecting land.
5 The Associate Minister of Finance actually made the decision.
6 Section 3.
7 Section 11 and associated defined terms.
8 Section 42.
9 Section 25(1)(f).

[12] As regulator under the Act, the OIO enforces the legislation and advises the Ministers how applications should be determined.[10] Its duty to advise Ministers is a statutory power,[11] but I accept Mr Hancock's invitation to focus on the Ministers' decision, since they adopted the OIO's recommendation and reasoning. The Ministers' decision is judicially reviewable, although the defendants urge restraint.

[13] Under s 14, the Ministers, in considering whether to grant consent, must have regard to "only the criteria and factors that apply to the relevant category of overseas investment". The Ministers must grant consent if satisfied that all of the relevant criteria in s 16 are met and must otherwise decline it. They may also determine which overseas person is making the overseas investment and which individuals control such overseas person.[12] It is not suggested that the Ministers have failed to identify the relevant people here.

[14] Section 16 contains the criteria for overseas investment in sensitive land. All of them must be satisfied. They begin with what are known as the investor criteria, which include good character and demonstrated financial commitment to the investment. For present purposes the important investor criterion is that the relevant overseas person or, if it is not an individual, the individuals who control it, "collectively" have "business experience and acumen relevant to that overseas investment".[13] I will call this the business skills criterion. It addresses personal attributes of the individuals who are or control the overseas person. The first issue for decision here is whether their experience and acumen must be directly related to dairy farming, as the plaintiffs claim, or whether generic business experience and acumen may suffice, as the defendants respond. I examine that issue at [22] below.

[15] Section 16 also requires that farm land to be acquired by an overseas person must first have been offered for acquisition on the open market to persons who are not overseas persons.[14]

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[10] Section 31.
[11] *McGechan on Procedure* (Brookers, Wellington) at JA3.05.09.
[12] Section 15.
[13] Section 16(1)(a).
[14] The Overseas Investment Regulations 2005 require that the land was available for acquisition on the open market for at least 20 working days after public notice of the sale was given.

[16] Where the relevant overseas person and all of those individuals who control it are not New Zealand citizens or residents or intending to reside indefinitely in New Zealand, the Ministers must also be satisfied, using factors in s 17, that the overseas investment "...will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders)".[15] Where the acquisition involves non-urban land exceeding five hectares, the Ministers must further be satisfied that the benefit will be, or is likely to be, "substantial and identifiable."[16] The second issue for decision is whether the Ministers must assess benefits by reference to a counterfactual (an alternative state of affairs) and, if so, whether that counterfactual is the status quo (a before and after approach) or what will happen if the transaction does not proceed (a with and without approach). I examine that issue at [30] below.

[17] The factors for assessing benefit to New Zealand in this case are found in s 17(2). No other factors may be considered.[17] The Ministers must consider all of them to decide which are relevant to the particular overseas investment and how important they are relative to one another.[18] Subsection 17(2) must be set out in full:

> **17 Factors for assessing benefit of overseas investments in sensitive land**
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> (2) The factors are the following:
>
> (a) whether the overseas investment will, or is likely to, result in—
>
> (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
>
> (ii) the introduction into New Zealand of new technology or business skills; or
>
> (iii) increased export receipts for New Zealand exporters; or
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> (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or

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[15] Sections 14(1)(c) and (d), and 16(1)(e)(ii).
[16] Section 16(1)(e)(iii).
[17] Section 14(1)(a).
[18] Section 17(1).

(v) the introduction into New Zealand of additional investment for development purposes; or

(vi) increased processing in New Zealand of New Zealand's primary products:

(b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:

(i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:

(ii) covenants over the land:

(c) whether there are or will be adequate mechanisms in place for—

(i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and

(ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:

(d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:

(i) conditions for conservation (including maintenance and restoration) and access:

(ii) agreement to support registration of any historic place, historic area, wahi tapu, or wahi tapu area under the Historic Places Act 1993:

(iii) agreement to execute a heritage covenant:

(iv) compliance with existing covenants:

(e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:

(f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:

(g) any other factors set out in regulations.

[18] Additional factors have been specified in Regulation 28:

28 Other factors for assessing benefit of overseas investment in sensitive land

The other factors that are referred to in section 17(2)(g) of the Act for assessing whether an overseas investment in sensitive land will, or is likely to, benefit New Zealand are as follows:

(a) whether the overseas investment will, or is likely to, result in other consequential benefits to New Zealand (whether tangible or intangible benefits (such as, for example, additional investments in New Zealand or sponsorship of community projects)):

(b) whether the relevant overseas person is a key person in a key industry of a country with which New Zealand will, or is likely to, benefit from having improved relations:

(c) whether refusing the application for consent will, or is likely to,—

(i) adversely affect New Zealand's image overseas or its trade or international relations:

(ii) result in New Zealand breaching any of its international obligations:

(d) whether granting the application for consent will, or is likely to, result in the owner of the relevant land undertaking other significant investment in New Zealand:

(e) whether the relevant overseas person has previously undertaken investments that have been, or are, of benefit to New Zealand:

(f) whether the overseas investment will, or is likely to, give effect to or advance a significant Government policy or strategy:

(g) whether the overseas investment will, or is likely to, enhance the ongoing viability of other overseas investments undertaken by the relevant overseas person.

(h) whether the overseas investment will, or is likely to, assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land.

(i) whether New Zealand's economic interests will be adequately promoted by the overseas investment, including, for example, matters such as all or any of the following:

(i) whether New Zealand will become a more reliable supplier of primary products in the future:

(ii) whether New Zealand's ability to supply the global economy with a product that forms an important part of New Zealand's export earnings will be less likely to be controlled by a single overseas person or its associates:

(iii) whether New Zealand's strategic and security interests are or will be enhanced:

(iv) whether New Zealand's key economic capacity is or will be improved:

(j) the extent to which persons who are not overseas persons (New Zealanders) will be, or are likely to be, able to oversee, or participate in, the overseas investment and any relevant overseas person, including, for example, matters such as all or any of the following:

(i) whether there is or will be any requirement that 1 or more New Zealanders must be part of a relevant overseas person's governing body:

(ii) whether a relevant overseas person is or will be incorporated in New Zealand:

(iii) whether a relevant overseas person has or will have its head office or principal place of business in New Zealand:

(iv) whether a relevant overseas person is or will be a party to a listing agreement with NZX Limited or any other registered exchange that operates a securities market in New Zealand:

(v) the extent to which New Zealanders have or will have any partial ownership or controlling stake in the overseas investment or in a relevant overseas person:

(vi) the extent to which ownership or control of the overseas investment or of a relevant overseas person is or will be dispersed amongst a number of non-associated overseas persons.

[19] The Minister of Finance has also exercised his power under s 34 of the Act to direct the OIO about, inter alia, the Government's general policy approach to overseas investment in sensitive assets and the relative importance of criteria or factors. By letter of 8 December 2010 the Minister notified the OIO of two specific concerns about overseas investment in the land-based primary sector: investment in vertically integrated firms which produce and distribute products on a large scale, and undue aggregation of farm land by overseas investors. Where overseas investment involves large areas of farm land, criteria in s 17(2)(a)(i)-(vi) (economic benefits), Reg 28(i) (economic interests) and Reg 28(j) (mitigating factor) are of "high relative importance". The OIO evidently saw this transaction as a large one

under the Ministerial directive; in its recommendation it flagged some of the factors as having high relative importance.

[20] Although the Act allows the Ministers to rely on benefits to a subset of New Zealanders, the s 17 factors do not include economic benefits to the vendor. Presumably for this reason, the OIO made no mention of such benefit in its recommendation. From an economic perspective, the price paid to a domestic vendor benefits the New Zealand economy by releasing capital for investment. Mr Stewart accordingly invited me to treat the price as an added benefit, assuring me that Milk NZ's price is much higher than any other offer. In my opinion the OIO correctly ignored financial benefit to the vendors. The Act finds New Zealand ownership of sensitive assets desirable, and it advances that preference in several ways; for example, by requiring that sensitive land first be offered for sale to non-overseas persons. By excluding financial benefits to the vendor, s 17 ensures that an overseas investor cannot pass the benefit test merely by outbidding others.

[21] I have already noted that an offence is committed when effect is given to an overseas investment that has not received consent. A party may also cancel a transaction where the other party needed consent but did not get it, and the OIO may ask the Court to cancel such transaction.[19] However, a transaction completed without consent is not void for want of consent, nor is it illegal under the Illegal Contracts Act 1970. The Court may also impose civil penalties, again on the OIO's application, for contravening the Act.[20] The Act does not authorise anyone else to intervene in civil proceedings, a point to which I must return when addressing the third issue, the plaintiffs' standing. I now turn to the first issue.

Relevant business experience and acumen

[22] The business skills criterion requires that the individuals who control Milk NZ possess "business experience and acumen relevant to that overseas investment", being the particular investment for which NZ Milk seeks consent.[21]

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[19] Section 29.
[20] Section 48.
[21] Section 16(1)(a).

[23] Mr Galbraith argued that this investment demands knowledge and experience of dairy farming but, on the evidence, none of the relevant individuals knows anything about the dairy industry. Milk NZ has relied upon their generic business expertise, but if that will suffice, any wealthy investor qualifies for any investment. He suggested the Shanghai Pengxin Group is essentially a commercial property developer. It has some investments in other sorts of farming in other countries, counsel conceded, but the Ministers lacked sufficient information to decide that the relevant individuals possess any relevant experience in dairying.[22] Indeed, the Ministers recognised both that specialist dairying skills are needed and that Milk NZ lacks them. They erred, Mr Galbraith argued, by relying for relevant expertise on Landcorp, which Milk NZ has engaged to run the farms.

[24] I record in passing that Milk NZ claimed its business plan includes forming partnerships with local dairy companies to process milk into value-added products and developing markets for New Zealand dairy products in China. The OIO accepted that these are Milk NZ's objectives but it discounted them, recognising only that by improving farm production Milk NZ will add to the quantity of raw milk processed domestically. It advised the Ministers that expertise in dealing with the Chinese market already exists within the dairy industry. It was not suggested before me that any of the relevant individuals qualifies through expertise of that kind.

[25] Mr Hancock argued that the legislature included the business skills criterion to ensure any given overseas investment will indeed benefit the New Zealand economy. Relevant experience and acumen include any skill or attribute that may ensure the investment's success, and the Ministers may decide what skills count. The relevant individuals here are talented businessmen and investors with proven general business acumen, particularly in large scale ventures. Further, they need not possess all relevant skills; it is enough that among them they possess some acumen and experience that is relevant to the investment. So they may engage a professional farm manager such as Landcorp to supply expertise that they lack. Landcorp's involvement was rightly seen as a positive feature of the application.

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[22] *Talleys Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1993 at 17-18 and 21.

[26] I generally accept Mr Hancock's submissions. Landcorp's engagement confirms that the relevant individuals will not manage the farms themselves, and the evidence points to them having no dairy farming experience, but that matters only if the Act insists that they possess such expertise. It insists only that they collectively possess business acumen and experience relevant to the particular investment, which comprises not one but 16 farms. The evidence tends to show that Mr Jiang, who is an engineer by training, and his colleagues are not mere passive investors but entrepreneurs who built a major business from nothing. That suggests they are astute and experienced managers and investors. The Ministers might conclude that their skills, although not specific to dairy farming or even agriculture, will help to ensure the investment delivers the promised benefits.

[27] Mr Galbraith's argument that the Act demands more specific expertise ultimately rested on the proposition that overseas ownership of farm land is a privilege, extended only to overseas persons and individuals who meet the Act's criteria. The proposition is correct. It precludes investment by an individual overseas investor who does not himself or herself possess relevant business experience and acumen, in addition to good character. Not every necessary skill can be outsourced.

[28] But it does not follow that the Ministers must require narrowly focused business skills, for two reasons. First, acumen and experience must be relevant to the particular investment, which indicates that the business skills criterion aims to ensure the investment delivers its promised benefits to New Zealand. That being so, a wide range of business skills may assume relevance, depending on the nature and scale of the particular investment. Second, the Act speaks of "business experience and acumen" that is "relevant to" the investment. That language, broad and flexible, allows the Ministers to require different or more or less specific expertise in any given case. So, by way of illustration only, the Ministers might insist on practical experience in a small-scale farm purchase where the overseas person brought no other significant skill.

[29] The first ground of review fails.

Measuring the benefits of an overseas investment

[30] The Act requires that the Ministers be satisfied, using the s 17 factors, that the overseas investment will benefit New Zealand, or is likely to do so.

[31] Mr Galbraith argued that when deciding whether the investment will cause a given benefit the Ministers must assess the application against a specific counterfactual: what will happen without the overseas investment. Sometimes nothing will change in that scenario. The land may remain in its present state. In those cases the Ministers may properly use the status quo as the counterfactual, because it is a reasonable proxy for what will happen without the overseas investment. But the Crafar farms will be sold, whether to an overseas buyer or New Zealand interests, and the counterfactual must recognise that any new owner will deliver the same economic benefits - capital investment in the farms and improved production - that Milk NZ promises. So, Mr Galbraith argued, the Ministers erred by attributing to the overseas investment all the benefits of bringing the farms up to a proper standard.

[32] Mr Hancock acknowledged the logical force of the argument that the Ministers must employ a counterfactual to assess benefits caused by the investment. Indeed, I observe that that the OIO itself used a counterfactual. It compared Milk NZ's claimed economic benefits under s 17(2)(a) to the status quo, the current state of the farms. The factors for which the OIO did so expressly are whether the investment would create new jobs, increase export receipts, improve efficiency, introduce capital into New Zealand for development purposes, and increase milk processing. The OIO took into account almost all the $14m (approximately) that Milk NZ will spend to ensure the farms reach their full capacity, to ensure environmental compliance, and to ensure employees enjoy good infrastructure and accommodation. In all these respects, the OIO emphasised, the farms are presently substandard. Only investment that the OIO characterised as maintenance or repair of existing assets, an unquantified but plainly modest amount, was discounted.

[33] A qualifying overseas investment must be likely to benefit New Zealand. I accept that it may be said to do so only if there exists a causal connection between

investment and benefit. The benefit must take the form of one or more of the s 17 factors, and the Ministers must not only identify such factors but also determine their relative importance. The causal connection between investment and most of the permissible benefits must be assessed by reference to some other state of affairs – that is, a counterfactual. Such requirement is explicit in the s 17(2)(a) economic factors, notably whether the investment will result in "increased" processing or "added" competition or "additional" overseas investment, or "the creation of new job opportunities" or retention of existing jobs "that would or might otherwise be lost". The real issue is whether the economic counterfactual is the state of affairs before the overseas investment or the likely state of affairs if the investment does not proceed.

[34] There is a sense in which both alternatives are available. Take greater productivity, a factor under s 17(2)(a)(iv). Suppose that if the application fails, Landcorp (which as it happens was once a bidder in its own right) will buy the farms and adopt Milk NZ's plans for improving production. When the application is examined against that scenario, two points emerge. The first is that the money that Milk NZ will pay to bring the farms into full production represents additional capital introduced into New Zealand and so may be counted as a factor under another provision, s 17(2)(a)(v). The second is that the farms' production will increase whether or not the overseas investment is made. Milk NZ's investment may still be said to cause the production increase, but only in the immediate sense that Milk NZ will pay for it. Will that do?

[35] In my opinion, the statute contemplates for several reasons that the economic factors in s 17(2)(a) may be accounted benefits only if they will not or might not happen absent the overseas investment. First, it says so expressly in s 17(2)(a)(i), by inquiring whether the overseas investment is likely to result in the retention of existing jobs that would or might otherwise be lost. This is the only s 17(2)(a) factor that speaks of retaining something. The work assigned to the phrase "that would or might otherwise be lost" is that of insisting the status quo will not serve as the counterfactual. Other factors do not specify that the benefit must be something that would not otherwise happen, but the drafter appears to have considered such language redundant, for each such benefit speaks of something new, something that the investment will introduce or add. If the status quo might serve as the

counterfactual for economic benefits, I can see no reason why the drafter singled out retention of jobs for different treatment.

[36] The drafting of the non-economic factors in s 17(2)(b)-(e) tends to support this analysis, because it expressly allows the status quo to be used as a counterfactual and, at the same time, attaches less significance to causation. While s 17(2)(a) inquires whether the overseas investment "will, or is likely to, result in" certain economic benefits, ss 17(2)(b)-(e) inquire whether "there are or will be" adequate mechanisms for various non-economic purposes, such as protecting heritage sites. So, to use that example, the overseas person may claim a benefit if heritage sites are already protected and may claim a (presumably larger) benefit if they are not and the overseas person will protect them. (Put another way, the legislative policy is that for these non-economic factors the status quo may serve as a benefit or a counterfactual, depending on the circumstances.) Subsection (f), dealing with whether riverbeds and the like have been offered to the Crown in accordance with regulations, assumes that a New Zealand buyer would not provide the same benefit for the good reason that only an overseas investor must by regulation offer such property to the Crown.[23] The criteria listed in reg 28 deal, for the most part, with benefits that only an overseas buyer could provide or what may be loosely described as strategic considerations, so they do not require a counterfactual analysis.

[37] Second, the statute's perspective is forward-looking, as the s 17 factors collectively demonstrate. The OIO must assess what will happen if the overseas investment is made (the factual). If it is to isolate economic benefits attributable to the overseas investment, the counterfactual must similarly be forward-looking, requiring that the OIO ask what will happen if the investment is not made.

[38] Third, causation occupies a central place in the statutory scheme. The legislature intended to grant the privilege of overseas ownership of farm land only where the overseas investment is likely to benefit New Zealand. It emphasised that objective in s 17(2)(a), which inquires whether the overseas investment will "result in" certain economic benefits. The Ministers could scarcely serve the legislative objective if when assessing a given economic benefit they were to ignore clear

[23] Overseas Investment Regulations 2005, regs 12-27.

evidence that the benefit will accrue anyway, should the land remain in (or, where another overseas investor already owns it, return to) New Zealand ownership. Further, farm land is a special case. The benefits of overseas investment must be identifiable and substantial. If a given benefit will happen anyway, it cannot easily be described as a substantial consequence of the overseas investment.

[39] Mr Hancock characterised a 'with and without' counterfactual as unworkable, saying that it would force the OIO to commission complex analyses of alternative scenarios, even to evaluate competing offers in a case such as this. To some extent this submission gained momentum from Mr Galbraith's reliance on the Commerce Commission's business acquisition guidelines, which employ a 'with and without' counterfactual and insist that benefits and detriments be quantified so far as possible.[24] But I do not accept that so disciplined an analysis is demanded here. That is the only relevant point to be drawn from *Talleys Fisheries v Cullen*, in which Ronald Young J held that the less rigorous "national interest" criterion in s 57(4)(b) of the Fisheries Act 1996 did not demand a counterfactual analysis.[25] The Judge recognised relevantly that not all of the criteria in that legislation were susceptible to measurement. That is equally true of the Overseas Investment Act. The Act does not require that benefits be quantified, however, only that the Ministers be satisfied, for farm land, that substantial and identifiable benefits are likely to flow from the overseas investment. It is a matter of inquiring, for each claimed economic benefit, whether it is likely to happen absent the overseas investment and is substantial and identifiable. The weighing of economic benefits among themselves and against non-economic benefits requires not calculation but Ministerial judgement. I observe too that the OIO already assesses future benefits against a counterfactual, the status quo. I am not persuaded that a 'with and without' counterfactual is unworkable.

[40] I also accept Mr Galbraith's submission that in practice the status quo may sometimes serve as the counterfactual. That will be so whenever it seems likely that the status quo will remain if the overseas investment is not made.

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[24] Commerce Commission *Guidelines to the Analysis of Public Benefits and Detriments* (October 1999).

[25] *Talleys Fisheries Ltd v Cullen* HC Wellington CP 287/00 31 January 2002.

[41] Mr Hancock also predicted that a 'with and without' counterfactual will considerably tighten New Zealand's overseas investment regime. I explored this point with counsel, inconclusively. It certainly matters in this case, which involves a failed farming business. If it were to adopt such a counterfactual, the OIO must discount the major economic benefits that it relied on, although some (notably a training facility for staff) would presumably survive. Any future buyer of substandard farms may be similarly affected. Some overseas investors evidently want such properties. But counsel could tell me nothing about the broader pattern of overseas investments. They may typically involve fully developed properties. What can be said is that investment capital introduced into New Zealand counts as an economic benefit in itself under s 17(2)(a)(v), and overseas investors may point to other factors, such as those in ss 17(2)(b)-(f) and reg 28, that a New Zealand investor is unlikely to match.

[42] The Crafar farms will be sold to someone. The status quo may serve as the counterfactual under s 17(2)(a) only if the Ministers think it likely that in the hands of another owner, or owners, the farms will remain in their present state. The OIO did not approach its analysis in that way. One opponent pointed out that an average New Zealand farmer would adopt similar development plans. The OIO did not disagree, nor did it dispute that a non-overseas buyer may acquire the farms should the Milk NZ purchase fail. Rather, it advised the Ministers that the Act does not require an overseas investor to do more than a New Zealand investor would do, but asks only whether the investment is likely to benefit New Zealand. In short, it insisted on a 'before and after' counterfactual for the economic factors, treating as irrelevant the likely behaviour of any alternative purchaser.

[43] Finally, causation is not a matter of Ministerial discretion under the 2005 Act. Although the Ministers enjoy much freedom of judgement when assessing benefits, the statutory criteria against which the benefits must be assessed are strict.

[44] For these reasons I conclude that the Ministers misdirected themselves in law by adopting the OIO's 'before and after' approach to the economic factors in s 17(2)(a). The statute requires that they assess those factors by assessing what

would happen 'with and without' the overseas investment that they are being asked to approve.

[45] The second ground of review is made out.

Standing

[46] The first to third defendants pleaded that the plaintiffs should be denied standing, but Mr Hancock was properly circumspect in argument. He acknowledged that groups having a particular interest in an issue of general public importance sometimes secure standing.[26] Indeed, but for the plaintiffs' private interest in buying the farms he might not have put standing in issue. Their private interest, he submitted, detracts from their claim to standing, for the Act affords third parties no role in its processes.

[47] Mr Galbraith argued that the plaintiffs possess both a particular interest in Government policy about overseas investment in farm land and a private interest in the farms. They have already been heard; CFIPG's submission was summarised in the OIO's advice to the Ministers. It is too late to deny them a hearing now. There exists a public interest in ensuring that Ministers and officials administer the Act correctly, and that interest will not be served unless a third party such as CFIPG may challenge the Ministers' decision.

[48] My attention was drawn to only one case dealing with standing in this context. In *Jeffries v Attorney-General*, Ronald Young J reviewed the issue in some detail, and held:[27]

> Neither the appellant nor indeed any member of the public has any role in the functioning of the Commission unless they are directly involved in an application for overseas investment consent. Members of the public have no role in a process which considers and either grants or rejects an overseas investment application, or once such an application is granted, the monitoring and enforcement of the regime. Given the power of Government direction, there is a high policy content in the operation of the Act. The

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[26] *Moxon v Casino Control Authority* above n 26 HC Hamilton M324/99 24 May 2000 at [103], per Fisher J, and *Society for the Protection of Auckland City and Waterfront v Auckland City Council* [2001] NZRMA 209 at [28].

[27] *Jeffries v Attorney-General* HC Wellington CIV2006-485-2161 20 May 2008 at [115].

> plaintiff here has no financial, or any other, connection with the Powells other than acting as counsel for a firm of designers in dispute with the Powells. The plaintiff is not a member of a society or organisation which has, as its focus, concern with how the overseas investment regime in New Zealand operates. The litigation giving Mr Jeffries his only connection with the Powells commenced some time after the Powells obtained their overseas investment consent for the purchase of the farm.

As that passage indicates, the Judge was speaking of the Overseas Investment Act 1973 and the Commission appointed under that Act. However, his comments are equally true of the 2005 Act.

[49] I also agree with what Ronald Young J said in *Jeffries* about the Court's approach to standing:[28]

> Issues of standing only rarely arise today in judicial review proceedings. The Courts have significantly liberalised the standing rules in such proceedings recognising that sufficient interest in the matter to which the proceeding relates will typically be sufficient. This "test" has been interpreted widely. Generally the Courts have been more interested in dealing with the merits of the application than in narrowly limiting standing.

[50] The plaintiff in *Jeffries* was denied standing, but he lacked any private interest in the overseas investment, which concerned a farm in the Marlborough Sounds. The overseas investors had promised to establish a luxury brand for New Zealand farm and tourism products, developing the property to that end. The plaintiff's complaint concerned alleged decisions to vary a condition and to cease monitoring the overseas investors' compliance with conditions. He claimed to represent the public interest, but he was not a member of some organisation focused upon the overseas investment regime. His complaint raised no broad policy issue, and it was made some time after the transaction. The Court found that the claim lacked merit, for the specific conditions imposed had generally been met.

[51] This case differs. There is an undoubted public interest in overseas investment generally and in the administration of the legislation. It has been highlighted in this case. CFIPG wants to buy the farms, but it shares the public interest too. It may serve the public interest by establishing what the legislation means and holding those who administer it to account. It was heard by the OIO;

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[28] At [108]

indeed, it appears to have been treated as the principal opponent.[29] Finally, its private interest in the Crafar farms also distinguishes it from other members of the public.[30]

[52] The decision is not so straightforward, however. The plaintiffs want to stop the Milk NZ transaction, but they cannot sue to cancel it under the Act. If the consent is set aside they may achieve their objective by indirect means. Milk NZ, which apparently means to prove itself a good corporate resident of New Zealand, might abandon the transaction rather than complete it without consent. Although counsel did not take this point expressly, it is arguable that too liberal an approach to standing might encourage strategic litigation by public interest groups or competing bidders, so raising barriers to overseas investment.

[53] But the Ministers' decision is judicially reviewable and the case must be examined on its merits. The plaintiffs have a proper interest. They have not tried to delay this litigation or to push the boundaries of judicial review. On the contrary, they have strictly confined themselves to two questions of law and done everything possible to get the case heard urgently. The transaction remains live and, for reasons given below, this litigation need not cause it to fail.

[54] I find that the plaintiffs enjoy standing to bring this application.

Relief?

[55] Defendants' counsel pressed me to deny relief. Mr Hancock argued that any error was narrow in scope and technical in nature. Even if the wrong counterfactual was used, so significant was the benefit to New Zealand that this overseas investment would probably better anything offered by a hypothetical domestic buyer.

[56] Relief is discretionary, but the starting point is that it normally follows a reviewable error.[31]

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[29] A summary of its submission is attached to the recommendation as a separate appendix.

[30] *Moxon v Casino Control Authority* at [103]; overturned on other grounds in *Riverside Casino v Moxon* [2001] 2 NZLR 78.

[31] *Air Nelson v Minister of Transport* [2008] NZAR 139.

[57] The error was not a mere technicality. No one suggested that the farms are likely to remain in their present unsatisfactory state, whoever purchases them. Any solvent purchaser can be expected to bring their production up to its potential. That being so, the economic benefits caused by the overseas investment were materially overstated in the OIO's recommendation.

[58] For that reason, I cannot be sure that the Ministers would have consented in any event. It is true that s 17(2) lists a number of factors that may be relevant under s 16, including the economic factors in subsection (2)(a). The economic factors must be considered, but they need not prove relevant in any given case, and if relevant they need not dominate the Ministers' decision. The Milk NZ application features numerous non-economic benefits which no New Zealand buyer must offer. They seem significant. For example, riverbeds will be offered to the Crown along with an historic pa site which the Office of Treaty Settlements wants to purchase, and another pa site will be protected by covenant. Milk NZ will create or facilitate public walking access to the Te Araroa Trail and the Taharua River and an unlogged podocarp forest, and it will commission extensive habitat protection and riparian planting. The Minister for Land Information, the Hon Maurice Williamson, has sworn an affidavit in which he explains that these proposals particularly influenced him. I accept that evidence. But the Minister does not say that his decision would have been the same without the economic factors. The OIO's recommendation emphasised those factors and attributed high relative importance to them. The Ministers adopted the recommendation. They listed the economic factors in a press release announcing the decision. To predict what they would have decided had the economic factors been assessed differently would be tantamount to substituting my opinion for theirs.

[59] Mr Hancock emphasised that the decision involves issues of high policy, including New Zealand's international standing and economic policy. He submitted that the investment may promote an important Government policy by demonstrating compliance with the New Zealand-China Free Trade Agreement and improving reciprocal investment flows. I observe that the OIO advised the Ministers that the Act is an agreed exception to a principle in the Free Trade Agreement that overseas and domestic investors will be treated alike. The OIO believed too that a well-

reasoned decision to decline consent would not likely harm New Zealand's image overseas. That said, these are indeed matters of high policy, firmly within the province of the executive. The application before me, however, claims that the Ministers were wrong in New Zealand law. If they were wrong, the Court will not make the decision for them. At most, it will direct that they reconsider.

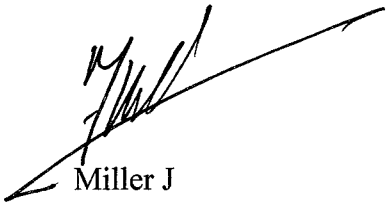
[60] By setting the consent aside the Court puts the Milk NZ transaction at some risk. The parties to the transaction have agreed to delay pending my decision but, based on what I have been told about the agreement for sale and purchase, either of them could respond to this judgment by cancelling it. The receivers are not parties to this litigation, although I heard them at their request. Other non-parties, in the form of the Crafars' financiers and perhaps other creditors, are affected. These considerations carry weight. But there is no evidence that the transaction will fail if the decision is returned to the Ministers for reconsideration, and the opportunity was there to adduce the evidence. If Milk NZ's price is much better than any competitor's, as Mr Stewart would have me accept, then the receivers face an incentive to wait so long as they think Milk NZ enjoys reasonable prospects of success. No one suggested that reconsideration need take long. On the face of it, the OIO may simply recalibrate its existing recommendation. Finally, the error matters enough on the facts to justify taking such risk as there is.

Decision

[61] The application for review is granted. The Ministers' consent to the overseas investment to be made by Milk NZ in the Crafar farms is set aside. I direct that the Ministers reconsider Milk NZ's application.

[62] The plaintiffs will have one set of costs on a 3B basis with provision for two counsel and disbursements as fixed by the Registrar. Memoranda may be filed if

counsel cannot reach agreement.



Miller J

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