IN THE SUPREME COURT OF NEW ZEALAND

SC 150/2016
[2017] NZSC 197

BETWEEN	FONTERRA CO-OPERATIVE GROUP LIMITED Appellant
AND	MCINTYRE AND WILLIAMSON PARTNERSHIP AND OTHERS Respondents

Hearing:	27 and 28 July 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J E Hodder QC, D T Street and H K Wham for Appellant D J Goddard QC, B M Russell and K M Kendrick for Respondents
Judgment:	21 December 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondents costs of $30,000 and reasonable disbursements to be determined by the Registrar if necessary. We allow for second counsel.

REASONS

O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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The appeal

[1] The appellant, Fonterra Co-operative Group Ltd, is a co-operative and a major processor of milk. Consistently with its status as a co-operative, it acquires milk from dairy farmers who own shares in Fonterra. The number of shares held corresponds to the volume of milk the farmer supplies, the ratio being one share per kilogram of milk solids (kgMS) supplied. Such supply is referred to as share-backed supply. Fonterra also acquires some milk on contract. Under its constitution, it is permitted to acquire milk on contract from suppliers who hold a stipulated minimum number of shares. At the relevant time, this was 1,000 shares. This number of shares would provide backing for supply of 1,000 kgMS.[1]

[2] The respondents are dairy farmers in South Canterbury and North Otago. In the 2011–2012 dairy season they were all suppliers of raw milk to New Zealand

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[1] To put this into context, Fonterra refers to its "then issued share volume of 1,501,784,000 shares". The respondents' supply to New Zealand Dairies Ltd (NZDL) for the 2011–2012 season was in the order of 10,600,000 kgMS.

Dairies Ltd (NZDL) which owned a plant at Studholme, South Canterbury. On 17 May 2012 NZDL went into receivership. This created two problems for the dairy farmers (including the respondents) who had been supplying NZDL: first, they were owed approximately $20 million for milk already supplied (money referred to as "retros"); and, second, they needed someone to process their milk for the new season which was to start on 1 June 2012.

[3] As it turned out, Fonterra acquired the Studholme plant at a price and pursuant to arrangements which ensured that the respondents were paid their retros. As well, Fonterra agreed to take the respondents' milk for the following and subsequent seasons but this was on terms now challenged by the respondents. In issue is: (a) a reduced contract price for the supply of milk compared to the standard contract; (b) the inability to share up in the first season;[2] and (c) Fonterra not purchasing the respondents' milk vats.[3]

[4] The respondents' challenge to these terms relies on s 106(1) of the Dairy Industry Restructuring Act 2001 (the Act). Section 106(1) provides:[4]

> **106 No discrimination between suppliers**
>
> (1) [Fonterra] must ensure that the terms of supply that apply to a new entrant—
>
> (a) are the same as the terms that apply to a shareholding farmer in the same circumstances; or
>
> (b) differ from the terms that apply to a shareholding farmer in different circumstances only to reflect the different circumstances.

[5] Fonterra's position is that the respondents were not new entrants in terms of s 106(1). Rather, they were contract suppliers and their nominal shareholdings of 1,000 shares did not alter the position. Fonterra's case is thus that s 106 does not impose restrictions on the way in which Fonterra deals with contract suppliers.

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2 "Share up" means moving to supply milk on a fully share-backed basis.

3 Contrary to Fonterra's usual practice: see below at [14](b)(iii).

4 Fonterra is referred to in the Dairy Industry Restructuring Act 2001 as "new co-op". For ease of understanding we will insert Fonterra in square brackets.

[6] The respondents maintain that they supplied milk to Fonterra in the 2012–2013 season as "new entrants" for the purposes of s 106 of the Act and that they are entitled to compensation for the less favourable terms of supply applicable to them than those which applied to shareholding farmers in the same circumstances. They were successful on liability[5] before Muir J in the High Court[6] and Fonterra's appeal against that judgment was dismissed by the Court of Appeal.[7] Fonterra now appeals with leave.[8]

[7] Although the High Court and Court of Appeal were required to deal with other areas of dispute between the parties,[9] the issues for us are whether the respondents are new entrants to whom s 106(1) applies and, if so, whether Fonterra was in breach of s 106(1).

The organisation of the dairy industry

[8] Fonterra is the principal milk processor in New Zealand. It was formed in 2001 as a result of the merger of a number of entities including the New Zealand Co-operative Dairy Company Ltd, Kiwi Co-operative Dairies Ltd and the New Zealand Dairy Board.[10] This merger was sanctioned by the Act. Fonterra's market share and associated ownership of processing infrastructure means that it is effectively a monopsonist. One of the purposes of the Act is to regulate the terms upon which it deals with milk suppliers.[11]

[9] Under the Act, Fonterra is required to operate on an "open entry/open exit" basis. This means, amongst other things, that Fonterra must generally accept milk

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5 Questions of liability and quantum were split by consent in the High Court. Thus the High Court judgment did not deal with quantum.

6 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 [*Fonterra* (HC)].

7 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 (Randerson, Winkelmann and Brown JJ) [*Fonterra* (CA)].

8 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2017] NZSC 47 [leave judgment].

9 Namely a factual dispute as to the advice given by Fonterra and issues as to misleading and deceptive conduct under the Fair Trading Act 1986 and misrepresentation under the now repealed and re-enacted Contractual Remedies Act 1979 (see Contracts and Commercial Law Act 2017, s 345 and sub-pt 3 of pt 2).

10 Section 4(a) of the Dairy Industry Restructuring Act refers also to the Tatua Co-operative Dairy Company Ltd, Westland Co-operative Dairy Co Ltd and Fonterra Co-operative Group Ltd.

11 Section 4(f).

supplied by dairy farmers willing to acquire or hold shares commensurate with the proposed supply and allow such farmers to leave Fonterra on terms which correspond to those on offer to farmers joining at the same time. What is material for this case are the statutory mechanisms which provide for open entry and open exit.

[10] A dairy season commences on 1 June. A farmer is entitled to commence or increase supply as a share-backed farmer for the next season by applying to do so between the immediately preceding 15 December and 28 February.[12] Fonterra may, but is not required, to accept late applications and, in practice, Fonterra has generally been willing to accept applications as late as September in the season in which supply is to commence or increase.

[11] In May and June 2012, Fonterra's offer to the respondents was that it was prepared to accept contract supply only pursuant to its standard Growth Contract. In particular, a new supplier at the time was required to purchase 1,000 shares immediately so that the first 1,000 kgMS would be share-backed. The supplier was required to complete sharing up by the sixth season covered by the contract and was bound to supply Fonterra over the duration of the contract.

[12] The evidence of Steve Murphy, previously the General Manager and subsequently Director of Milk Supply at Fonterra was that the "main purpose of the Growth Contract" was "to make it easier for new milk suppliers" to join the co-operative:

> … by removing the need for those suppliers to meet the Share Standard on day one (i.e. to purchase Fonterra shares equivalent to the amount of milk solids supplied). This can be a significant financial cost. Instead, under the standard Growth Contract, suppliers can gradually acquire the shares necessary to meet the Share Standard.

The facts

[13] As we have noted, NZDL went into receivership in May 2012. That was after the end of the 15 December–28 February application period. This meant it was too late for the respondents to exercise the rights under s 73 of the Act to share up in

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[12] Section 75(2) provides that this is the "minimum" application period. Section 75(1) allows Fonterra to set an application period longer than this minimum period.

respect of the milk they intended to supply for the 2012–2013 season. As we discuss, s 73 provides that Fonterra must accept applications to become a shareholding farmer made within the application period.[13]

[14] On the approach we take, the details of the subsequent negotiations between Fonterra, the receivers of NZDL and the respondents are of no moment. What matters is that:

(a) Fonterra purchased the Studholme plant on terms which enabled payment of all retros; and

(b) the respondents entered into Milk Supply Agreements on terms which differed from those offered to other suppliers in the following respects:

(i) under Fonterra's standard contract, the contract price for the milk to be supplied in the 2012–2013 was five cents per kgMS less than the standard Fonterra milk price (as paid for share-backed supply). In contradistinction, the contract price for that season offered to the respondents was ten cents per kgMS less than the standard price;

(ii) the respondents would not be entitled to share up for the 2012–2013 season; and

(iii) Fonterra would have no obligation to purchase the respondents' milk vats, contrary to its usual practice.

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13 See below at [24]–[25].

[15] The other factor we should mention at this point is that Fonterra was at the relevant time preparing for the introduction of a Trading Among Farmers scheme, known as TAF. As Muir J said, that scheme:[14]

> … allowed the creation of a private market in which shareholding farmers could trade Fonterra shares among themselves. It was generally anticipated that the introduction of the scheme would result in an increase in Fonterra's share price … . This expectation was borne out in reality when the scheme was introduced.

[16] Before turning to the issues on the appeal – that is, whether s 106(1) of the Act applied and, if so, whether Fonterra's actions were in breach of s 106(1) – we first set out the relevant provisions from Fonterra's constitution and the statutory scheme and then outline the judgments in the High Court and the Court of Appeal.

Fonterra's constitution

[17] Fonterra's constitution defines "Contract Supply" as meaning:[15]

> [T]he supply of Milk to the Company by a Shareholder pursuant to clause 3.4 in a Season without the Milksolids obtainable from that Milk being taken into account for the purposes of the Share Standard for that Season.

[18] Other provisions of the constitution which are relevant are:

> **2. SHAREHOLDERS**
>
> **2.1 Applications for supply:** Any person that intends to commence the supply of Milk to the Company shall give written notice of that intention to the Company and complete such application in the form and by the time the Board may from time to time determine in a manner consistent with any applicable enactment.
>
> **2.2 Irrevocable application:** The supply by any person of Milk to the Company is an irrevocable application by that person to become a Shareholder and to hold the number of Co-Operative Shares from time to time required … .
>
> **2.3 Board may accept application:** The Board may in its absolute discretion decide:

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[14] *Fonterra* (HC), above n 6, at [36]. On the introduction of TAF Fonterra adopted a new constitution and amendments were made to the Dairy Industry Restructuring Act by the Dairy Industry Restructuring Amendment Act 2012, none of which are material to the present case.

[15] We note that this was not part of the constitution approved by the Dairy Industry Restructuring Act: see below at [18].

(a) whether or not to accept an application by a person to become a Shareholder made in accordance with clause 2.2 or any application procedure which the Board may from time to time determine; and

(b) whether or not to accept the supply of Milk from any person, on such terms and conditions as the Board thinks fit, without requiring that person to become a Shareholder in respect of that supply.

…

3.4 Contract Supply: Without limiting any other provision of this Constitution, the Board may, at its discretion and on such terms as it sees fit, permit a Shareholder to supply Milk to the Company in a Season on Contract Supply. … Without limiting the terms which the Board may set Contract Supply … , the Board:

(a) shall set, or determine the methodology for setting, the amount to be paid to a Shareholder for Milk supplied to the Company on Contract Supply; and

(b) may require a Shareholder to hold a minimum number of Co-operative Shares continuously throughout the terms of any arrangements for the supply of Milk to the Company by that Shareholder on Contract Supply;

Clauses 2.1, 2.2 and 2.3 were specifically approved under s 11(1) of the Act.[16] These clauses address applications in respect of both share-backed supply and contract supply and do so in a generic way and, for this reason, rather awkwardly.

[19] Also of contextual interest is cl 2.5 which provides:

2.5 Separate designation for suppliers from each Farm: The supply of Milk to the Company from each Farm shall be treated as a supply from a separate Shareholder, and the Company shall take appropriate steps to ensure the Co-operative shares relating to the supply from each such Farm are registered separately in the Share Register and other applicable records of the Company.

The key provisions in the Act

The statutory definitions

[16] Section 11 was later repealed by s 18 of the Dairy Industry Restructuring Amendment Act.

[20] The Act defines "new entrant" as meaning "a dairy farmer who is not a shareholding farmer who applies to become a shareholding farmer under section 73".[17]

[21] "Shareholding farmer" means "a dairy farmer who is registered as the holder of co-operative shares".[18] A "co-operative share" is defined as:[19]

> … a share in [Fonterra] issued, or to be issued,—
>
> (a) from the [Fonterra] amalgamation; or
>
> (b) in relation to the supply of milk to [Fonterra] by new entrants or shareholding farmers

[22] The 1,000 shares which the respondents each acquired were "co-operative shares" (the constitution makes it clear that contract suppliers must hold such shares). The language of the definitions of "shareholding farmer" and "co-operative share" suggests that: (a) their ownership of such shares means that they are "shareholding farmers"; and (b) their contract supply is aptly described as "the supply of milk to [Fonterra] by new entrants or shareholder farmers". This is a textual consideration in favour of the respondents' argument and, as we will see, it was relied on by both Muir J in the High Court and the Court of Appeal.[20] That text must be considered alongside purpose and it is to the relevant purposes of the Act that we now turn.

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17 Dairy Industry Restructuring Act, s 5(1).
18 Section 5(1).
19 Section 5(1).
20 See below at [35]–[36].

Subpart 5 of Part 2 of the Act: statement of purposes

[23] Primarily relevant for present purposes is sub-pt 5 of pt 2 of the Act (sub-pt 5). The purpose of sub-pt 5 is defined in s 70 as being "to promote the efficient operation of dairy markets in New Zealand". The relevant principles are stipulated by s 71 in this way:

> **71 Statement of principles**
>
> The intention of this subpart is to promote the following principles:
>
> (a) independent processors must be able to obtain raw milk, and other dairy goods and services, necessary for them to compete in dairy markets:
>
> (b) [Fonterra] must accept applications by new entrants and shareholding farmers to supply it with milk, as shareholding farmers:
>
> (c) [Fonterra] must not discriminate between new entrants and shareholding farmers whose circumstances are the same:
>
> (d) shareholding farmers who withdraw from [Fonterra], and cease or reduce supply, must receive their capital in [Fonterra] without unreasonable delay:
>
> (e) the amount per unit of milk production paid, at a time, to [Fonterra] to become a shareholding farmer must be the same as the amount per unit of milk production received, at the same time, from [Fonterra] by a shareholding farmer who withdraws from [Fonterra].

Applications under s 73

[24] Section 73 relevantly provides:

> **73 [Fonterra] must accept application**
>
> (1) [Fonterra] must accept an application to become a shareholding farmer that is made by a new entrant in an application period.
>
> (2) [Fonterra] must accept an application to increase the volume of milk supplied as a shareholding farmer to [Fonterra] that is made by a shareholding farmer in an application period.
>
> …

[25] Section 74(1) states that where an application is made within the application period, Fonterra "must accept the milk to which the application relates from the

beginning of the season following that application period".[21] Despite s 74(1), Fonterra "is not required to accept milk if the shareholding farmer fails to satisfy the applicable terms of supply".[22]

[26] Under the Act as it was enacted, Fonterra was required to set prices for co-operative shares,[23] peak notes[24] and standards as to the quantity of shares and peak notes required to be held.[25] The new entrant, or shareholding farmer wishing to increase supply, was required to acquire co-operative shares and peak notes to the extent required by the standards set by Fonterra. Fonterra was entitled to require the payment of a deposit and the balance had to be paid before 1 June.[26] The result of the process is that the new entrant or farmer increasing supply is necessarily fully shared up by 1 June for the milk encompassed by the application and to be supplied in the season commencing on that day.

[27] We note, largely for completeness, that ss 86–93 provide for Fonterra to issue a constraint notice for geographical areas if, in its "reasonable opinion, processing the expected increase in the volume of milk supplied … from that area in the next season cannot reasonably be managed".[27] Such a notice enables Fonterra to defer acceptance of milk to which new applications under s 73 apply.

Late applications

[28] The purpose of the application period is to ensure that Fonterra has time to put in place whatever processing infrastructure is required for the milk which it must accept. Where Fonterra has that infrastructure already in place, there will usually be no practical reason for not accepting a late application and, as we have noted, in practice, Fonterra was prepared to accept applications as late as September in the new

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21 Under s 75 of the Dairy Industry Restructuring Act, Fonterra must set an application period each season. Section 75(1) provides that the minimum period "must span the dates 15 December in a year to 28 February in the next year".
22 Dairy Industry Restructuring Act, s 74(2).
23 Section 77.
24 Section 78. "Peak notes" are defined in s 5(1).
25 Section 79.
26 Sections 84 and 85.
27 Section 86(1).

season. The ability to accept late applications is provided for by s 74(3), which provides:

> [Fonterra] may, in its discretion, accept an application made outside an application period from a dairy farmer, including a shareholding farmer, to supply milk as a shareholding farmer.

[29] Section 82 sets out various requirements applicable to co-operative shares issued in response to a late application under s 74(3).[28]

Section 106

[30] Despite the repetition, we think it best to set out s 106(1) again:

> **106 No discrimination between suppliers**
>
> (1) [Fonterra] must ensure that the terms of supply that apply to a new entrant—
>
> (a) are the same as the terms that apply to a shareholding farmer in the same circumstances; or
>
> (b) differ from the terms that apply to a shareholding farmer in different circumstances only to reflect the different circumstances.

[31] Section 107, which we discuss in more detail later, deals with the regulation of supply contracts.[29]

The legislative history

[32] The explanatory note to the Bill as introduced comments on the clauses corresponding to what are now are now ss 73 and 106.[30] The explanation of the clause which became s 73 was that it "requires [Fonterra] to accept applications to supply milk as a shareholding farmer to [Fonterra]".[31] And the explanation for the clause corresponding to s 106 was that it "requires [Fonterra] to ensure that the terms of supply for new entrants are the same as those for existing shareholders in the same circumstances".[32]

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28 See below [48]–[49].
29 See below at [45]–[46].
30 Dairy Industry Restructuring Bill 2001 (139-1) (explanatory note).
31 At 12.
32 At 13.

[33] The Select Committee considering the Bill devoted considerable attention to the mechanism by which fair value for the shares of Fonterra would be arrived at. In its report the Select Committee noted that this question arose in the context of what it described as:[33]

> The cornerstone of the measures to mitigate Fonterra's dominance is an open entry and exit regime to the co-operative. For this regime to function properly it is critical that, at any given time, Fonterra charges the same price (per kilogram of milksolids) for entry to the co-operative as it pays upon exit. It is also essential that all other barriers to entry and exit are removed or at least reduced to an absolute minimum.
>
> …
>
> The bill does not directly legislate for the establishment of "fair value shares" for exiting shareholding farmers. Rather, it establishes a regime of open entry and exit to the [co-operative], which is intended to create commercial incentives on Fonterra to set a value for its shares that reflects the true value of Fonterra's expected future earnings.

[34] The underlying idea of an open entry and exit regime was referred to a number of times in the associated debates. For present purposes it is sufficient to refer to the remarks made by the Minister at the second reading debate, the Hon Jim Sutton:[34]

> I conclude with a few comments on the open entry and exit provisions that lie at the heart of the legislative regime contained in the bill. …
>
> This is designed to put strong commercial pressure on Fonterra to set a share price that accurately reflects the expected future earnings of the company. Fonterra must post a share price, then accept all entry and exit, to and from the cooperative, applied for at that price. To work properly, it is essential that the only barrier to entry to the cooperative is the capital cost of entry. This means that, aside from a small number of specific situations provided for in the bill, Fonterra must accept all new entrants—and their milk—if they agree to pay the capital cost of entry. Fonterra must also promptly pay exiting farmers exactly the same amount per kilogram of milk solids as Fonterra charges farmers joining the cooperative at the same time.
>
> It is also essential that Fonterra does not discriminate between existing supplying shareholders, and new entrants to the cooperative. This is not to say that Fonterra cannot respond to the entry of new competitors. However, Fonterra must apply its response to new entrants and existing shareholders alike.

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33 Dairy Industry Restructuring Bill 2001 (139-2) (select committee report) at 2–3.

34 (18 September 2001) 595 NZPD at 11780.

The approach of Muir J

[35] The essence of the reasoning of Muir J on the application of s 106 to the respondents appears in the following three paragraphs of his judgment:[35]

> [103] … . The concept that one party to that relationship [being the relationship between Fonterra and its suppliers] might be defined not as an individual but as a proxy for a block of shares to which, and in respect only of which, obligations of equality apply, would in my view be an unusual interpretation of legislation designed to ensure that individual farmers are not disadvantaged by Fonterra's dominance in the raw milk market. It would, as Mr Goddard submits, effectively deprive late entrants of any real protections, leaving them at the mercy of Fonterra's monopsonist powers. Of course, for valid reasons Fonterra retains a discretion in terms of whether it accepts such entrants into the shareholding farmer "fold", but why, having elected to do so, it should be able to discriminate against the individuals concerned in a way not possible in respect of timely applicants seems to me a proposition which struggles for a basis in principle.
>
> [104] I consider that conclusion reinforced by the following:
>
> (a) A plain and ordinary reading of the s 5 definition defines a "new entrant" as an individual dairy farmer who is not already a shareholding farmer but who wishes to be one (either as of right under s 72(1) or in Fonterra's discretion under s 74(3)).
>
> (b) From the point such a person becomes a shareholding farmer he/she is, ex hypothesi, no longer a new entrant.
>
> (c) Each of the plaintiff farmers will, as a result of performance of their Growth Contracts, end up a fully subscribed shareholder farmer in accordance with Fonterra's share standard. At some point during the performance of that contract and at only one such point they were "new entrants".
>
> (d) I say only one such point because the s 5 definition precludes a finding of sequential "new entries" with each tranche of shares acquired under the Growth Contracts. That is because:
>
> - From the point at which the first tranche of shares is issued each of the plaintiffs *is* "a shareholding farmer", whereas the new entrant definition requires that they be someone who *is not*.
>
> - It was not necessary for the plaintiffs to make any further application "to become a shareholding farmer" in respect of the sequential tranches (a point I will return to subsequently).

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35 *Fonterra* (HC), above n 6.

(e) Once a farmer has become a "shareholding farmer" then, if he/she subsequently wishes to increase supply, he/she is not regarded as a new entrant to that extent – he/she is, in the words of s 73(2), a shareholding farmer "applying to increase the volume of milk supplied as a shareholding farmer". So again the concept of "new entrant" is detached from any specific block of shares and focused rather on the identity of an individual satisfying the three requirements of the "new entrant" definition.

(f) The definition of "shareholding farmer" which the "new entrant" definition itself invokes, reinforces this approach. It simply refers to a dairy farmer who is registered as the holder of co-operative shares. That status is satisfied at the point a dairy farmer is issued with any such shares. He or she is no more nor less a shareholding farmer for the fact that they hold 1,000 or 100,000 shares. Likewise a person can be a shareholding farmer and a contract supplier but is no less a shareholding farmer for the fact that some of his or her supply is not share backed.

[105] So the scheme of the Act logically envisages new entrant status applying to an individual at a particular point in time – the point at which a dairy farmer becomes a registered holder of co-operative shares. At that point individuals become part of what Fonterra's director Mr Monaghan referred to at the meeting on 15 June, as the "Fonterra family" and the "terms of supply" came, in my view, to be governed by s 106. If, in respect of a late applicant, that was not a consequence acceptable to Fonterra it could negotiate for an exclusively contractual supply. In relation to such an applicant there was no obligation to accept them as a "shareholding farmer". But I do not consider Fonterra was in a position to treat the plaintiffs as shareholding farmers for some purposes but not for others.

The Court of Appeal decision

[36] The Court of Appeal's reasoning on the application of s 106 was as follows:[36]

[90] … we are unable to accept Fonterra's submission that the [supply contracts] in this case were supply contracts without share backing. Or, to put it another way, that the [supply contracts]were not agreements to supply milk as shareholding farmers.

[91] We reach that conclusion essentially for the reasons advanced by the respondents and accepted in the High Court. First, we are satisfied on the facts that the application forms Fonterra provided to the respondents to complete were applications to become shareholding farmers. In applying for "Growth Contract Supply", the respondents acknowledged they were required to hold at least 1,000 shares from the outset and that they would be obliged to become fully shared up in the last three years of the contract in order to meet the share standard applicable to Growth Contracts. It is not in dispute that no further

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36 *Fonterra* (CA), above n 7 (footnotes omitted).

application for shares would be necessary to acquire shares in the later years. That simply followed as a term of the Growth Contracts.

[92] Second, we are satisfied on the evidence that Fonterra exercised its discretion under s 74(3) to accept the respondents' applications as new entrants. That is clear from the Board's resolution … stating the shares were issued to the respondents "in accordance with clause 5.1(a) of the Constitution and sections 73 and 74 of [the Act]". …

[93] Third, as soon as Fonterra accepted the respondents' applications and they became registered as holders of co-operative shares they became "shareholding farmers" in terms of the [the Act's] definition. In doing so they became bound by the terms of the Constitution.

[94] Fourth, we do not accept Mr Hodder's submission that Fonterra relied on cl 3.4 of the Constitution to enter into "Contract Supply" with the respondents. There is no evidence to support that submission and it is inconsistent with the evidence we have already mentioned. In any event, the exercise of any discretion under cl 3.4 does not assist Fonterra since the discretion to permit the supply of milk under Contract Supply is only available under cl 3.4 to a shareholder of the company.

[95] Fifth, we do not accept Fonterra's submission that 1,000 shares is merely a token holding that could be ignored. We agree the number is small in relation to the milk quantities involved but it cannot be dismissed as de minimis. It is set at a level that is effectively the minimum entitlement under the Constitution.

[96] Sixth, we accept Mr Goddard's submission that [the Act] identifies two categories of dairy farmers to whom co-operative shares may be issued, namely new entrants or shareholding farmers as defined. This is supported by the definitions of "co-operative share" and "co-operative share standard" and numerous other provisions of subpart 5. As Mr Goddard submitted, there is no third category of a "contract supplier holding shares" who may be treated as being exempt from regulation under [the Act].

[97] Mr Hodder did not press the alternative submission that [the Act] could apply to the 1,000 shares but not to the remainder the respondents were obliged to acquire in later years. We reject that submission ... .

[98] In conclusion, we agree with the Judge that once Fonterra had exercised its discretion under s 74(3) the respondents were new entrants in terms of subpart 5 , including for the purposes of s 106.

Application of s 106 to the respondents

[37] At the outset, we accept there is force in the literal approach adopted by the High Court and the Court of Appeal. By virtue of their shareholding of 1,000 shares each, the respondents were, arguably, "shareholding farmers" as that term is defined in s 5(1) of the Act, that is, dairy farmers "registered as the holder of co-operative shares". However, we consider that the primary focus of the regulatory scheme in

sub-pt 5 is on share-backed supply. The obligation on Fonterra to accept milk is to accept supply on a share-backed basis in terms of s 73 of the Act. Hence, a "new entrant" is "a dairy farmer who is not a shareholding farmer who applies to become a shareholding farmer under section 73".[37]

[38] That said, we consider that for the purposes of s 106(1) the respondents were applicants to become fully share-backed farmers and so fell within the definition of "new entrant". We have two reasons for this view.

Respondents must become fully shared-up

[39] First, the applications to supply milk completed by the respondents were applications to become a fully share-backed supplier, although not immediately.

[40] The Growth Contracts the respondents entered into required them to become fully shared-up over the term of their contracts. While they had a right to become fully shared-up in accordance with the contract, there was a concomitant obligation to do so. The introduction to the Contract put it in simple terms:[38]

> You will share up in respect of 1/3 of the 2015/16 season Contract Milk Quantity[39] at the start of the 2016/17 season, a further 1/3 at the start of the 2017/18 season and the final 1/3 at the start of the 2018/19 season.

[41] Fonterra's constitution described the supply of milk to Fonterra as "an irrevocable application" to become a shareholder and to hold the requisite number of shares.[40] Consistently with that, the evidence of Christine Burr, the General Manager of Share Compliance at Fonterra, was that no further application to become a shareholder was necessary either in relation to the initial 1,000 shares or the additional shares required to be taken up over the course of the Growth Contract.[41]

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37 Dairy Industry Restructuring Act, s 5(1).

38 For completeness we note that the terms of the standard Growth Contract would allow sharing up to be completed faster than the full contract period but this is not material for present purposes.

39 The contract defines Contract Milk Quantity to mean the "quantity of Growth Milk [supplied] in the 2014/15 season". The details as to the definition of "Growth Milk" and associated calculations are not material for present purposes.

40 Clause 2.2, set out above at [18]. The application to supply form completed by the respondents was necessary to comply with the requirements of s 50 of the Companies Act 1993 (regarding the need for written consent to the issue of shares that impose liabilities on a shareholder to the company).

41 See cl 2.2 of the constitution, above at [18]. The Growth Contract Supply Terms 2012/2013

[42] In this situation, that is, where the respondents' supply inevitably became fully share-backed without any further application, it is artificial not to treat them as new entrants so that they are within s 106 of the Act. The logic of Fonterra's approach appears to be that the respondents would never become new entrants or at least not during the term of the Growth Contracts. That cannot be right where the respondents ultimately, and inevitably, became fully share-backed suppliers. This suggests the underlying analysis is not correct. Further, on this approach the respondents would become fully share-backed suppliers but never new entrants with the result that the regulatory protections would never apply to their milk supply.

[43] Policy considerations also support the view it is artificial not to treat the respondents as new entrants. While the primary focus of the regulatory scheme in sub-pt 5 is to preserve open entry and open exit , that purpose has to be treated fairly expansively. That would reflect the concern to create incentives for Fonterra to set a value for its shares reflecting "the true value of Fonterra's expected future earnings".[42] It is also plain that otherwise there is a risk that open entry and open exit could be undermined by a proliferation of contract supply arrangements.[43]

[44] There are also other indications in the Act suggesting the concern about Fonterra's monopsonist power is a broad one. The purpose of the Act includes promoting "the efficient operation of dairy markets in New Zealand by regulating the activities of [Fonterra] to ensure New Zealand *markets* for dairy goods and services are contestable".[44] Subpart 5, within which s 106 is found, similarly places some emphasis on the broader regulation of markets in that it is headed "[r]egulation of dairy markets and obligations of [Fonterra]". In addition, under s 70, the purpose of sub-pt 5 is stated to be promoting "the efficient operation of dairy markets in New Zealand".

(contained in the 2012 Growth Contract Booklet) recorded that by entering into the Growth Contract, the applicant was "deemed" to have made any necessary application to Fonterra for the purpose of ensuring the applicant held the required number of shares. In contrast to William Young J below at [134] we do see Fonterra's practice as material to an assessment of the respondents' position .

42 Dairy Industry Restructuring Bill (select committee report), above n 33, at 3.

43 Ms Burr accepted in evidence that in the 2012–2013 season there were "significant" numbers of applicants to supply on a fully share-backed basis and a "significant" number of applicants to supply under Growth Contracts. We are not aware of the exact relationship between these types of applications.

44 Dairy Industry Restructuring Act, s 4(f) (emphasis added).

Finally, ss 106 and 107 (which is discussed in the following paragraphs) appear under the heading "[r]egulation of milk supply".

[45] The last point to note under this heading is that the Act does contemplate some regulation of contract supply through s 107(3). Section 107 regulates supply contracts for raw milk in a number of ways. First, it provides that Fonterra must offer new entrants contracts for supply as shareholding farmers for one season.[45] Second, s 107(2) provides that Fonterra may offer "new entrants and shareholding farmers longer-term contracts for milk supply" if Fonterra complies with s 107(3). Section 107(3) states that Fonterra:

> … must ensure that, at all times, 33% or a greater percentage of the milksolids produced within a 160 kilometre radius of any point in New Zealand—
>
> (a) is supplied under contracts with independent processors; or
>
> (b) is supplied under contracts with [Fonterra] that—
>
> (i) expire or may be terminated by the supplier at the end of the current season without penalty to the supplier; and
>
> (ii) on expiry or termination, end all the supplier's obligations to supply milk to [Fonterra].

[46] The focus of this provision is, as Mr Hodder QC submitted on behalf of the appellant, on maintaining contestability for independent processors. The section does that by ensuring there are limits on the extent to which suppliers are locked into long-term supply agreements. There is nothing in s 107(3) to indicate that these limits apply only to share-backed supply, but rather appear also to extend to contract supply. It is relevant in terms of our analysis that the regulatory regime contemplates contract supply and makes some attempt to regulate it.

Fonterra treated applications as made under s 74(3)

[47] The second reason for our view the respondents' contracts were governed by s 106(1) is that Fonterra treated the applications as applications made under s 74(3). As we have noted, s 74(3) gives Fonterra a discretion to accept late applications "to supply milk as a shareholding farmer". The Board resolved to issue the relevant shares

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[45] Section 107(1).

to new shareholders for the 2012–2013 season, which included the issue of shares to the respondents, in accordance with cl 5.1(a) of the constitution (dealing with new shareholders and applications to increase supply) and ss 73 and 74. (We rely primarily on the reference to s 74.)[46]

[48] The effect of the applications being made under s 74(3) and accepted by Fonterra is that s 82 of the Act then applies. At the relevant time, s 82 provided as follows:[47]

> **82 Requirements applying to co-operative shares and peak notes for applications outside application period**
>
> (1) The price of a co-operative share issued to a new entrant or a shareholding farmer in response to an application to which section 74(3) applies is the June price in the first season for the supply of milk to which the application relates.
>
> (2) The co-operative share standard and the peak note standard that apply to a new entrant or a shareholding farmer who makes an application to which section 74(3) applies are the co-operative share standard and the peak note standard published at the beginning of the application period in the season immediately before the first season for the supply of milk to which the application relates.
>
> …

[49] There is a corresponding provision (s 81) also regulating the price to be paid for shares where the application is made within time under s 73. It would be surprising if s 82 applied to the respondents but none of the other statutory protections, like s 106, were applicable. Rather, s 82 suggests the regulatory regime applies to applications made outside of the application period under s 74(3) and accepted by Fonterra, which would include the respondents' applications.

[50] As the written submissions for the respondents put it:

> There are obvious practical reasons for Fonterra to be able to decline to accept milk after the end of each application period, to facilitate planning for the coming dairy season. But if Fonterra does have the capacity to accept additional milk offered to it after the end of the application period, and agrees

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46 In reliance on the Board's resolution, the Court of Appeal said it was satisfied on the evidence that Fonterra exercised its discretion under s 74(3) to accept the respondents' applications as new entrants: *Fonterra* (CA), above n 7, at [92].

47 Section 82 was amended by the s 18 of the Dairy Industry Restructuring Amendment Act to remove the reference to "peak notes".

> to take that milk, there is no reason to exclude the suppliers of that milk from the operation of the regulatory regime governing the terms on which Fonterra deals with its suppliers. Nor did Parliament intend to do so, as s 82 confirms.

[51] For these reasons, we consider s 106 was applicable in this case.

[52] For completeness, we record we would also have dismissed the argument, made for the first time in this Court, that four of the respondents were not new entrants as they each had supply from other dairy farms and held shares in respect of that supply. We agree with the submission made by Mr Goddard QC on behalf of the respondents that it is too late to raise this argument now. But, in any event, under the constitution, supply from each farm dairy is treated separately for this purpose.[48] There is accordingly no merit in this argument.

Was there a breach of s 106(1)?

[53] Section 106(1)(b) provides that Fonterra must ensure that the terms of supply applicable to a new entrant "differ from the terms that apply to a shareholding farmer in different circumstances only to reflect the different circumstances".

[54] In the High Court, Muir J concluded that all three differences (the reduced contract price for milk supplied in the first three years of the contract term; the inability to share-up in the 2012–2013 season; and Fonterra's unwillingness to purchase the respondents' vats) were in breach of s 106(1).[49] That was primarily because the differences were imposed for a collateral purpose, namely, to "keep the shareholders sweet".[50] The Judge emphasised in this respect (amongst other matters) that the financial viability of the transaction, as Fonterra's legal advisers accepted, was not dependent on these different terms.[51] Muir J also found the five cents per kgMS milk discount was "a small and relatively arbitrary figure" intended to be and to be seen as a "penalty" for the respondents who had previously left the co-operative and so could not expect just to "waltz back in".[52] Finally, the Judge found that the prohibition on

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48 Clause 2.5. This approach was contemplated by Parliament at the time the Dairy Industry Restructuring Act was enacted: see cl 2.5 above at [19] (repealed by s 18 of the Dairy Industry Restructuring Amendment Act).

49 *Fonterra* (HC), above n 6, at [107]–[116].

50 At [111].

51 At [113](b).

52 At [113](c).

sharing-up in the first season was to ensure that this penalty would apply for at least one year and "also intended to deprive the suppliers of the expected gain in share price" post the introduction of TAF.[53]

[55] The Court of Appeal agreed with Muir J that the less favourable terms offered to the respondents amounted to a breach of s 106.[54] The Court did not consider the payment of the retros justified the less favourable terms.[55] The Court relied on Fonterra having made an earlier bid (prior to the receivership) of $50 million for the assets[56] and the absence of any evidence the price Fonterra paid was affected by the fact the retros were to be paid.[57] Rather, the Court considered it was "difficult to escape the Judge's conclusion" the terms were "imposed as a penalty for the respondents' perceived disloyalty".[58]

[56] The Court of Appeal also agreed with Muir J that Fonterra could not rely on its expressed concerns about the upcoming TAF proposals to justify the less favourable terms.[59] The Court concluded:

> [127] Significantly, the prohibition on the acquisition of shares for 12 months had the effect of ensuring that the respondents did not benefit from the expected increase in the Fonterra share price post-TAF. This was a matter of real concern to the respondents and was raised by them in the June meetings with Fonterra. It meant that the terms offered to the respondents were substantially less favourable than those available to Fonterra's existing suppliers under Growth Contracts.

Approach to s 106(1)

[57] We consider it goes beyond the scope of s 106(1) to require, as Mr Goddard submitted and the High Court[60] and Court of Appeal[61] accepted, a difference in circumstances that would be apparent in a workably competitive market.[62] We take

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53 At [113](d) and (e), and on TAF see above at [15] .
54 *Fonterra* (CA), above n 7, at [119].
55 At [120].
56 At [120]. It is now accepted that there was no formal bid but rather Fonterra expressed a potential interest in purchasing the assets at around $50 million some months earlier in the context of a different sales process, prior to receivership.
57 At [121]–[122].
58 At [123].
59 At [126].
60 *Fonterra* (HC), above n 6, at [110].
61 *Fonterra* (CA), above n 7, at [117].
62 As Elias CJ notes below at [116], we are in disagreement on this point.

the view the Court of Appeal was right to say that there is a need for "some care" before importing the concepts of the Commerce Act 1986 into the Act.[63] The matter is to be approached objectively but it is a straightforward factual inquiry, namely, whether these applicants present with different circumstances.

[58] In this case, the different circumstances were that the respondents were getting their retros paid and that reflected a cost of some significance to Fonterra. The evidence does not however establish that Fonterra paid an inflated purchase price for the NZDL assets. The evidence of Fonterra's expression of potential interest for the same assets prior to any decision about terms suggests that it did not do so.[64] But it is not necessary that the different circumstances directly translate into the price paid by Fonterra.[65] The cost to Fonterra can only have been a small part of the sum paid by Fonterra but Fonterra has paid more than the next bidder in order to secure the assets and pay the retros. Therefore, the respondents were receiving a benefit that differentiated their position from that of other shareholding farmers and Fonterra bore the cost of that.

[59] Turning then to whether the terms differ "only", as required by s 106(1)(b) to reflect the different circumstances, there must be a rational connection between the different terms and the circumstances. Mr Hodder accepted that was so.[66]

[60] Mr Goddard supported the conclusions of the High Court and the Court of Appeal that the principal reason for imposing the less favourable terms was the "optics", that is, how the arrangement might look to, particularly, "existing shareholders who might have harboured concerns that the respondents were being" permitted to "waltz back in".[67] These findings have not been shown to be wrong and they undermine what may otherwise have been seen as a rational link between the respondents' different position and all three different terms of supply. While the

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63 *Fonterra* (CA), above n 7, at [118].
64 See above at n 56.
65 Contrast Elias CJ below at [116].
66 Fonterra argued in the alternative that, if the respondents were new entrants, the terms of the agreements complied with s 106(1) because the difference from standard terms reflected the unique position of the respondents – particularly that shareholder funds were used to pay their retros.
67 *Fonterra* (CA), above n 7, at [123]. See also *Fonterra* (HC), above n 6, at [113].

respondents' were in a different position to other Fonterra suppliers, the different terms offered by Fonterra take on the appearance of an attempt to discourage others from leaving the co-operative to supply independent processors. The different terms were thus not rationally linked to the difference in circumstances.

[61] This is particularly clear in respect of the restriction on sharing up in the first season. There was evidence that Fonterra imposed the restriction on sharing up to ensure that the respondents were required to bear the reduction of the standard price for at least a year – so those two terms are linked.[68] The prohibition on sharing up in the first year had the effect of depriving the respondents from the expected future gains as a result of the introduction of TAF[69] without any financial impact on Fonterra.[70] In these circumstances, where it was expected TAF would have a positive impact on the shares, the restriction on sharing up (and the associated reduction in price) went beyond a rational response to the additional cost of the payment of the retros. Rather, both terms reflect an illegitimate collateral purpose. They were additional and unrelated penalties imposed on the respondents for their earlier exit from Fonterra in a way that was inconsistent with the purpose of the regulatory regime.

[62] Finally, it is relevant that Growth Contracts generally provided a means by which farmers wishing to supply to Fonterra could be assisted in their entry into the co-operative because sharing up was deferred.[71] By contrast, in the present case, Fonterra has compelled the use of the Growth Contract as a means of enforcing a delay in sharing up rather than as a way of facilitating that by allowing payment in instalments over time for those who cannot afford to pay for their share entitlements in the first season.

[63] It follows that the conclusion of the Court of Appeal that all three terms breached s 106(1) was correct.

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68 *Fonterra* (HC), above n 6, at [113](d).

69 See *Fonterra* (HC), above n 6, at [113](e); and *Fonterra* (CA), above n 7, at [127].

70 In particular, there was nothing in the evidence to indicate that allowing the respondents to share up in the first year would have diluted the value of shares when TAF was implemented.

71 See above at [12].

Result

[64] This Court granted leave to appeal on the question of whether the Court of Appeal was right to answer in the affirmative two questions, that is, whether the respondents were new entrants for the purposes of s 106 and, if so, whether Fonterra breached s 106.[72]

[65] The majority of this Court upholds the decision of the Court of Appeal in relation to both questions. Accordingly, the appeal is dismissed.

[66] Costs should follow the event. The respondents are entitled to costs of $30,000 and reasonable disbursements to be determined by the Registrar if necessary.[73] We allow for second counsel.

ELIAS CJ

[67] Fonterra Co-operative Group Ltd appeals against a decision of the Court of Appeal[74] dismissing its appeal from determinations in the High Court[75] that it breached s 106 of the Dairy Industry Restructuring Act 2001 in the terms of supply it applied to the respondents when it accepted them as suppliers of milk in the 2012–2013 dairy year.[76] The respondents had formerly supplied another milk processor, New Zealand Dairies Ltd, but following its receivership Fonterra acquired the New Zealand Dairies plant at Studholme and all its dairy farmer suppliers. Fonterra is a co-operative in which supply by shareholding farmers is on the basis of a share standard fixed to the amount of milk solids supplied.

[68] There are two issues on the appeal. The first is whether the respondents had applied under s 73 of the Act to be "shareholding farmers" in Fonterra and were accordingly "new entrants" (a defined term under the Act for farmers who are not

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72 Leave judgment, above n 8.

73 Hearing of one day and a half.

74 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 (Randerson, Winkelmann and Brown JJ).

75 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 (Muir J).

76 Other claims under the Fair Trading Act 1986 and Contractual Remedies Act 1979 (now sub-pt 3 of pt 2 of the Contract and Commercial Law Act 2017) were adjudicated on in the Courts below but are not before this Court.

"shareholding farmers" but who apply to become shareholding farmers under s 73).[77] If the respondents were "new entrants", Fonterra was obliged by s 106(1) of the Act to ensure that the terms of supply for the respondents' milk were "the same as the terms that apply to a shareholding farmer in the same circumstances" or differed "only to reflect the different circumstances". If the respondents are "new entrants" (as they have been held to be in the High Court and Court of Appeal), the second issue on the appeal is whether Fonterra discriminated between them and other shareholding farmer suppliers of milk on a basis that was not justified and in breach of s 106.

[69] Fonterra maintains that the Court of Appeal "erroneously disregarded the fundamental distinction between Share-backed Supply and Contract Supply" when it treated the respondents as "new entrants" for the purposes of s 106 of the Act. If wrong in that principal contention, it contends that the Court of Appeal misapplied s 106 in finding that Fonterra had discriminated against the respondents. It says the respondents were in a unique position because the terms on which Fonterra had acquired New Zealand Dairies from its receivers had enabled them to receive the money owed to them for milk they had earlier supplied to New Zealand Dairies.

[70] The facts and background are set out in the reasons given by Ellen France J and do not need to be set out again in full by me, although the slightly different view I take of the structure of the Act and the arrangements entered into between Fonterra and the respondents mean that some repetition is unavoidable.

The terms of supply

[71] The terms of supply between Fonterra and the respondents are regulated by the Act and by three contractual documents entered into between Fonterra and the respondents contemporaneously.

[72] The first is a "Milk Supply Agreement" which was part of the agreement for sale of the New Zealand Dairies assets entered into on 26 June 2012 between Fonterra, the receivers of New Zealand Dairies and the farmers who had previously supplied New Zealand Dairies with milk. This Agreement is the source of the three special

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[77] Dairy Industry Restructuring Act 2001, s 5.

conditions which have been held in the lower courts to be discriminatory in effect and in breach of s 106 and which are described at [75] below.

[73] The second contractual document was an "Application to Supply" in form "A01"[78] which was required by Fonterra to be completed by the respondents. It became binding on the respondents when accepted by Fonterra. The form was a general one which gave those making the application the option of one of two bases of supply: supply "as a fully share-backed shareholding supplier" who agreed "to hold shares for [their] estimated supply"; or supply "under Growth Contract" which allowed staged capital payments with a discount as to price. In fact, the respondents were not given the option of supply "as a fully share-backed shareholding supplier" but were required by the Milk Supply Agreement to supply the milk under Growth Contract.

[74] The Growth Contract was the third contractual document governing the terms of supply. It required suppliers under it to hold "at least 1,000 shares" from the outset but allowed the acquisition of shares in the co-operative to be staged over six years so that suppliers were not obliged to be "fully shared up" until before the start of the 2018–2019 season. Nevertheless, under the Growth Contract, and in accordance with the Act, suppliers could accelerate their acquisition of shares after giving notice in an application period (a period set by Fonterra before the commencement of each season on 1 June but required at minimum to span the period from 15 December to 28 February[79]). Under the Growth Contract, a "Contract Milk Price" was paid for the proportion of milk solids which was not backed by shares, at a discount of five cents on the price paid to shareholding farmers who had provided the full capital requirement under the share standard for their milk supply (this discount was referred to as the "Contract Fee").

[75] The Milk Supply Agreement imposed three conditions on supply by the respondents which did not attach to other shareholding farmers whose supply was on

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78 The form is headed as being one for use in cases of "Dry Farm Conversion". It appears to have been accepted, however that this form was also used in other circumstances of application to become a shareholding farmer: see *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [53].

79 Dairy Industry Restructuring Act, s 75.

the terms and conditions set by the Application to Supply and the Growth Contract. The Agreement provided that milk would be acquired and supplied "on the terms of Fonterra 2012 Growth Contract in the form attached" but with three exceptions from that contract:

> (1) [T]he price is $0.05 per kgMS less than the Contract Milk Price for the then current season (and because the Contract Milk Price is $0.05 per kgMS less than Fonterra's fully shared Milk Price for the 2012/13 season, suppliers who enter into this contract will in effect get Fonterra's Milk Price less $0.10 per kgMS) for the first three years of the contract term.
>
> (2) Fonterra will not be obliged to acquire any Milk Vat but will have an option (but not obligation) to acquire the Milk Vat at fair market value by notice in writing to the Supplier. Any dispute as to value shall be determined by arbitration.
>
> The Supplier will have no entitlement to become Fonterra fully share backed in the 2012/13 season under this contract. The Supplier can become fully share backed in subsequent seasons (and receive the full Milk Price), but will still be bound to supply Fonterra for the entire contract term.

[76] The High Court and Court of Appeal accepted that these differences in the terms of supply were discriminatory treatment contrary to s 106 of the Act.[80]

"Contract Supply"?

[77] Fonterra argued unsuccessfully in the High Court and Court of Appeal that the respondents were not new entrants but suppliers of milk under contract. Alternatively, Fonterra submitted that in the 2012–2013 year the respondents supplied milk as "shareholding farmers" only in respect of the milk solids represented by the 1,000 shares they were required to hold throughout.

[78] Fonterra maintains this position on further appeal to this Court. It says that the Court of Appeal, in taking the view that the 1,000 shares in themselves constituted the respondents as "shareholding farmers" adopted an approach that was "selectively" literal and ignored the fundamental distinction between "share-backed" and "contract" supply.

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[80] *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [107]–[116]; and *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [99]–[128].

[79] The terminology employed by Fonterra of "share-backed supply" and "contract supply" reflects language found in the constitution of Fonterra and the language in its contractual documents (although they are terms not found in the legislation and the provisions of the constitution enacted in sch 1 of the Act,[81] setting up some dissonance). Although useful shorthand, the terminology may be apt to mislead if it suggests antithesis between supply according to contract or shareholding.

[80] All supply (whether as shareholding farmers or not) is subject to contractual terms, as s 107 of the Act, which regulates "supply contracts for raw milk" and which applies to contracts offered to "new entrants and shareholding farmers", makes clear.[82] The Growth Contract entered into by the respondents is one such basis of supply but contracts also set the terms of supply by shareholders who have fully paid up their share capital on entry, as is illustrated by the Application to Supply referred to at [73] which, on Fonterra's acceptance, sets out the terms for what Fonterra calls "share-backed supply". Whether the suppliers of milk are shareholding farmers, new entrants or those from whom supply is obtained under the discretion the Board of Fonterra has to accept supply under cl 2.3(b) of the constitution "without requiring that person to become a Shareholder in respect of that supply",[83] the supply is contractual.

[81] Clauses 3.3 and 3.4 of the constitution were not enacted in sch 1 of the Act, which contained only sub-cls 1 and 2 of cl 3, concerning the core obligations to hold shares determined by the share standard. Clauses 3.3 and 3.4 provide for "Unshared Supply" and "Contract Supply" as exceptions to the general requirement to hold shares according to the share standard of one share for each kilogram of milk solids. Milk supplied on "Contract Supply" on such terms as the Board thinks fit is exempted from the requirement to hold shares to meet the standard. The price paid

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81 The Act was amended in July 2012 by the Dairy Industry Restructuring Amendment Act 2012 in anticipation of the introduction of the Trading Among Farmers scheme (see below at n 123). These amendments included the repeal of sch 1. I have referred throughout to the principal Act as it was at the time of the key events in May and June 2012. I have also referred to Fonterra's constitution as it was at the time.

82 Section 107 is set out in full below at [94].

83 Clause 2.3 gives the Board of Fonterra discretion to determine (a) "whether or not to accept an application by a person to become a Shareholder"; and (b) "whether or not to accept the supply of Milk from any person … without requiring that person to become a Shareholder in respect of that supply."

for milk on "Contract Supply" is set by the Board which, under cl 3.4(b) of the constitution, may also "require a Shareholder to hold a minimum number of [Fonterra] Shares continuously throughout the term of any arrangements for the supply of Milk to the Company by that Shareholder on Contract Supply".

[82] The label "Contract Supply" does not answer the question whether the milk is supplied as a new entrant or shareholding farmer. As appears below, I consider that under the Growth Contract the milk was supplied as shareholding farmers because the suppliers were obliged to obtain the shares to meet the share standard set under clauses 3.1 and 3.2 of the constitution, although the payment of capital was deferred. The staged payment was reflected in the discount of five cents paid on such "Contract Supply".

[83] Contrary to the submissions made on behalf of Fonterra, "Contract Supply" under cl 3.4 is different than a contract for supply entered into by the Board under cl 2.3(b) "without requiring that person to become a Shareholder in respect of that supply". The critical consideration in determination of whether the respondents were new entrants for the purposes of s 106 is then not whether they were on "Contract Supply" under cl 3.4 but whether they were "required" to "become a Shareholder in respect of that supply".

The scheme of the Act

[84] As has already been mentioned, the Act defines "new entrant" as "a dairy farmer who is not a shareholding farmer who applies to become a shareholding farmer under section 73".[84] A "shareholding farmer" is "a dairy farmer who is registered as the holder of [Fonterra] shares".[85] The respondents are "new entrants" in the terms of these definitions if they applied to become shareholding farmers under s 73. Once their application was accepted and the minimum number of shares were allocated to them they became "shareholding farmers".

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84 Dairy Industry Restructuring Act, s 5(1).
85 Section 5(1).

[85] The regulation of dairy markets and the obligations of Fonterra are set out in sub-pt 5 of pt 2 of the Act. Section 71 contains a "[s]tatement of principles". In addition to the principle that independent processors must be able to obtain raw milk,[86] it is a principle of the Act that Fonterra must accept applications by new entrants and shareholding farmers to supply it with milk "as shareholding farmers".[87] Fonterra has limited capacity under the legislation to refuse an application to supply milk "as a shareholding farmer". As was explained by the Minister of Agriculture at the second reading of the Bill, it was seen as essential to the design of the legislation that "the only barrier to entry to the co-operative is the capital cost of entry". As a result, subject to the few exceptions in the Act, Fonterra was required to accept all new entrants "if they agree to pay the capital cost of entry" and was prohibited from discriminating between new entrants and existing shareholders.[88]

[86] By contrast, Fonterra is not so limited under cl 2.3(b) in the choice to accept or reject supply "without requiring [a] person to become a Shareholder in respect of that supply". Except in restrictions designed to protect access for independent processors,[89] there is little regulation under the Act of supply other than as a shareholding farmer. (Such freedom may be constrained in practical terms by the obligation to accept milk from those who apply to be shareholding farmers and by general regulation under the Commerce Act 1986.) The Dairy Industry Restructuring Act itself does not deal specifically with supply of milk by suppliers other than shareholding farmers,[90] although cl 2.3 of the constitution was contained in sch 1 as enacted.

[87] It is a principle of this part of the Act under s 71 that Fonterra "must not discriminate between new entrants and shareholding farmers whose circumstances are the same".[91] Other principles ensure exit from Fonterra on the same basis as entry, on proper notice.[92]

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86 Section 71(a).
87 Section 71(b).
88 The Hon Jim Sutton speaking in relation to the Dairy Industry Restructuring Bill 2001 (139-2): (18 September 2001) 595 NZPD 11780.
89 Dairy Industry Restructuring Act, s 107(3).
90 Apart from the brief reference in s 107(3): see below at [94].
91 Section 71(c).
92 Section 71(d) and (e).

[88] Section 72 provides a useful "[o]verview" to sub-pt 5, of assistance in the interpretation of its provisions. As is relevant to the appeal, it describes ss 73–85 as concerning Fonterra's obligations to accept applications "from new entrants and shareholding farmers to supply milk, as shareholding farmers".[93] Sections 86–93 and 94–96 respectively allow deferral of the commencement of the obligation to accept supply of milk[94] and for exceptions to the obligation.[95] Sections 97–105 describe the rights of shareholding farmers to cease or reduce the supply of milk to Fonterra "as shareholding farmers".[96] The key provisions of the Act relating to the appeal are found in ss 106–109 which are described in s 72(5) as being provisions "to regulate the supply of milk" to Fonterra.

[89] Section 73 provides that Fonterra must accept applications to become shareholders by new entrants made in an application period[97] and must accept applications made in an application period by shareholding farmers to increase the volume of milk supplied as a shareholding farmer.[98] It also provides, by reference to ss 136–139, the manner in which such applications "may be given".[99] Section 74 expands on s 73 by making it clear that the acceptance of the milk in respect of which an application is made under s 73 must be from "the beginning of the season following that application period".[100] Fonterra is not required to accept milk unless the shareholding farmer satisfies "the applicable terms of supply".[101] In addition, under subs (3), Fonterra "may, in its discretion, accept an application made outside an application period from a dairy farmer, including a shareholding farmer, to supply milk as a shareholding farmer". Where applications are accepted outside the application period, s 82(1) provides that the price of a share issued to a new entrant or shareholding farmer is "the June price in the first season for the supply of milk to which the application relates" (or, if the applicant so elects, the "default price"[102]).

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93 Section 71(1).
94 Section 71(2).
95 Section 71(3).
96 Section 71(4).
97 Section 73(1).
98 Section 73(2).
99 Section 73(4)(a).
100 Section 74(1).
101 Section 74(2).
102 The "default price" is the same as the June price except where that price falls outside of a designated price range: see s 5.

[90] It was suggested in argument that the applications in issue here were not made under s 73 because they were out of the application period and therefore no s 73 application could be made. On this basis, it is said that the respondents do not come within the definition of "new entrants" and s 106 does not apply. I do not consider the argument is valid.

[91] First, ss 73 and 74 must clearly be read together. Section 74(3) permits Fonterra to accept an application "made outside an application period". It seems clear from the context that the "application" referred to is one under s 73. Indeed, the express terms of s 74(1) refer to s 73. It would be nonsense if the occasion for exercise of the discretion contained in s 74(3) could never arise. The "application" referred to is the "application to become a shareholding farmer" or an application "to increase the volume of milk supplied as a shareholding farmer". The consequences described in s 73(1) and (2) (that Fonterra "must" accept such applications if made during an application process) are not definitional of the application. They provide for the result if the application is made during the application period. Section 73(4) deals with how such an application is to be made. It provides that "how an application may be given" and "when an application is made" are as specified in ss 136–139. Together, these provisions are concerned with applications "to become a shareholding farmer" or to "increase the volume of milk supplied as a shareholding farmer".

[92] Under s 97 a shareholding farmer who wants to cease or reduce the supply of milk as a shareholding farmer may give notice of withdrawal, subject to "the terms governing the relationship between [Fonterra] and the shareholding farmer". If made during an application period the shareholding farmer is entitled under s 98 to receive a surrender value for the shares which is either the June price immediately following the application period or, at the shareholding farmer's option, the default price set under a formula in the Act[103] multiplied by the number of shares.

[93] Sections 106 to 109 are concerned with the "[r]egulation of milk supply", as the cross-heading to these provisions indicates. Section 106 is set out by Ellen France J above at [30] and, as the heading to the section provides, is concerned

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[103] See above at n 102.

to ensure "[n]o discrimination between suppliers". The suppliers concerned are "new entrants" and "shareholding farmers".

[94] Section 107 concerns the "[r]egulation of supply contracts for raw milk" and permits longer-term contracts for milk supply for "new entrants and shareholding farmers" longer than one season if sufficient capacity (according to a formula contained in subs (3)) is maintained to meet the needs of independent processors and prevent the extraction of penalties for termination by the supplier. Section 107 makes it clear that terms of supply of milk are by contract for both new entrants and existing shareholder farmers (as I have already discussed at [80]). And the limits set in s 107(3) seem to apply to all supply:

> **107 Regulation of supply contracts for raw milk**
>
> (1) [Fonterra] must offer new entrants contracts for milk supply as shareholding farmers for 1 season.
>
> (2) [Fonterra] may offer new entrants and shareholding farmers longer-term contracts for milk supply if new co-op complies with subsection (3).
>
> (3) [Fonterra] must ensure that, at all times, 33% or a greater percentage of the milk solids produced within a 160 kilometre radius of any point in New Zealand—
>
> (a) is supplied under contracts with independent processors; or
>
> (b) is supplied under contracts with [Fonterra] that—
>
> (i) expire or may be terminated by the supplier at the end of the current season without penalty to the supplier; and
>
> (ii) on expiry or termination, end all the supplier's obligations to supply milk to [Fonterra].
>
> (4) A requirement in a supply contract that the supplier give [Fonterra] up to 3 months' notice to terminate the contract is not a penalty under subsection 3(b)(i).

[95] As mentioned, supply other than as shareholding farmers is permitted by cl 2.3(b) of Fonterra's constitution. Clause 3.4 of the constitution (not enacted in sch 1), relied on by Fonterra in argument, is headed "Contract Supply". It is not however an independent power to contract for supply, as cl 2.3(b) of the constitution is. Clause 3.4 has to be seen in the context of cl 3 as a whole. That clause deals with

the "Co-operative Share Standard". Clause 3.4 therefore is not concerned with supply by those not required to be shareholders, as cl 2.3(b) is. Rather, cl 3.4 provides an exception against immediate provision of the capital represented by the share standard as required by cls 3.1 and 3.2.

[96] Clause 3.4 of the constitution permits arrangements such as the Growth Contract, which would otherwise be contrary to cls 3.1 and 3.2.[104] It empowers the Board to set the methodology for setting the price of milk on what it calls "Contract Supply" and to require a minimum number of shares to be held throughout the period of supply. As has already been indicated at [79]–[83], I consider that the term "Contract Supply" is used as a convenient label to distinguish such supply from that made by shareholding farmers who have paid the capital required by clause 3.1 in full ("share-backed", as the appellant describes it). But, as already foreshadowed, where there is an obligation to acquire the shares over time, in my view the deferral of payment does not mean that the supplier is not a shareholding farmer in respect of that supply. I consider such supply is equally "share-backed".

[97] Section 109 of the Act obliges Fonterra to sell any milk vat on the farm of a shareholding farmer who withdraws from the co-operative at market value. Implicit in this obligation is the indication that usual terms of supply entail Fonterra acquiring the milk vat of a new entrant. That acquisition of milk vats is indeed the usual practice is indicated by the fact that a specific condition was imposed in the Milk Supply Agreement in the present case to set an exception.

The respondents were "new entrants"

[98] The respondents had each applied to be a shareholding farmer under s 73 through the Application to Supply and on the basis of the Growth Contract. They were accordingly new entrants in terms of the definition in s 5(1).

[99] The fact that the applications were made outside the application period permitted Fonterra to decline them for the 2012–2013 season. But although outside

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[104] And indeed, in the constitution adopted later in 2012 in order to enable the Trading Among Farmers scheme (see below at n 123), a more detailed authorisation of Growth Contracts was set out in the new cl 3.9. That clause was headed, tellingly, "New entrants".

the application period, the applications to supply as shareholding farmers were accepted by the Board under s 74, as the terms of the Board's resolution in referring to that provision makes clear. This was a point made in the High Court by Muir J.[105] He considered that there was no principled basis for allowing Fonterra to discriminate against farmers on the basis of whether they had applied within the application period or later. Once Fonterra had elected to accept applications, it was not justified in discriminating between late applicants and those who had applied within the application period. After accepting the application outside the application period it was not open to Fonterra under the legislative scheme to impose requirements which set up different terms of supply than those applicable to other shareholding farmers except properly to reflect differences. Accordingly, pursuant to s 106, Fonterra was obliged to ensure that the terms of supply applying to the respondents as new entrants were "the same as the terms that apply to a shareholding farmer in the same circumstances" or differed "only to reflect the different circumstances".

[100] The "Application for Growth Contract Supply" completed by all respondents acknowledged that each was required to "hold at least 1,000 shares and that these will be issued to me/us if we do not already hold shares".[106] They acknowledged too in the Application that they were "required to purchase [Fonterra] Shares on 1 June 2016, 1 June 2017 and 1 June 2018, in addition to any end of season or new season adjustments, in accordance with the Growth Contract Supply Terms 12/13". To the extent that the respondents acquired shares to meet the general share standard, in whole or part, or in advance of the obligations to do so on 1 June in the three years 2016–2018, the payment for supply moved from the "Contract Milk Price" (a discount of five cents on the milk price paid by Fonterra to shareholding farmers who had paid up the capital required by the share standard in full) to the price paid to those who had "fully shared-up".

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105 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [105].

106 Note this is an indication that existing shareholding farmers applying to supply additional milk were not required to obtain a further 1,000 shares but were obliged to retain at least 1,000 shares during the term of the supply under the Growth Contract (under which they were also required to increase their shareholding over the six-year term). I agree with O'Regan and Ellen France JJ that the fact that four of the respondents already held Fonterra shares at the time of entering into the agreements is not material: see above at [52].

[101] This process of increasing the capital in advance of the contractual timeline (and receiving the full price in respect of milk supplied in accordance with the share standard of one share for each kilogram of milk solids supplied) required application in an application period (unless Fonterra accepted later application). The Growth Contract and Fonterra documents describe this process both in fulfilment of the six-year obligation to move to share standard supply and, where it is accelerated on application of the supplying farmer, as moving from "contract supply" to "share-backed supply". As has already been foreshadowed, I consider that on both bases of payment they had been accepted as new entrants so that their supply was as "shareholding farmers".

[102] I am accordingly of the view that at all stages of supply under the Growth Contract, the supplier of the milk provides it "as a shareholding farmer". As applicants whose applications were accepted by Fonterra under s 74(3), the respondents became new entrants protected from discrimination in the terms of supply by s 106. The deferral of the capital payment, offset by the reduction in price, does not mean that either the existing shareholding farmer or the new entrant is supplying milk outside the statutory regulation in sub-pt 5 of pt 2 of the Act which concerns "[r]egulation of dairy markets and obligations of [Fonterra]". As Muir J pointed out, once an application is accepted by Fonterra, the sense of the definitions of "new entrant" and "shareholding farmer" under s 5 is that the new entrant becomes a shareholding farmer, rather than a "new entrant" in respect of each new tranche of shares as the shareholder is obliged to put in capital sequentially under the Growth Contract.[107]

[103] In dismissing the appeal, the Court of Appeal accepted that the facts established that the applications Fonterra provided to the respondents to complete were applications to become "shareholding farmers":[108]

> In applying for "Growth Contract Supply", the respondents acknowledged they were required to hold at least 1,000 shares from the outset and that they would be obliged to become fully shared up in the last three years of the contract in order to meet the share standard applicable to Growth Contracts.

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107 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [104](c)–(e).

108 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [91] (footnote omitted).

> It is not in dispute that no further application for shares would be necessary to acquire shares in the later years. That simply followed as a term of the Growth Contracts.

[104] The Court of Appeal agreed with the High Court that it was established on the evidence that Fonterra had exercised its discretion under s 74(3) to accept the applications.[109] As a result, the respondents became registered holders of 1,000 shares (an amount that the Court considered "cannot be dismissed as de minimis"[110]) and became "shareholding farmers" under the definition in the Act. The Court accepted the view of the High Court Judge that once Fonterra had exercised its discretion under s 74(3) "the respondents were new entrants in terms of subpart 5 of [the Act], including for the purposes of s 106".[111]

[105] I agree with the conclusions reached in the High Court and Court of Appeal. In agreement also with O'Regan and Ellen France JJ, I am of the view that the regulatory scheme is concerned with supply on the basis of the "co-operative share standard", defined in the Act to mean "the share standard referred to in [Fonterra's] constitution that determines the number of shares that a new entrant or shareholding farmer is required to hold".[112] The respondents were applicants to become suppliers on the basis of the share standard in cl 3.2 of the constitution of "one Co-operative Share for each kilogram of Milksolids obtainable from Milk supplied to the Company", which pursuant to the Act applied "at the beginning of the application period in the season immediately before the first season for the supply of milk to which the application relates".[113] That obligation was not affected by the terms of the Growth Contract which enabled the capital payment to be deferred, as cl 3.4 of the constitution permitted. No further application was necessary and the suppliers were contractually bound to provide the full capital sum over the term of the Growth Contract.

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109 At [92].
110 At [95].
111 At [98].
112 Dairy Industry Restructuring Act, s 5(1).
113 Section 82(2).

Were the terms of supply applied to the respondents in breach of s 106?

[106] It was accepted in evidence in the High Court that the three different conditions of supply imposed on the respondents were not justified by economic considerations.[114] In the High Court Muir J found on the evidence that the additional discount of five cents above the standard Growth Contract discount was a penalty imposed on the respondents because of their disloyalty in leaving Fonterra to supply New Zealand Dairies.[115] Similarly, he found that the prohibition on the respondents' providing the full capital payment in respect of the 2012–2013 season was to maintain the five cents penalty for at least a year and to prevent them benefiting in the expected increase in share price following implementation of the Trading Among Farmers scheme.[116] Nor was there any adequate explanation for the decision not to acquire the milk vats while permitting Fonterra to pick them up at a later stage.[117] These findings of fact were confirmed in the Court of Appeal.[118]

[107] Muir J took the view that the distinct treatment of the respondents was not objectively justified by any material difference in their circumstances and was in breach of s 106.[119] The Court of Appeal agreed in dismissing the appeal. It accepted that the terms offered to the respondents were "substantially less favourable than those available to Fonterra's existing suppliers under Growth Contracts".[120] It rejected the argument that the different treatment was justified by the fact that the purchase price obtained by the receivers of New Zealand Dairies and the terms on which it was paid were a benefit obtained by the respondents which justified different treatment. The Court pointed out that there was no evidence that Fonterra had paid more than it would otherwise have done for the New Zealand Dairies assets in order to meet the payments due to the respondents. Indeed, there was evidence that Fonterra had indicated interest in acquiring New Zealand Dairies 18 months before it was placed in receivership at

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114 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [113].
115 At [113](c).
116 At [113](d) and (e).
117 At [113](f).
118 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [119]–[128].
119 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [115]–[116].
120 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [127].

an indicative price of $50 million (although, contrary to the view expressed by the Court of Appeal, no actual bid was made).[121] Fonterra's internal communications at the time of the agreement with the receivers indicated that, on the basis of gaining 100 per cent of New Zealand Dairies suppliers at a discount of 10 cents per kgMS, Fonterra would be acquiring the assets at a net present value of $72 million.[122] That was $22 million dollars above the price paid of $50 million (including in that $20 million owed to the suppliers to New Zealand Dairies). There was accordingly no evidence that the price paid by Fonterra was inflated by payment of the money owing to the respondents for the supply of milk to New Zealand Dairies, providing them with a benefit not available to other suppliers which justified the different treatment. There was no justification for the differential treatment.

[108] On further appeal to this Court, Fonterra argues that the respondents' circumstances were "unique" because of the background of the acquisition of New Zealand Dairies and the benefits obtained by the respondents in that purchase in receiving payment of the money owed to them for milk supplied to New Zealand Dairies. Fonterra says that the application of s 106 produces a "windfall benefit" to the respondents (who would not otherwise have received payment of the money owed by New Zealand Dairies) and rewrites the contract entered into as the Milk Supply Agreement.

[109] In addition, Fonterra contends that the Courts below were wrong to be dismissive of the business reasons why the different treatment of the respondents was justified, including as to the penalty dimension. Fonterra was rightly concerned to forestall any resentment Fonterra's existing shareholders might have felt if the respondents could buy into the co-operative, having earlier left it, without penalty and when the Trading Among Farmers scheme was imminent and expected to lead to a rise

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121 At [120].
122 See at [121].

in share value.[123] The scheme still required shareholder approval and the Board was sensitive to any backlash against the proposal should it be thought the respondents would get a windfall.

[110] The Courts below did not accept these arguments. In large part that was because of findings of fact which were concurrent. First in the High Court it was concluded that the evidence did not support a conclusion that the price paid for New Zealand Dairies had depended on the terms imposed on the respondents as to supply. Indeed Muir J recorded that Fonterra did not suggest any such thing.[124] The Court of Appeal agreed.[125]

[111] Without such foundation, it seems to me that the arguments that the respondents had received a "windfall" through the payment of the money owed to them by New Zealand Dairies cannot be substantiated. The fact that the purchase price for New Zealand Dairies was structured around the value of the plant obtained and the cost to allow the receivers to clear indebtedness to the bank and meet the obligations for milk supplied does not mean that the respondents received a "windfall" or a benefit that differentiated their position from that of other shareholding farmers, to Fonterra's cost.[126] While the offer to the receivers may well have been pitched to meet the obligations to the unpaid suppliers of milk to New Zealand Dairies (as well as the obligations to the bank which had appointed the receivers), there is no basis for thinking an appropriate price was not paid for the assets acquired and for the transfer of 100 per cent of the New Zealand Dairies supply of milk which supported the acquisition of the plant.

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123 The Trading Among Farmers Scheme was introduced in November 2012 by the Dairy Industry Restructuring Amendment Act and by Fonterra's adoption of a new constitution. The scheme created a private market in which shareholding farmers could trade Fonterra shares among themselves, purchasing shares at any time of the year either at the current price on the market or privately through an off-market transaction. As noted by Muir J the general expectation that introduction of the Scheme would result in an increase in Fonterra's share price from the published $4.52 in the 2012–2013 season was borne out: *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [36].

124 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [113](b).

125 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [121].

126 Compare the reasons given by Ellen France J above at [58].

[112] It has not been shown that the purchase price paid by Fonterra was inflated to cover the money owed. In those circumstances I am of the view that the payment of the money owed by New Zealand Dairies to the respondents is immaterial as an explanation for the difference between the respondents and other suppliers of milk in the 2012–2013 season and beyond. I would not disturb the concurrent findings of fact in the Courts below on this point.

[113] Without determination that the price paid was inflated by the payments to the New Zealand Dairies suppliers, I consider that benefit to the respondents or cost to Fonterra is not shown to justify the lower price for the milk supplied by the respondents to Fonterra than was paid by Fonterra to others who supplied milk under the Growth Contracts. Nor do I consider that there is any basis for the additional disadvantages entailed in locking the respondents into the Growth Contract price for the 2012–2013 season or in preventing them providing the capital to enable them to receive the milk price on the basis of the share standard in that season (and to be able to purchase shares prior to the introduction of the Trading Among Farmers scheme). I agree with the decisions in the High Court and Court of Appeal and consider that no adequate basis on which to overturn them has been demonstrated.

[114] Secondly, there was contemporary evidence to justify the conclusion reached by the High Court and Court of Appeal that a punitive approach was taken to the respondents when the terms were settled. Again, this conclusion is based on concurrent findings of fact in the Courts below which have not been shown to be wrong.

[115] In this Court it was argued that even if the terms were in the nature of penalties, it was objectively rational for Fonterra to be seen to take a tough line with the respondents. That was particularly so given nervousness among Fonterra management as to whether shareholder endorsement of the Trading Among Farmers scheme (a matter of considerable moment to Fonterra) would be obtained. But it seems to me that this argument collides with the policies of sub-pt 5 of pt 2 of the Act in regulating milk supply.

[116] Regulation of milk supply under the Act was adopted as the appropriate response to establishment of Fonterra as the dominant purchaser and processor of milk in New Zealand. Although the Court of Appeal considered that some care was required in "importing notions from the Commerce Act to the s 106 analysis",[127] the linkage between the two Acts is explicit. The authorisations in terms of s 58 of the Commerce Act are the reason for enactment of a number of the provisions of the Fonterra Constitution in the first Schedule to the Act[128] and there was reference to the Commerce Act in the Act's purpose section.[129] With that background, I consider that counsel for the respondents was correct to submit that some objective difference in the economic circumstances would usually be required before different treatment could be justified under s 106. Differing somewhat on this point from the view taken by O'Regan and Ellen France JJ,[130] I also accept the suggestion by counsel for the respondents that it may often be a useful check in such cases to consider whether the proffered difference in circumstances is one that could arise in a workably competitive market.[131]

[117] The Growth Contract sets up a differential in the treatment of suppliers under that contract and suppliers on the share standard basis. That is an example of a difference that may be objectively justified on a basis that does not seem to me to be inconsistent with the purposes of the statute. No such objective justification is pointed to here as to difference in treatment between the respondents on the one hand and, on the other hand, other farmers who applied to supply milk on Growth Contracts as new entrants or existing shareholding farmers.

[118] I agree with O'Regan and Ellen France JJ that the motivation in preventing the respondents from participating in the expected lift in the value of shares following the introduction of Trading Among Farmers in the shares was a collateral purpose that was

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127 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [118].

128 See s 11 of the Dairy Industry Restructuring Act which, prior to its repeal in 2012, provided that Fonterra and its shareholders were authorised to adopt in its constitution clauses identical to those set out in sche 1 and that such authorisation "must be treated as if it were an authorisation granted by the Commerce Commission under section 58(1), (2), (5), and (6) of the Commerce Act 1986".

129 Dairy Industry Restructuring Act, s 4(a), also repealed in 2012.

130 See above at [57]–[58].

131 This was also accepted in the Courts below: see *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [110]; and *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [117].

not legitimate for Fonterra to act on.[132] I consider that Mr Goddard QC for the respondents was right in the submission that the "core purpose" of s 106 is to prevent Fonterra pursuing such interests at the expense of new entrants. The legislative scheme to require equal treatment of suppliers in like circumstances in order to protect against exercise of monopsony power justifies different treatment only where it results from difference which would exist in the absence of such power and is no more than is necessary to respond to such difference.

[119] It was not shown that that there was economic detriment to existing shareholders beyond that which resulted from the statutory obligation to accept new entrants. Although Fonterra had the option of declining to accept the applications by the respondents because they were made out of the application period, that option was not taken, no doubt because Fonterra needed the supply for the Studholme plant. (It had been a condition of the agreement to purchase the New Zealand Dairies plant that 100 per cent of its suppliers would supply Fonterra and each of the Milk Supply Agreements was subject to the same condition.) Similarly, as the High Court and Court of Appeal found, there is no objective justification shown for the differential in relation to the acquisition of the milk vats, including the preservation of the option of later acquisition by Fonterra.[133] I agree with the conclusions in the Courts below that the terms of supply for the respondents were in breach of s 106.

Result

[120] I would accordingly dismiss the appeal with costs to the respondents. I consider that the respondents became "new entrants" in respect of the supply of milk in the 2012–2013 season when Fonterra accepted their applications to supply the milk as shareholding farmers. I consider that Fonterra breached s 106 in relation to the terms of supply it applied to the respondents as new entrants.

GLAZEBROOK J

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132 See above at [61].

133 *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012 at [114]–[115]; and *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 at [119].

[121] O'Regan and Ellen France JJ have set out the background to this appeal at [1]–[36] of their reasons.

[122] I agree there is force in the literal approach to the interpretation of the term "shareholding farmers".[134] Even if the focus of the Act is on share-backed supply,[135] I agree with O'Regan and Ellen France JJ that the respondents were applicants to become fully share-backed farmers and thus fell within the definition of "new entrant".[136] I agree therefore that s 106 applies in this case.

[123] I agree with the analysis of the Chief Justice on the issue of whether the terms of supply applied to the respondents were in breach of s 106.[137]

[124] It follows that I agree the appeal should be dismissed.

WILLIAM YOUNG J

Section 106

[125] Despite the repetition, I think it best to set out s 106(1) of the Dairy Industry Restructuring Act 2001 again:

> **106 No discrimination between suppliers**
>
> (1) [Fonterra] must ensure that the terms of supply that apply to a new entrant—
>
> (a) are the same as the terms that apply to a shareholding farmer in the same circumstances; or
>
> (b) differ from the terms that apply to a shareholding farmer in different circumstances only to reflect the different circumstances.
>
> …

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134 See the High Court's and Court of Appeal's reasons set out above at [35] and [36] respectively; see also O'Regan and Ellen France JJ at [37].

135 As O'Regan and Ellen France JJ maintain see at [37] above. This is a point on which I do not need to comment.

136 At [39]–[51] of their reasons. I also agree with their comments at [52]. The Chief Justice also holds that the respondents were new entrants: at [98]–[105].

137 At [106]–[119] of her reasons.

> (4) [Fonterra] must not treat a shareholding farmer who exercises an entitlement under this subpart any less favourably than a shareholding farmer who does not do so.

The central issues in the case

[126] For both contract and share-backed supply, the supplier must be a shareholder; in the case of contract supply, holding the minimum number of shares specified by the Board (1,000 shares), and, in the case of share-backed supply, shares to the extent required by the share standard.[138] As well, because Fonterra is committed to the concept of share-backed supply, all those who supply milk on contract are required to share up over time.[139]

[127] The respondents maintain that they were new entrants in respect of the milk supplied to Fonterra for the 2012–2013 season and the terms offered to them were not the same as those offered to shareholding farmers in the same circumstances. They say that they should have been: (a) entitled to share up for the 2012–2013 season; (b) (if they did not share up) paid the same price as other contract suppliers; and (c) able to sell their milk vats to Fonterra.

[128] Fonterra's position is that the respondents were not new entrants save perhaps as to the supply associated with the nominal shareholdings of 1,000 shares. They were otherwise contract suppliers and s 106 does not impose restrictions on the way in which Fonterra deals with contract suppliers.

[129] The primary difficulty with the case is working out what is meant by "supply by a shareholding farmer" which, together with related expressions, forms the basis of the regulatory regime put in place by the Act. Under its constitution Fonterra can accept contract supply only from those who hold shares. This means that contract supply can be regarded as supply by a shareholding farmer. As I will explain, however, the detail of the sub-pt 5 of pt 2 regulatory regime is addressed specifically to share-backed supply. Taking the literal approach that "supply by a shareholding farmer" for the purposes of sub-pt 5 of pt 2 encompasses contract supply would have the effect that sub-pt 5 of pt 2 of the regulatory regime would apply to contract supply,

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138 One share per anticipated kilogram of milk solids (kgMS) of supply.

139 See my explanation of this below at [137].

something which, as I will also explain, is not easily consistent with the statutory language and policy.

[130] The key question therefore, is whether s 106 applies only to the terms of supply offered by Fonterra for new supply provided on a share-backed basis (which is Fonterra's position) or also encompasses supply on contract. I see this as coming down to whether the purpose and effect of the regulatory regime created by sub-pt 5 of pt 2 of the Act is to regulate only share-backed supply or both share-backed and contract supply.

My approach

[131] My interpretation of s 106 is that:

(a) it applies only to the terms of supply applicable to share-backed supply, that is supply which is backed by shares to the extent required by the share standard stipulated by Fonterra; and

(b) a "new entrant" is a person whose application to supply milk on a share-backed basis for the season in question has been accepted by Fonterra either compulsorily (under ss 73 and 74(1)[140]) or at its discretion (under s 74(3)[141]).

[132] On this basis, the respondents were new entrants for the 2012–2013 season only in respect of the supply backed by the 1,000 shares they were required to acquire. Their s 106(1) rights were confined to that portion of their supply.

[133] I do not see the downstream Growth Contract commitments of the respondents to share up in years four, five and six of the Growth Contracts as meaning that they were new entrants in any broader sense.[142] The opposing view seems to me to: (a) ignore the season-to-season focus of the regulatory scheme; and (b) extend to

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140 For applications made within the application period. The minimum application period is between 15 December and 28 February, but Fonterra can set a longer period at its discretion: Dairy Industry Restructuring Act 2001, s 75.

141 For late applications: see below at [149].

142 Compare O'Regan and Ellen France JJ above at [39]–[42]; and Elias CJ above at [102]–[105].

contract supply a regulatory scheme only ever intended to apply to share-backed supply. Instead, I would see them as shareholder farmers increasing supply as and when they share up. And, as will become apparent, I regard the reference to "new entrant" in s 106(1) as encompassing a shareholding farmer increasing supply under s 73(2), or alternatively, that such a shareholding farmer is entitled to what in substance are the same rights under s 106(2).[143]

[134] I do not see it as significant that, as a matter of practice, sharing up applications are not required of Growth Contract suppliers in the fourth, fifth and sixth years.[144] Under the Growth Contract, suppliers were required to make all necessary applications. This stipulation could be read as encompassing applications under s 73(2) (that is on the basis that they are shareholding farmers wishing to increase supply) if such applications were required. But, in any event, and more importantly, I do not see how the proper interpretation of the statute could be controlled by what at most is some laxity in the way it has been administered.

[135] In succeeding sections of these reasons, I propose to explain my approach by reference to Fonterra's constitution, the relevant provisions of the Act, the legislative history and the reasons why I disagree with the conclusions of Muir J and the Court of Appeal.

Fonterra's constitution

[136] The relevant provisions of the constitution are set out in the reasons of O'Regan and Ellen France JJ.[145]

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143 See below at [151]–[152].
144 Compare O'Regan and Ellen France JJ above at [41]–[42].
145 See above at [17]–[19].

[137] The concept of contract supply as provided for in the constitution is not expressed with great clarity but I see it as involving the supplier:

(a) being a shareholder holding the minimum number of shares specified by the Board;[146] and

(b) committing to become a share-backed supplier over time.

The second element of the concept is a consequence of cl 2.2:

> **2.2 Irrevocable application:** The supply by any person of Milk to the Company is an irrevocable application by that person to become a Shareholder and hold the number of Co-Operative Shares from time to time required from time to time required by the Share Standard, or by the Board under clause 3.3, as applicable.

Clause 3.3 allows shareholders to hold down to 80 per cent of shares required by the share standard, at the discretion of the Board. In practical terms cl 2.2 is of no moment for an applicant whose supply is to be share-backed from the time it commences. The situation of such an applicant is comprehensively addressed by s 73 and succeeding sections of the Act.

[138] I would not construe cl 2.3(b)[147] as providing scope for exemption from the requirement to hold shares. Rather, I see it as proceeding on the basis that a contract supplier is not a shareholding farmer in respect of the contract supply (that is non-share-backed supply). I also see cl 2.5 (which provides for separate designation for suppliers with more than one farm) as consistent with the view that shares are regarded as representing supply, in this case, particular supply on a farm by farm basis.

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146 I see the definition of "contract supply" and the permission extended by cl 3.4 as extending only to supply from shareholders. I see the expression "Shareholder in respect of that supply" in cl 2.3(b) as referring to share-backed supply: these clauses are set out in the reasons of O'Regan and Ellen France JJ above at [18].

147 Clause 2.3(b) provides that the Board may in its absolute discretion decide to accept the supply of milk from any person "without requiring that person to become a Shareholder in respect of that supply": see O'Regan and Ellen France JJ above at [18].

The Act

Definitions of "shareholding farmer", "co-operative share" and "new entrant"

[139] The 1,000 shares which the respondents acquired in Fonterra are co-operative shares and I agree with O'Regan and Ellen France JJ that "shareholding farmer" and "co-operative share" are defined in the Act in such a way as to suggest that: (a) the respondents' ownership of such shares means that they are "shareholding farmers"; and (b) their contract supply is aptly described as "the supply of milk to [Fonterra] by new entrants or shareholder farmers".[148]

[140] "New entrant" is defined as meaning "a dairy farmer who is not a shareholding farmer who applies to become a shareholding farmer under section 73".[149] This definition suggests that a shareholding farmer will be a new entrant only once, that is when that farmer first applies to supply milk on a share-backed basis.

[141] A literal approach to the definitions just discussed provides strong support for the respondents. As will by now be apparent, I however, I do not see that approach as consistent with the overall scheme and purpose of the Act and, in particular, sub-pt 5 of pt 2 of the Act.

Statement of principles

[142] Section 71 sets out the principles intended to be promoted by sub-pt 5 of pt 2 of the Act:

> **71 Statement of principles**
>
> The intention of this subpart is to promote the following principles:
>
> (a) independent processors must be able to obtain raw milk, and other dairy goods and services, necessary for them to compete in dairy markets:
>
> (b) *[Fonterra] must accept applications by new entrants and shareholding farmers to supply it with milk, as shareholding farmers:*

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148 See O'Regan and Ellen France JJ above at [22].
149 Dairy Industry Restructuring Act, s 5.

(c) *[Fonterra] must not discriminate between new entrants and shareholding farmers whose circumstances are the same*:

(d) shareholding farmers who withdraw from [Fonterra], and cease or reduce supply, must receive their capital in [Fonterra] without unreasonable delay:

(e) *the amount per unit of milk production paid, at a time, to [Fonterra] to become a shareholding farmer must be the same as the amount per unit of milk production received, at the same time, from [Fonterra] by a shareholding farmer who withdraws from [Fonterra]*.

(emphasis added)

[143] Section s 71(b) is predicated on the assumption that the supply of milk "as shareholding farmers" encompasses only share-backed supply. Thus Fonterra has no obligation to accept contract supply. The same assumption is implicit in s 71(e). It might be thought to follow that s 71(c) refers to non-discrimination in respect only of share-backed supply.

[144] Section 71(b) refers to new entrants and shareholding farmers in a context which plainly encompasses shareholding farmers increasing supply whose applications to do so must be accepted under s 73(2). In s 71(c) the expression "new entrant" also appears to be used as encompassing shareholder farmers increasing supply.

Section 73

[145] Section 73 relevantly provides:

73 [Fonterra] must accept application

(1) [Fonterra] must accept an application to become a shareholding farmer that is made by a new entrant in an application period.

(2) [Fonterra] must accept an application to increase the volume of milk supplied as a shareholding farmer to [Fonterra] that is made by a shareholding farmer in an application period.

Section 74(1) provides that where an application is made within the application period, Fonterra "must accept the milk to which the application relates from the beginning of the season following that application period". Pausing at this point, this can only be a

reference to share-backed supply. This is because Fonterra is under no obligation to accept milk otherwise than on a share-backed basis.

[146] As O'Regan and Ellen France JJ note, under the Act as it was enacted, Fonterra was required to set prices for co-operative shares and peak notes and specify standards as to the quantity of shares and peak notes required to be held.[150] The new entrant, or shareholding farmer wishing to increase supply, was required to acquire co-operative shares and peak notes to the extent required by the standards set by Fonterra. Fonterra could require a deposit and the balance was to be paid before 1 June.[151] Under this process, the new entrant or farmer increasing supply would be fully shared up by 1 June for the dairy season starting on that day.

[147] I think it follows from what I have just said, that "an application to become a shareholding farmer" in s 73(1) refers only to an application to supply milk on a share-backed basis for the following season and "milk supplied as a shareholding farmer" in s 73(2) encompasses only share-backed supply. If contract supply was, for the purposes of s 73(2), supply "as a shareholding farmer", a contract supplier (who is necessarily a shareholder) would have the right to require Fonterra to take additional supply, which is simply not the case. As well, the statutory mechanisms as to what follows from an application under s 73 – that is under ss 74–93 – make it clear that what is envisaged is only share-backed supply which commences or increases in the next season.

[148] O'Regan and Ellen France JJ[152] also refer to ss 86–93 which provide for Fonterra to issue constraint notices for geographical areas if, in its reasonable opinion "processing the expected increase in the volume of milk supplied … from that area in the next season cannot be reasonably managed".[153] As the majority observe, such a notice enables Fonterra to defer acceptance of milk to which new applications under s 73 apply.[154] The detail of these sections is of no moment for present purposes but the overall scheme emphasises the season-to-season operation of the Act in terms of

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150 O'Regan and Ellen France JJ above at [26], citing ss 77–79 of the Act.
151 Dairy Industry Restructuring Act, ss 84–85.
152 Above at [27].
153 Dairy Industry Restructuring Act, s 86(1).
154 Above at [27].

Fonterra's obligations and assumes that supply resulting from s 73 applications will be share-backed.

Late applications

[149] In practice Fonterra was usually prepared to accept applications as late as September in the new season providing it had in place the necessary processing infrastructure. This is provided for by s 74(3), which provides:

> [Fonterra] may, in its discretion, accept an application made outside an application period from a dairy farmer, including a shareholding farmer, to supply milk as a shareholding farmer.

[150] As I understand it, the respondents (or at least most of them) did not apply to supply milk for the 2012–2013 season on a share-backed basis,[155] albeit this is understandable as Fonterra had made it clear that it would not have accepted such applications. Its reasons for this stance had nothing to do with capacity, as it was willing to process, via the Studholme plant, all of the milk supplied by the respondents. Whether the approach taken by Fonterra was open to it as a matter of administrative law may be open to question, but this is not before us. What is important for present purposes is that s 74(3), when read in context, uses the expression "supply … as a shareholding farmer" as encompassing only share-backed supply.

What, if any, rights does a shareholding farmer increasing supply have under s 106?

[151] Let us say that a shareholding farmer whose supply has always been fully share-backed wishes to increase supply. That farmer is entitled under s 73(2) to require Fonterra to accept the increased supply providing a timely application is made.

[152] On literal interpretations of the definition of "new entrant" and s 106(1), that shareholder farmer is not a new entrant. So, would it be open to Fonterra to discriminate against that farmer in respect of the new supply? The policy of the Act requires that this question be answered no, albeit that there is scope for argument as to how this result should be arrived at. One approach is to treat the phrase "new entrant"

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[155] It is possible that some of the respondents who were already existing Fonterra shareholders may have applied for shares over and above what they required for their non- New Zealand Dairies Ltd farms. Nothing, however, turns on this.

in s 106 as encompassing those applying under s 73(1) and (2) and thus as including shareholding farmers increasing supply. Another is to treat s 106(4) as encompassing shareholders exercising their statutory entitlement to increase supply who may not be treated "less favourably" than similarly placed shareholders in respect of share-backed supply. My preference is for the first – a shareholding farmer increasing supply is, in respect of the increased supply, a new entrant. I accept that this sits slightly awkwardly with the definition of new entrant but see the awkwardness as less significant than the necessity to apply s 106 in a way that is consistent with the policy of open entry and open exit.

The legislative history

[153] The legislative history is reviewed in the reasons of O'Regan and Ellen France JJ.[156] That legislative history makes it clear that the Act is premised on: (a) the recognition that Fonterra would be a monopsonist with dominance in a number of markets; and (b) the resulting policy consideration that regulation was appropriate to mitigate associated risks and in particular to facilitate competition. This policy is given effect to by the Act in various ways, most relevantly by stipulating for a system of open entry and open exit.

[154] The concept of open entry and open exit is referable only to share-backed supply. There is not the slightest indication in the background material to suggest that the contract supply was to be regulated.

The approach of Muir J

[155] The essence of the reasoning of Muir J appears in the paragraphs of his judgment set out in the reasons of O'Regan and Ellen France JJ.[157]

[156] On his approach, Fonterra, by requiring the respondents to acquire 1,000 shares each, set for itself, and then fell into, a trap. On his view, expressed in [105] of his reasons, Fonterra's conduct would have been unobjectionable legally if it had refused

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156 Above at [32]–[34].

157 Above at [35]; setting out [103]–[105] of Muir J's reasons in *McIntyre and Williamson Partnership v Fonterra Co-operative Group Ltd* [2015] NZHC 3012.

to allow the respondents to acquire any shares but had otherwise dealt with them on the terms it insisted on. He did not address the provisions in Fonterra's constitution which are approved by the Act and permit Fonterra to accept contract supply only from shareholders. While he understandably drew support for his approach from the definition of "shareholding farmer",[158] he did not address the other considerations to which I have referred which strongly suggest that the regulatory regime is directed only to share-backed supply.

[157] At [103] the Judge rejected the view that a supplier: "might be defined not as an individual but as a proxy for a block of shares to which, and in respect only of which, obligations of equality apply". In contradistinction, I consider that the obligations of equality created by the Act apply only to supply which is share-backed. The statutory rights of new entrants and shareholding farmers to share up are so premised and it is only in respect of the shares which are acquired that suppliers have the statutory entitlements created by s 106. This makes sense because the comparison envisaged by the Act is between the terms of supply offered to them in respect of their new supply and those available to farmers whose supply is already backed by shares. This is the essence of the open entry/exit regime: farmers can join and leave the co-operative as they like with the capital cost of acquiring shares the only barrier to entry. Under such a regime there is no need to address contract supply.

The Court of Appeal approach

[158] The Court of Appeal's reasoning is set out in the reasons of the O'Regan and Ellen France JJ.[159]

[159] Although it will generally be apparent from what I have already said why I disagree with this reasoning, some aspects of the judgement warrant brief comment.

(a) The judgment does not recognise that the regulatory regime is confined to the facilitation of open entry to Fonterra for share-backed supply or

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158 At [104](f).

159 See above at [36]; setting out extracts from [90]–[96] of *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435 (Randerson, Winkelmann and Brown JJ) [*Fonterra* (CA)].

the point already made in relation to Muir J's judgment that the statutory rights under s 106 apply to share-backed suppliers and in that sense attach to shares. Because Fonterra can only accept contract supply from shareholders, the approach adopted by the Court of Appeal means that the Act operates so as to regulate the basis on which Fonterra accepts contract supply, something which was plainly not its purpose.

(b) On my approach, Fonterra accepted the respondents as new entrants in relation to 1,000 shares, and thus supply of 1,000 kgMS, but their entitlements under sub-pt 5 of pt 2 of the Act were confined to that supply.

(c) In relation to what was said at [91] of the Court of Appeal judgment, as a matter of practice, Fonterra did not require formal applications in respect of compulsory sharing up commitments for the fourth, fifth and sixth years of milk supply agreements. I do not see this as material; this for reasons which I have already explained.[160]

(d) I regard the analysis contained in the sixth point as wrong.[161] The statutory scheme (encompassing as it does approval of the relevant clauses of the constitution) recognises a concept of contract supply by shareholders which, to the extent to which it is share-backed is subject to the sub-pt 5 of pt 2 regime but is not otherwise subject to regulation.

Disposition

[160] I would accordingly allow the appeal.

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160 See above at [134].
161 *Fonterra* (CA), above n 159, at [96].