Supreme Court of New Zealand
Te Kōti Mana Nui

21 December 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

FONTERRA CO-OPERATIVE GROUP LIMITED v MCINTYRE AND WILLIAMSON PARTNERSHIP AND OTHERS

(SC 150/2016) [2017] NZSC 197

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The appellant, Fonterra Co-operative Group Ltd, is a co-operative and a major processor of milk. 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 Dairies Ltd (NZDL). On 17 May 2012 NZDL went into receivership.

Fonterra purchased the NZDL plant on terms which allowed the respondents to be paid money owed by NZDL for milk previously supplied, known as "retros". Fonterra also agreed to take the respondents' milk for the following and subsequent seasons. The terms of these supply agreements between Fonterra and the respondents were the subject of this case.

The agreements contained three terms which differed from those offered to other suppliers. Those terms were: (a) a reduced price for the supply of milk compared to the standard contract; (b) a deferment of the right to buy shares commensurate with milk supply, which prevented the purchase of shares (other than the 1000 shares the respondents were required to hold) in the first season; and (c) no obligation on Fonterra to purchase the respondents' milk vats. The respondents contended that these terms

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breached s 106 of the Dairy Industry Restructuring Act 2001 (the Act). That section prohibits discrimination between new entrants and existing shareholder suppliers of Fonterra.

Fonterra submitted that s 106 did not apply to the respondents' agreements as the section only applies to "new entrants" and the respondents were not new entrants. This argument rested on the premise that to be a new entrant a supplier had to have shares commensurate with their supply – that is, to be "share-backed" suppliers. In addition, the respondents had entered into the agreements outside of the application period for the 2012–2013 season, which meant the obligation on Fonterra to accept them as suppliers under s 73 of the Act did not apply. Fonterra submitted, in the alternative, that if s 106 applied the terms were permissible because the respondents were in different circumstances to other shareholding farmers because Fonterra had paid the retros.

Both the High Court and the Court of Appeal found that s 106 was engaged and that all three terms at issue breached that section.

Fonterra was granted leave to appeal to this Court on the question of whether the Court of Appeal was correct to find that the respondents were new entrants for the purposes of s 106 and, if so, whether Fonterra breached s 106 in offering the respondents the terms of supply set out in the agreements.

This Court has, by majority (Elias CJ, Glazebrook, O'Regan and Ellen France JJ) dismissed the appeal. Four sets of reasons were delivered.

O'Regan and Ellen France JJ considered there were two key reasons why s 106 applied: first, the respondents were obliged to become fully share-backed over the course of the agreements; and second, Fonterra had exercised its discretion to accept the respondents' milk despite their late application. The scheme of the Act indicated that s 106 would apply in such situations.

The Judges held that the terms offered by Fonterra were impermissible as they were not offered "only to reflect the different circumstances" between the respondents and existing shareholding farmers, as required by s 106. Instead, they were offered for the principal reason of "optics": that is, to address the potential concerns of existing shareholders about the transaction. It was significant that Fonterra had not paid an inflated price for the NZDL assets.

The Chief Justice, following her own analysis of the Act, agreed with the result arrived at by O'Regan and Ellen France JJ. She accepted the respondents' suggestion that in application of s 106 it may be useful to consider whether the different treatment in question could arise in a workably competitive market. She agreed with O'Regan and Ellen France JJ that the terms in issue breached s 106.

Glazebrook J agreed with O'Regan and Ellen France JJ that the respondents were new entrants and agreed that the three terms breached s 106 for the reasons given by the Chief Justice.

William Young J, dissenting, accepted Fonterra's submission that the Act only regulates share-backed supply and the respondents were not share-backed suppliers. Therefore, on his approach, s 106 was not engaged and the appeal should have been allowed.

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