

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

**CIV-2010-404-3263**

UNDER section 24C(4) Judicature Act 1908

BETWEEN UBNZ ASSETS HOLDINGS LTD  
First Plaintiff

AND NATURAL DAIRY (NZ) HOLDINGS LTD  
Second Plaintiff

AND PLATEAU FARMS LTD, FERRY VIEW  
FARMS LTD, TAHARUA LTD AND  
HILLSIDE LTD, ALL IN RECEIVERSHIP,  
ACTING THROUGH MICHAEL PETER  
STIASSNEY AND BRENDON JAMES  
GIBSON  
First Defendant

AND OVERSEAS INVESTMENT OFFICE (LAND  
INFORMATION NEW ZEALAND)  
Second Defendant

Hearing: 4 June 2010

Appearances: Bruce Gray QC and Jane Anderson for Plaintiffs  
Sean Gollin for First Defendant  
Hamish Hancock and Pedro Morgan for Second Defendant

Judgment: 11 June 2010

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**JUDGMENT OF HARRISON J**

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*This judgment was delivered by me on 11 June 2010 at 3.30 p.m.  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

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**SOLICITORS**

Knight Coldicutt (Auckland) for Plaintiffs  
Minter Ellison Rudd Watts (Auckland) for First Defendant  
Crown Law (Wellington) for Second Defendant

**COUNSEL**

Bruce Gray QC

UBNZ ASSETS HOLDINGS LTD AND ANOR V PLATEAU FARMS LTD, FERRY VIEW FARMS LTD,  
TAHARUA LTD AND HILLSIDE LTD, ALL IN RECEIVERSHIP, ACTING THROUGH MICHAEL PETER  
STIASSNEY AND BRENDON JAMES GIBSON AND ANOR HC AK CIV-2010-404-3263 11 June 2010

## **Introduction**

[1] The Crafar group of companies owns 16 dairy farms located throughout New Zealand (the Crafar Farms). The total area is 9344.26 ha or  $\frac{1}{5}$ <sup>th</sup> of 1% of all New Zealand rural land. The Crafar Farms are collectively classified as "sensitive land" under the Overseas Investment Act 2005 (the OIA).<sup>1</sup>

[2] In late 2009 the Crafar Group was placed in receivership by its principal creditor. On 21 May 2010 the receivers entered into an agreement to sell the Crafar Farms to UBNZ Funds Management Ltd, a New Zealand company, for \$213.2m plus stock and valuation. However, the transaction involves an overseas entity, Natural Dairy (NZ) Holdings Ltd (NDL). The agreement is thus conditional upon consent from the Overseas Investment Office (the OIO).

[3] The parties are not confident that OIA consent will be granted and have since restructured the transaction. On 1 June UBNZ applied to this Court for a declaration that the restructured transaction does not require OIA consent. The receivers will abide the decision but the OIO opposes UBNZ's application. The OIO, which is not cited as a defendant, has applied for joinder. Neither UBNZ nor the receivers oppose and I am satisfied that it should be joined as second defendant. An order is made accordingly.

## **Transactions**

[4] The Crafar Group originally entered into an agreement to sell the Crafar Farms to the UBNZ Group on 19 May 2009 ("the initial transaction"). Mr Bruce Gray QC for UBNZ advises that the group had identified the Crafar Farms as potential farming operations for a venture to produce and distribute UHT milk in China. New Zealand milk commands a premium price there. The UBNZ companies are owned by May Wang, a New Zealand resident. It is a matter of public record that Ms Wang is currently the subject of an application to this Court to adjudicate her bankrupt and there is no evidence that either Ms Wang or the UBNZ Group has

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<sup>1</sup> Part 1, Schedule 1.

independent financial worth or means of raising the capital or finance necessary to settle the purchase.

[5] In order to give effect to the initial transaction, NDL entered into agreements with UBNZ Assets Holdings Ltd, UBNZ Funds and UBNZ Trustee Ltd on these relevant terms:

- (1) UBNZ Funds would on-sell the Crafar Farms to its associated company, UBNZ Assets;
- (2) NDL acquired 2,000 or 20% of the 10,000 shares in UBNZ Assets and UBNZ Trustee, described as the trustee of a trust, acquired the remaining 8,000 or 80% of the shares;
- (3) UBNZ Trustee was to advance \$100 million to UBNZ Assets by way of a shareholder loan;
- (4) UBNZ Trustee has granted NDL an option to acquire its remaining 80% shares in UBNZ Assets. Both parties contemplate that NDL will move directly to exercise the option;
- (5) UBNZ Assets and UBNZ Trustee were subject to fetters and controls pending NDL's exercise of its option to acquire the remaining 80%.

[6] The initial transaction had not settled before Crafar's receivership. The receivers have since agreed to sell the Crafar Farms to UBNZ Funds on substantially the same terms and conditions as the initial transaction. The UBNZ Group accepts that the effect of the initial transaction is that UBNZ Funds, UBNZ Trustee and UBNZ Assets may have been "associates" of NDL for the purposes of acquiring the Crafar Farms under the relevant agreements;<sup>2</sup> accordingly, OIA consent may have been required for the acquisition as an "overseas investment in sensitive land".<sup>3</sup>

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<sup>2</sup> Section 8, Overseas Investment Act.

<sup>3</sup> Section 10.

[7] However, the parties have since restructured the initial transaction. In summary the restructured transaction's material terms are:

- (1) UBNZ Assets will acquire the Crafar Farms on settlement by nomination or novation as purchaser (removing UBNZ Funds from and thus simplifying the process);
- (2) UBNZ Assets' share capital will be increased to 100 million ordinary \$1 shares;
- (3) NDL will hold 20 million shares or a 20% interest in UBNZ Assets and UBNZ Trustee will hold the remaining 80 million shares or an 80% interest, with all UBNZ Assets shares being paid up;
- (4) UBNZ Assets' acquisition of the Crafar Farms will be funded by:
  - (a) \$100 million raised from the issue of 20% of its share capital to NDL;
  - (b) \$100 million loan from Westpac (as the original lender to the Crafar companies) secured over the assets of UBNZ Assets (the receivers advise that this statement is not strictly correct);
  - (c) \$50 million from the issue of UBNZ Assets to NDL and UBNZ Trustee of redeemable preference shares with a face value of \$50 million for a three year term at 7% interest (such transaction being exempt from the requirement of consent under the OIA pursuant to Reg 33(1)(d) Overseas Investment Regulations 2005).
- (5) NDL will hold an option from UBNZ Trustee to acquire the remaining 80 million shares in UBNZ Assets (this option is expressly conditional on OIA consent).

[8] UBNZ pleads that by virtue of the restructured transaction:

- (1) UBNZ Assets will fund the transaction from its own equity and borrowings, and will be in a position to hold and manage the Crafar Farms without NDL having direct or indirect influence or control over the properties;
- (2) UBNZ Trustee will hold and control its 80% shareholding in UBNZ Assets without NDL exercising any direct or indirect influence or control over UBNZ Trustee or its shareholding in UBNZ Assets (other than in accordance with NDL's rights under the share option).

[9] UBNZ further pleads that:

- (1) UBNZ Funds, UBNZ Trustee and UBNZ Assets will not be "associates" of NDL relating to the acquisition of the Crafar Farms;
- (2) UBNZ Assets and UBNZ Trustee are not "overseas persons";
- (3) OIA consent will not be required for UBNZ Assets to acquire the Crafar Farms pursuant to the agreements;
- (4) OIA consent is not required for UBNZ Trustee to acquire 80% of the shares in UBNZ Assets as part of the restructured transaction;
- (5) OIA consent will be required and will be sought when and if NDL exercises the share option.

[10] The receivers have advised UBNZ that, because they are uncertain whether OIA consent to the restructured transaction is required, they will refuse to execute the new contract without a declaration from this Court confirming that consent is not required. Accordingly, UBNZ says, a dispute has arisen between the parties requiring declaratory relief.

## **Declaratory Relief**

[11] The OIO raises a jurisdictional objection to UBNZ's application. It says there is a danger in deciding the questions raised by UBNZ's statement of claim in a vacuum. Its counsel, Mr Hamish Hancock, observes that the transaction documents before the Court disclose limited facts. The questions posed by UBNZ are, he says, hypothetical and subject to such a wide range of reservations as would render any declaration potentially meaningless. Moreover, if granted, a declaration would give comfort to a transaction which on further investigation may be in breach of the OIA.

[12] Mr Hancock's submission has a proper foundation. Ms Johanna McClure, the OIO Manager, has sworn an extensive affidavit at short notice. She outlines the unsatisfactory nature of the OIO's previous dealings with UBNZ and NDL relating to this transaction and the sale of four other Crafar Farms. She questions the true nature and the extent of the actual relationship between those two parties and the principal individuals.

[13] Ms McClure advises that the OIO is already investigating eight suspected breaches of the OIA by parties involved in this transaction. She has cause to doubt that they have made full and accurate disclosure of critical elements of the restructured transaction.

[14] However, I am satisfied that a sufficient factual foundation exists for considering whether to exercise the discretionary power to grant declaratory relief. It is plainly in the interests of both the contracting parties and the public that UBNZ's application is determined promptly. A decision might provide a degree of guidance on future dealings. Even if a declaration favourable to the contracting parties is granted, the OIO will still be entitled to exercise its investigative and legal powers if it is satisfied that a transaction approved by this Court was misrepresented.

## **Decision**

[15] The OIA proceeds on the unequivocal premise that it is a privilege for overseas persons to own or control sensitive New Zealand assets. Its purpose is,

first, to require overseas investments in those assets before being made to meet specified criteria for consent and, second, to impose conditions on those investments. The Act defines "overseas persons" as either an individual who is neither a New Zealand citizen nor ordinarily resident here, or a body incorporated outside New Zealand, or a 25% or more shareholder in a local company. It defines the "associate" of an overseas person expansively, for the apparent purpose of preventing such a person from circumventing its provisions by operating through the medium of a third party such as an agent, nominee or co-venturer.

[16] Argument on this application tended to focus on whether or not UBNZ was an associate of NDL. I will return to this point. In my judgment, however, a more direct approach is justified. In the end, both routes rely on the same facts and lead to the same result for substantially the same reasons.

*(1) Acquisition by NDL*

[17] The first question is whether the restructured transaction will result in an overseas investment in the Crafar Farms, irrespective of an associate relationship between NDL and UBNZ Assets. This answer centres on the existence of NDL's acquisition of a 20% shareholding in UBNZ Assets and its option to acquire the remaining 80%. Mr Gray submits there is no certainty - just a possibility - of NDL exercising its option and, unless and until it does, the issue of OIA consent does not arise.

[18] A transaction requires OIO consent "if it **will result** in an overseas investment in sensitive land",<sup>4</sup> being "the acquisition by an overseas person, or an associate of an overseas person, of an interest in [sensitive] land ...".<sup>5</sup> An overseas investment transaction is defined as "a transaction **that results** in an overseas investment in sensitive land".<sup>6</sup> An acquisition "includes obtaining ownership or

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<sup>4</sup> Section 10(1).

<sup>5</sup> Section 12A.

<sup>6</sup> Section 6(1).

coming into possession by any means".<sup>7</sup> A transaction "includes the sale or transfer of property ...".<sup>8</sup> And an interest "includes a legal or equitable interest".<sup>9</sup>

[19] The term "acquisition" is given an inclusory meaning but is not otherwise defined. The verb "acquire" is defined as "to gain possession or control of; to get or obtain"; and the noun "acquisition" as "the gaining of possession or control over something".<sup>10</sup> The statutory reference to obtaining ownership or coming into possession by any means suggests a broad or liberal construction consistent with the OIA's clear focus on the substance of a transaction. In my judgment "obtaining ownership" is not limited to the act of taking legal title but necessarily includes substantive control over or possession of the sensitive land.

[20] An assessment of the requirement for consent is necessarily prospective. A value judgment must be exercised at the time a transaction is entered into - when the agreement for sale and purchase is executed - on whether it will result in an overseas investment; that is the acquisition of sensitive land by an overseas person. That determination will be based upon the evidence then available. The time spectrum is indefinite. The result of an overseas investment, which triggers the immediate requirement for consent, might occur at any future time. Its occurrence, contrary to Mr Gray's submission, is not expressly or impliedly limited to the period before settlement.

[21] Mr Gray accepts that the initial transaction is relevant to the inquiry into whether the restructured transaction will result in NDL acquiring the Crafar Farms by taking title or possession by any means, whether before or after settlement. It reveals the nature and extent of NDL's intention to use UBNZ as a corporate vehicle to acquire the Crafar Farms, structured through the medium of its 100% ownership in UBNZ Assets. The requirement for OIA consent to the initial transaction is unanswerable.

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<sup>7</sup> Section 6(1).

<sup>8</sup> Section 6(1).

<sup>9</sup> Section 6(1).

<sup>10</sup> *Black's Law Dictionary*, 9th ed. at p26.

[22] The question then arises: does the restructured transaction materially alter that initial relationship or merely effect a legal rearrangement of NDL's underlying control? The answer lies in a comparison of the two transactions. NDL's provision of funds of \$100 million is the same core element of both. In the initial transaction it is by way of shareholders loans to UBNZ Assets, which it will own entirely; in the restructured transaction it is through provision of the same amount of money but by way of present ownership of 20% of the UBNZ Assets shares.

[23] In both transactions NDL retains the same option to purchase the remaining 80% of the UBNZ Assets shares. The only difference is one of timing and certainty. If the initial transaction proceeds, NDL will exercise its option immediately; if the restructured transaction proceeds, Mr Gray will only acknowledge that total acquisition might happen but that NDL does not presently plan to take the necessary series of steps to reach that result. The distinction between the two transactions, he says, is that the first is a continuum whereas the second is contingently staged or tiered, breaking the original chain.

[24] The shareholding agreement is particularly material. It was executed on 22 May 2009, three days after the initial transaction. It provides that, first, NDL agrees to buy from UBNZ Trusts 20% of UBNZ Assets' share capital for \$100 million (despite those shares are being issued at par, they were acquired immediately for four times their face value); and, second, UBNZ Trusts grants NDL an irrevocable and unconditional option to purchase the remaining 80% of the UBNZ Assets shares at any time for \$400 million. On this basis, the capitalized value of UBNZ Assets is \$500 million, even though the Crafar Farms are its only asset which NDL acknowledges have a current value of \$230 million. The provisions for payment of the further \$400 million are convoluted, almost incomprehensible. On one view NDL would be able to acquire the remaining 80% of UBNZ Assets without making any additional payment.

[25] Moreover, the shareholders agreement provides that on settlement of NDL's purchase of 20% of UBNZ Assets' shareholding, UBNZ Trustees shall deliver to NDL letters of resignation signed by the director or directors and a shareholders resolution approving the appointment of substitute directors nominated by NDL. On

10 February 2010 the parties entered into a supplementary agreement whereby NDL agreed "not at this time [to] appoint any director of [UBNZ Assets]" but reserved to itself the right to appoint at the company's first board meeting a chairman who would have two votes. Board decisions are to be by a majority. Ms Wang was originally the sole director of UBNZ Assets. An additional director was appointed on 11 March 2010. I infer that he is the NDL appointed chairman.

[26] The shareholders agreement and its variation, considered in conjunction with the other available evidence, lead inexorably to one conclusion. Contrary to UBNZ's pleading, NDL now has absolute control over the ownership of UBNZ Assets, and through that route control over all its assets. UBNZ Assets is not free to dispose of its remaining shares to a third party. It is inevitable that NDL will move to obtain full legal ownership of the company - it is only a matter of when, not if.

[27] However, the occurrence of that contingency is not necessary to establish that the transaction "will result in an overseas investment in sensitive land". Settlement of the restructured transaction on its existing terms, without NDL exercising its option to purchase UBNZ Assets' remaining 80% shareholding, will achieve that result. Acquisition of title in UBNZ Assets' name is not decisive. The statute mandates a review of the substance. NDL controls all of the shares in and the board of UBNZ Assets. In terms of the OIA, the company will acquire substantive ownership of the Crafar Farms by virtue of its existing control over the nominal purchaser or title holder.

[28] The documentary evidence answers Mr Gray's submission that UBNZ Assets is acquiring the Crafar Farms for its own benefit, at least for the time being. I agree with Mr Hancock that NDL's acquisition of UBNZ Assets is the reason for the transaction. Without NDL's participation, the UBNZ Group would not have the means to proceed. It is simply being used as a conduit to obtain and hold legal title.

[29] In my judgment, there is no material difference between the initial and restructured transactions for the OIA's purposes. Settlement of each will result in an overseas investment in sensitive land. Even if that view is wrong, the distinction drawn by Mr Gray is without a real difference. It is irrelevant that NDL has not

exercised and will not exercise its option to acquire the additional 80% of UBNZ Assets before settlement. A break in the chain of timing is not decisive. The evidence satisfies me that NDL intends to take the step to full legal ownership of UBNZ Assets at some time in the foreseeable future.

(2) *Associate*

[30] However, if that conclusion is wrong, then I am satisfied that UBNZ Assets is an associate of NDL in relation to the transaction. An associate is widely defined as follows:<sup>11</sup>

(1) In this Act, a person (A) is an **associate** of another person (B) in relation to an overseas investment or any other matter if—

- (a) A is controlled by B or is subject to B's direction:
- (b) A is B's agent, trustee, or representative, or acts in any way on behalf of B, or is subject to B's direction, control, or influence, in relation to the overseas investment or the other matter:
- (c) A acts jointly or in concert with B in relation to the overseas investment or the other matter:
- (d) A participates in the overseas investment or the other matter as a consequence of any arrangement or understanding with B:
- (e) A would come within any of paragraphs (a) to (d) if the reference to B in any of those paragraphs were instead a reference to another associate of B.

(2) If A is an **associate** of B, B is also an **associate** of A.

(3) For the purposes of subsection (1), it does not matter whether the control, direction power, influence, arrangement, or other relationship between A and B is—

- (a) direct or indirect:
- (b) general or specific:
- (c) legally enforceable or not.

(4) In this Act, land (**land A**) is **associated land** in respect of other land (**land B**) if—

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<sup>11</sup> Section 8.

- (a) land A adjoins land B or, in the case of land on an island listed in Part 2 of Schedule 1, land A and land B are on the same island; and
- (b) a person owns or controls, or will (as the result of any transaction entered into or to be entered into) own or control, (directly or indirectly) an interest in land A (other than an exempted interest); and
- (c) the same person, or an associate of that person, owns or controls, or will (as the result of any transaction entered into or to be entered into) own or control, (directly or indirectly) an interest in land B (other than an exempted interest).

[31] Mr Gray has faced reality. He accepts that NDL and UBNZ Assets would be associated for the general purposes of s 8. But, he says, it is not for the relevant purpose of relating "to an overseas investment" - that is, to enable an overseas person to acquire an interest in the Crafar Farms. Instead he says that the purpose of the association is to assist NDL in its long-term objective of acquiring a source of production for UHT milk for distribution in China at premium price.

[32] For the reasons given, I disagree. The only purpose of the association discernible from the documents is for UBNZ Assets to act as NDL's agent or representative "in relation to" its acquisition of an interest in the Crafar Farms. Alternatively, the same reasoning leads to the conclusion that UBNZ Assets is acting subject to NDL's direction, control or influence. Alternatively, it can be said that the two companies are acting jointly or in concert for the same purpose. Almost all the alternative statutory definitions of "associate" are satisfied. UBNZ Assets is an associate of NDL in relation to the restructured transaction.

## **Result**

[33] UBNZ's application for declaratory relief is dismissed.

[34] In my provisional view each party should bear its own costs. However, if a party wishes to pursue an application, a supporting memorandum of no more than five pages in length is to be filed by 2 July 2010. A memorandum or memoranda in answer, subject to the same length limitations, is or are to be filed by 23 July 2010. Counsel are to advise whether the issue is suitable for determination on the papers.

[35] I wish to express my appreciation to counsel for their considerable assistance at short notice.

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Rhys Harrison J