IN THE COURT OF APPEAL OF NEW ZEALAND

CA338/2008
[2010] NZCA 38

	BETWEEN	WILLIAM PATRICK JEFFRIES Appellant
	AND	THE ATTORNEY-GENERAL Respondent

Hearing: 10-11 June 2009

Court: Hammond, Chambers and Baragwanath JJ

Counsel: W P Jeffries in person
H S Hancock for Respondent

Judgment: 26 February 2010 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS

CHAMBERS J

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Monitoring an overseas investment

[1] In April 1999 Marc and Ivy Powell, who are American citizens, applied for consent under the Overseas Investment Act 1973 (OIA 73) and the Overseas Investment Regulations 1995 (the regulations) to buy 2000 ha of land known as "Waitai" on D'Urville Island in the Marlborough Sounds. The Waitai Station was at that time a farm running approximately 8900 stock units. The Powells needed consent to buy the land because they were "overseas persons" (as defined) and the land they were buying, being "part of an island", was land for which consent was required. The Overseas Investment Commission referred the application to the relevant Ministers for their decision as to whether the acquisition was "in the national interest".[1] The OIC's recommendation to the Ministers was that they "determine that the application was in the national interest and approve it subject to the standard conditions that you have previously agreed to". The Ministers accepted the recommendation and approved the application together with "standard conditions". The Powells were advised of the decision by letter dated 21 May 1999. A little later their agreement to purchase the land became unconditional.

[2] In 2005, the Hon Bill Jeffries, the appellant, became interested in whether the Powells were adhering to what he considered to be their obligations under the OIC's consent. Mr Jeffries is a former Minister of the Crown and a barrister. He became aware of the Powells through acting for a New Zealand company which was involved in a legal dispute with the Powells. Mr Jeffries became concerned that the OIC was not fulfilling its statutory monitoring obligations under the OIA 73. On 14 June 2005, he wrote a 57 page letter about the Powells and what he considered to be the OIC's inaction to the Hon Dr Michael Cullen, then Attorney-General and Minister of Finance. That letter led to further correspondence between Mr Jeffries, Dr Cullen, and the OIC.

[3] The Powells found out that they were the subject of correspondence at high levels. On 29 November 2005, their solicitors wrote to the Overseas Investment Office, which had replaced the OIC when the Overseas Investment Act 2005 (OIA 05) came into force. They requested, under the Official Information Act 1982 (the 1982 Act), all correspondence in the OIO's possession concerning them.

[4] The OIO referred this request to Mr Jeffries for his response. He objected to the release of the correspondence. The OIO considered no ground existed to withhold release.

[5] In September 2006, Mr Jeffries commenced judicial review proceedings. The proceedings had two parts. The first part in effect challenged the OIC's alleged inaction in monitoring the conditions to which the OIC's consent was subject. Mr Jeffries also challenged what was said to be a decision by Dr Cullen to vary the obligations on the Powells. The second part challenged the OIO's intention to release requested information to the Powells. Subsequently, the OIO agreed not to release the information pending the determination of the judicial review proceeding.

[6] Ronald Young J heard the proceeding. Mr Jeffries was unsuccessful on both parts.[2] Mr Jeffries has appealed.

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[1] OIA 73, s 14A (1)(d) and (2), which section was reproduced in the regulations as reg 15.
[2] *Jeffries v Attorney-General* HC Wellington CIV-2006-485-2161, 20 May 2008.

Issues on the appeal

[7] Mr Jeffries raised a number of grounds on the first part of the appeal. I have to deal with only one of them, as, in my view, Mr Jeffries fails on that issue, which dooms his claim against the OIC and Dr Cullen. (Under the OIA 05, s 64, all liabilities of the OIC have, since its dissolution, become liabilities of the Crown.) The issue on which Mr Jeffries must fail is this: were the Powells under continuing obligations which they breached? If they were not under continuing obligations, then there was nothing for the OIC to monitor. If they were but it is abundantly clear they did not breach them, then any laxness in OIC monitoring will be inconsequential.

[8] On the second part of the appeal, two issues arise.

[9] The first is whether the OIO correctly applied ss 6(2), 9(2)(ba) and 9(2)(g)(i) of the 1982 Act when determining to release the information to the Powells' solicitors.

[10] The second issue is whether the OIO breached Mr Jeffries's rights under s 27 of the New Zealand Bill of Rights Act 1990, in that, it is said, the OIO acted unfairly towards Mr Jeffries and failed to provide adequate reasons for its decisions.

Were the Powells under continuing obligations which they breached?

[11] Before I deal with the specific conditions to which the Powells' consent was subject, I need to explain some crucial features of the OIA 73 and the regulations. The OIA 73 itself did not require the Powells to apply for anything. The essential features of that Act were the establishment of the OIC and the empowerment of regulation-making for the purpose of "prohibiting, controlling, or regulating overseas investment".[3] It was the regulations thus made that necessitated and led to the Powells' application. The regulations applicable at the time were divided into four parts. Part I contained interpretation sections. Part II regulated "transactions not

[3] Section 14(a).

involving acquisition of land". Part III regulated "transactions involving acquisition of land". Part IV covered miscellaneous matters.

[12] "Land" had a special meaning under the regulations. It meant only the "land specified in the First Schedule".[4] Waitai came within that definition as it was "part of an island". Therefore, out of Parts II and III, it was Part III which covered the Powells' case. By reg 8(1), which was part of Part III, the Powells had to obtain the relevant Ministers' consent "before giving effect to a transaction [involving] the acquisition by the overseas person of land or any estate or interest in land". That is all they required consent for, as Mr Hancock, for the Attorney-General, rightly emphasised. And it was for that the Ministers gave their consent. The Powells did not require specific consent for the business enterprise (farming) they planned to carry out on the land.

[13] That is not to say, however, that the Powells' plans for the land were irrelevant. They were, in fact, highly relevant to whether their acquisition of the land "would be in the national interest". In determining whether they should grant consent to the Powells' acquisition of Waitai Station, the Ministers were obliged to consider the criteria for consent set out in s 14A, and reproduced in the regulations as reg 15:

> (1) Where, pursuant to this Act or regulations made under this Act, the approval, consent, or permission of the Minister or the Minister and the Minister of Lands, as the case may be, is required to an overseas investment, the Minister or the Minister and the Minister of Lands shall grant that approval, consent, or permission only if satisfied that:
>
> (a) The overseas person has, or, where the overseas person is not an individual, the individuals exercising control over the overseas person have, business experience and acumen relevant to that overseas investment; and
>
> (b) The overseas person has demonstrated financial commitment to the overseas investment; and
>
> (c) Every person who will have not less than a 25 percent beneficial interest in the overseas investment is, or, where the overseas person is not an individual, the individuals exercising control over the overseas person are, of good character and no such person is a person of the kind referred to in section 7(1) of the Immigration Act 1987; and

[4] See definition of "land" in reg 2.

(d) Where the application for such approval, consent, or permission relates to the ownership or acquisition of, or control over, -

(i) Land or any estate or interest in land in New Zealand; or

(ii) Securities or rights or interests in securities of any company or body corporate that owns or controls directly or indirectly any land or any estate or interest in land in New Zealand, -

the overseas investment would be in the national interest.

(2) For the purposes of subsection (1)(d) of this section, the Minister and the Minister of Lands shall have regard only to the following matters:

(a) Whether the overseas investment will or is likely to result in -

(i) The creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or

(ii) The introduction into New Zealand of new technology or business skills; or

(iii) The development of new export markets or increased export market access for New Zealand exporters; or

(iv) Added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or

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

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

(b) Where land is currently being used for agricultural purposes, -

(i) Whether experimental or research work will be carried out on the land:

(ii) The proposed use of the land by the applicant:

(iii) If the overseas person is an individual, whether the overseas person intends to farm the land for his or her own use and benefit and is capable of doing so:

(c) Whether the overseas person or, if the overseas person is not an individual, any individual who exercises control over the overseas person, intends to reside permanently in New Zealand:

(d) Such other matters as may be prescribed:

(e) Such other matters as the Minister and the Minister of Lands, having regard to the circumstances of the particular overseas investment, think fit.

[14] As will be apparent, this is a case to which subss (1)(d) and (2) applied, as this was an application for consent to the acquisition of land falling within the relevant definition.

[15] Predecessors of the relevant Ministers had approved, back in 1995, some "standard conditions" which officials had drafted. These were intended to be applicable in a range of situations, including as conditions to consents granted in cases involving the controlled acquisition of land and to consents granted in cases involving other controlled overseas investment. Inevitably, the standard conditions represented a better fit in some circumstances than in others. Officials needed to apply them with discernment; the evidence in this case would suggest that did not always happen.

[16] The Powells' consent incorporated the following standard conditions, which were modified only to the extent that dates were inserted:

5 Consent has been granted subject to the following conditions:

(a) this consent will lapse if the property, specified securities or land has not been acquired and transferred [or business has not been established] by 21 May 2000;

...

(c) every individual with a 25 percent or more beneficial interest in the overseas investment, or where the Applicant is not an individual, the individuals exercising control over the Applicant (as the case may be) must continue to meet the eligibility criteria specified in section 14A(1)(a)-(c) of the Act.

...

7 If the investment proceeds the Applicant or their agent must:

(a) report in writing to the Commission providing evidence of compliance with condition 5(c) in this letter no earlier than 21 November 1999 and no later than 21 May 2000. The Applicant must also, if required by the Commission, provide this information at any subsequent time;

(b) notify the Commission in writing within 28 days of ceasing to be an overseas person; and

> (c) notify the Commission in writing within 28 days of selling any land (or specified securities in a land-owning entity) which this letter grants them consent to acquire.

[17] I deal first with clause 5(a). When interpreting this condition, we must remember that all the Powells required consent for was their acquisition of the land. They were not acquiring "property" (other than the land), "specified securities" or establishing "a business". That last expression was relevant to consents conferred in cases caught by reg 5(b) (in Part II). So the only part of this standard condition which applied to the Powells was the need for the land to be acquired and transferred by 21 May 2000.

[18] Mr Jeffries argued that clause 5(a) required the Powells to establish a "high-end international brand" by 21 May 2000. This requires further explanation. When the Powells made application to buy the land, they explained that their intention was to develop "a very high-end international brand based upon the Marlborough Sounds' and New Zealand's unique combination of natural, unspoiled coastal beauty, healthy lifestyle, and gracious people". Their application continued:

> Using the existing farming operation of land, sheep and beef products as a springboard, the Applicants intend to develop a brand (Waitai-D'Urville) that responds to this market demand and over time leveraging the subject property to add products which support and enhance the brand over the long-term.

[19] The application continued to the effect that the Powells hoped "to build a luxury brand for farm, horticulture and potential tourism products". They envisaged that "the brand created will be extended to cover products beyond land, sheep and beef products to cover other products sourced from the Nelson/Marlborough region (eg olives, olive oil, wine, salmon, scallops, mussels, etc)".

[20] This information had been inserted in the application with a view to satisfying the Ministers that the Powells' purchase of Waitai Station "would be in the national interest" in terms of s 14A(1)(d) and (2). It had, and has, however, no relevance to clause 5(a) of the conditions.

[21] Ronald Young J rejected Mr Jeffries's submission that clause 5(a) required the development of that brand. The Judge found that all this standard condition

required was that the land should be acquired and transferred within a year of consent date, a condition which was fulfilled. He noted that no OIC consent was necessary to develop a high-end brand.[5] He observed that, if a special condition had been intended relating to the development of a high-end brand based on the Powells' application, "considerable discussion between the Powells and the OIC [would have been required] to identify measurable goals for the Powells to achieve".[6] I have no doubt whatsoever that the Judge was correct in this conclusion. Clause 5(a) was complied with and, having been complied with, required no ongoing monitoring by the OIC: there was nothing to monitor.

[22] I now turn to clause 5(c). This clause purported to render "the eligibility criteria specified in section 14A(1)(a)-(c) of the Act" as continuing obligations. The first and most important point to note is that the condition imposed no continuing obligation to satisfy "the national interest", as particularised in s 14A(2). All the representations the Powells had made in their application had been geared towards satisfying the Ministers under subs (2). Clause 5(c) did not cover the fulfilment of those representations. Whether this was intentional or not is unclear.

[23] Even the paragraphs of s 14A(1) which were carried across into clause 5(c) are an uneasy fit as continuing obligations. (Each made perfect sense as matters in respect of which Ministers needed to be satisfied before consent could be given to the particular overseas investment.)

[24] For instance, take criterion (a). It is easy to test, when deciding whether to approve an application, whether the overseas person "has ... business experience and acumen". But how does one test whether he or she "continues" to have "business experience and acumen"? How can one lose something like that? I suppose in theory, if the overseas person went bankrupt, one might be able to argue that he or she had lost or no longer continued to have "business experience and acumen", but that is drawing a long bow. In reality, the attempt to give this particular criterion continuing effect missed the mark, as in the end Mr Hancock was constrained to concede.

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[5] At [29].
[6] At [28].

[25] Similarly, criterion (b), namely that "the overseas person had demonstrated financial commitment to the overseas investment [the purchase of the land]", makes perfect sense as a criterion when the Ministers are deciding whether to grant the consent. It makes no sense as a continuing obligation, as once the land has been bought, it has been bought.

[26] Criterion (c) is different, however. People's character can change; someone who was of good character may, through their actions, cease to be of good character. And someone who was not a person of the kind referred to in s 7(1) of the Immigration Act 1987 may become a person of a s 7(1) kind. There has never been any suggestion in this case, however, that the Powells have ceased to be of good character. Nor is there any suggestion that they have become people of the kind referred to s 7(1).

[27] In my view, therefore, it is abundantly clear that the Powells did not breach clause 5(c), in so far as it was applicable. The OIC did from time to time seek confirmation that the Powells continued to meet the criteria set out in s 14A(1)(a)-(c). The Powells' solicitors confirmed that their clients continued to meet those criteria. There is no evidence to suggest those assurances were wrong. In those circumstances, no additional monitoring of that condition was required.

[28] Mr Jeffries argued that the clause 5(c) condition, like the clause 5(a) condition, required the Powells to carry out the plan that they had put up when making their application, including establishment of the "high-end international brand". This condition required no such thing. Mr Jeffries complains that, unless clause 5(a) or 5(c) is interpreted so as to require applicants to carry out business plans which they have articulated as part of their application for OIC consent, there is no way of ensuring that overseas persons will make a genuine attempt to do what they have said they intend to do. I can sympathise with Mr Jeffries's concern, but the fault lies in the inadequate standard conditions being employed in 1999. The position has now been neatly tidied up in s 28 of the OIA 05:

> **28 Conditions of consent**
>
> (1) It is a condition of every consent, whether or not it is stated in the consent, that –

(a) the information provided by each applicant to the regulator or the relevant Minister or Ministers in connection with the application was correct at the time it was provided; and

(b) each consent holder must comply with the representations and plans made or submitted in support of the application and notified by the regulator as having been taken into account when the consent is granted, unless compliance should reasonably be excused.

[29] Mr Jeffries's argument really depends on conditions of that kind being read into the Powells' consent. But there were no such conditions under the former regime. Mr Jeffries did not seek to argue that s 28 had retrospective effect.

[30] Ronald Young J came to the same conclusion I have. Mr Jeffries has not shown that the Powells were in breach of any conditions of their OIC consent. This must mean this part of the application for review is doomed to failure. There is no point complaining about the OIC's failure to monitor the Powells' consent if all the monitoring in the world would not have disclosed any breach.

[31] In actual fact, light-handed monitoring was all that was required in the circumstances since, as I have shown, it was highly unlikely that the Powells were ever going to fall foul of the continuing obligations, as those obligations, perhaps through bad drafting, were practically non-existent. I accept that the OIC, particularly under pressure from Mr Jeffries, did seek not only to monitor whether the Powells were continuing "to meet the criteria set out in s 14A(1)(a)-(c)" but also details as to the progress of the farming development the Powells had set out in their proposal. The OIC did not specify its authority for seeking the latter information. In my view, it had none, as Mr Hancock in the end conceded. If there was fault on the OIC's part, the fault occurred in 1995 when the OIC drafted for ministerial approval standard conditions which did not achieve all that they perhaps were intended to achieve.

[32] For the reasons I have expressed, I am satisfied that Ronald Young J came to the correct conclusion on this part of the judicial review application. He dismissed this part of the application, a conclusion with which I concur.

[33] My conclusion on this issue means that I do not have to consider the other issues dealt with by Ronald Young J. In particular, I express no view on the issue of whether Mr Jeffries had standing to bring this application for review. The issue of standing is complex and is best left to a case where its resolution would affect the outcome.

Did the Overseas Investment Office correctly apply the Official Information Act 1982?

[34] Mr Jeffries's first argument was that the OIO's decision to release the requested information under the 1982 Act was "plainly unreasonable". He also submitted the OIO had failed to take into account relevant considerations. Both arguments turned on the same fundamental contention, namely that the OIO had misconstrued three provisions of the 1982 Act. Those provisions were ss 6(c), 9(2)(ba), and 9(2)(g)(i). Had the OIO correctly construed those provisions, Mr Jeffries submitted, it would have concluded there was "good reason for withholding official information" under the Act.

[35] Ronald Young J concluded that the OIO had not misinterpreted the Act when determining the Powells' request under the Act. Mr Jeffries contends the OIO and the Judge were both in error. Were they? I shall consider the three provisions in turn.

Section 6(c)

[36] Section 6(c) provides that "good reason for withholding official information exists ... if the making available of that information would be likely ... to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial". Ronald Young J rejected the argument that there was good reason for withholding the information under s 6.[7]

[7] At [92]-[93].

[37] Mr Jeffries submitted the Judge was wrong. The gist of Mr Jeffries's argument under this head was perhaps most clearly expressed in a detailed letter he sent to the OIO on 12 September 2006. In that letter, he said:

> [There is good reason for withholding the requested communications under s 6(c)] because since January 2000 I have had to investigate, as an officer of the Court being instructed Counsel, the conduct of the Powells in relation to their overseas investment in Waitai Station on D'Urville Island in and since 1999. Since July 2003 that investigation has necessarily had to extend into investigation of the related decisions of OIC, and in particular into the decisions of OIC's former Chief Executive, Mr Dawe and of his subordinate Mr Hill, since 22 May 2000, and of the decisions of OIC's successor, OIO, since August 2005.

[38] Mr Jeffries went on to explain that that investigation had established, in his view, that the Powells might have committed offences under the OIA 73. This related to their alleged breach of clauses 5(a), 5(c) and 7(a) of their consent. He went on to explain how the OIC and the OIO had failed to perform their statutory functions of monitoring the Powells' consent.

[39] He submitted that he had established "a well-grounded belief" that the alleged offences might have been committed. He said that if the communications were released to the Powells' solicitors, they would "use them to attempt to stifle investigation of their conduct necessary to maintain the law". He referred to the Powells' complaints against him to the Privacy Commissioner.

[40] I have already shown that, in my opinion, the Powells had not breached the conditions of their consent and thus had not breached the law. So releasing this information was not in any way going "to prejudice the maintenance of the law". No trial was or is in prospect, with the consequence that it cannot be said that release of the information would prejudice "the right to a fair trial". The OIO made no error in terms of s 6(c).

Section 9(2)(ba)

[41] Section 9(2)(ba) provides that there is "good reason for withholding official information" if:

the withholding of the information is necessary to - ...

(ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information –

(i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or

(ii) would be likely otherwise to damage the public interest.

[42] Ronald Young J rejected this argument too.[8]

[43] Mr Jeffries submitted the Judge was wrong. He submitted his letter to Dr Cullen was about "the effective conduct of public affairs", in that he had transmitted "confidential information and opinion to the Minister" with regard to alleged criminal offending which required investigation.

[44] I cannot accept Mr Jeffries's argument. I appreciate that Mr Jeffries purported to make his letter to Dr Cullen (copied to the State Services Commissioner and the Solicitor-General) "private and confidential" and also purported to bind "the recipients of this letter" to not releasing the letter to "the Powells' current solicitors, Kensington Swan" without his consent. Dr Cullen, however, never indicated he was prepared to accept the letter on that basis. If Mr Jeffries had wanted to gain such protection, he should first have ascertained whether Dr Cullen was prepared to accept the information he wished to convey on such a confidential basis. For obvious reasons, citizens cannot write to Ministers of the Crown and hope to avoid the release of their letters to enquirers simply by marking the letters "private and confidential". The information contained in Mr Jeffries's letter was not, therefore, "subject to an obligation of confidence" on either Dr Cullen's part or on the part of the other recipients.

[45] Further, making available this letter and its follow-up correspondence to the Powells' solicitors would not in any way "damage the public interest". It so happens that Dr Cullen, in his reply, rejected Mr Jeffries's assertions that the Powells had

[8] At [92]-[93].

breached New Zealand law. He also advised his support for the level of monitoring which the OIC had undertaken.

[46] Of course, Mr Jeffries's real concern is not possible damage to "the public interest" but rather a fear of reprisal if and when the Powells discovered what Mr Jeffries was saying about them to Dr Cullen and others. The fact that Mr Jeffries may end up being sued by the Powells for what he has said is irrelevant under the 1982 Act. In any event, in the unlikely event the Powells did now want to sue Mr Jeffries, Mr Jeffries may well have defences available to him under defamation law.

[47] In short, I agree with Ronald Young J that s 9(2)(ba) did not provide good reason for withholding the information.

Section 9(2)(g)(i)

[48] Section 9(2)(g)(i) provides that "good reason for withholding official information" exists if:

> the withholding of the information is necessary to ...
>
> (g) maintain the effective conduct of public affairs through –
>
> (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty.

[49] Under this head, Ronald Young J held:

> [101] The unsolicited letter of 14 June [by] Mr Jeffries ... to the Minister was effectively an expression by a private person of his concern about the way in which the Overseas Investment Commission and the statutory regime operated at that time. It was little to do with the conduct of public affairs or about the free and frank exchange of opinions between the Minister of the Crown and others mentioned in the section. Mr Jeffries was expressing his private concern about the Powells' case.

[50] I do not consider this provision was available as a ground for withholding the information. The focus of this paragraph is on communications between Ministers and on communications between Ministers and officers and employees of their

departments. Mr Jeffries, despite his status as a former Minister of the Crown, was acting as a private citizen when he wrote to Dr Cullen. Dr Cullen had not sought the information from him. Dr Cullen did not impose any restriction on the letter he wrote back to Mr Jeffries.

[51] Accordingly, I agree with the Judge on this point as well. In so finding, I am also agreeing with the assessment made by the OIO.

Did the Overseas Investment Office breach Mr Jeffries's rights under s 27 of the Bill of Rights?

[52] Mr Jeffries submitted that the OIO had breached his rights under s 27 of the Bill of Rights. Section 27(1) reads as follows:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect to that person's rights, obligations, or interest protected or recognised by law.

[53] He submitted the OIO had breached his rights by failing to observe "the principles of natural justice" or, to put it simply, had failed to "act fairly". He submitted that rights were "bestowed on him" by the 1982 Act. He said that among his "obligations" was "his obligation to maintain the rule of law". And finally, he submitted, among his "interests protected or recognised by law" was his interest that "persons providing information on the possible commission of offences warrant protection". Mr Jeffries also wrapped up in this submission his contention that the OIO had an obligation to provide reasons for its decision. He said such must be implied by the right to judicial review conferred by s 27(2).

[54] Ronald Young J dealt with this matter at [99] of his decision. As to the first part of this argument, he thought "the interests of interested parties [were] protected by a merits-based review by the Ombudsman". As to the second part, he said that no authority had been provided for the proposition that the OIO was obliged to give reasons. This was, he said, "a novel proposition" which, if accepted, "would fundamentally change the way in which the Official Information Act functions in New Zealand". He concluded that decision-makers under the 1982 Act had to do no

more than identify "the relevant statutory provisions" on which their decision to release or withhold official information was based. The OIO had done that.

[55] Mr Hancock did not join issue on the question of whether a person who writes letters to someone bound by the 1982 Act has "rights, obligations, or interests protected or recognised by law" in circumstances where a request is made under the Act which, if granted, would result in the correspondence in question being released. We suspect that was because the Attorney-General accepts the position the Ombudsmen have reached on this issue.[9] They have concluded that, where information requested under the 1982 Act relates to a third party, it is often necessary for the holder of the information to consult with a third party to determine whether they have any concerns with the disclosure of the information. Where third parties are consulted as to whether they believe release of information would prejudice one of the interests protected by s 6 or s 9, the third party can reasonably expect their concerns to be taken into account. The Ombudsmen have held, however, that the third party does not have the right to veto the disclosure of the information. If the holder of the information believes, in good faith, that there is no good reason under the Act to withhold the information at issue, then it is not open to the holder to refuse the request simply because the third party does not consent to disclosure.

[56] The OIO complied with the Ombudsmen's editorial and, whether legally required to do so or not, consulted Mr Jeffries before determining whether to release the information to the Powells' solicitors. So they had acted fairly towards him. They had also told Mr Jeffries of his right to have their decision investigated by an Ombudsman to determine whether it was reasonable. I agree with Mr Hancock that, in so far as there was an obligation to consult with Mr Jeffries, the obligation was fulfilled. Mr Jeffries's views were considered by the OIO but they did not consider good reason to withhold the information had been made out. I agree with their conclusion.

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[9] *Ombudsmen Quarterly Review* (volume 7, issue 1, March 2001).

[57] I also agree with Mr Hancock and with Ronald Young J that an information-holder, when making a decision under the 1982 Act, does not need to go further than explaining the provisions under which it had decided to release or withhold information. In any event, the OIO did explain in some detail why it considered it had to release the information to the Powells' solicitors.

[58] I find that the OIO did not breach Mr Jeffries's rights or interests under s 27 of the Bill of Rights.

Result

[59] Mr Jeffries having failed on both parts of this appeal, I would dismiss it.

HAMMOND J

[60] I have had the advantage of reading in draft the judgments of Baragwanath J and Chambers J.

[61] In my view, this appeal should be dismissed. For the reasons given by him, I agree with Chambers J that no formal legal obligation to create the development of the particular brand has been established, and therefore Mr Jeffries' claim fails at the outset. I add some brief observations.

[62] Assuming for the purposes of argument that there was something which could be termed an "obligation", it must be in the terms stated to be that very obligation, viz:

> [To] begin the development of a very high end international brand based upon the Marlborough Sounds and New Zealand's unique combination of natural, unspoiled coastal beauty, healthy lifestyle and gratuitous people.

[63] The enforcement of something of that character would be a matter of the gravest difficulty. Assume, for the purposes of argument, that an attempt was made by the respondent to specifically enforce something in those terms. A court does not enforce something which is so imprecise that it would involve the court enlarging upon (of its own motion) what had not been specified by the parties. The principle is

that a court does not attempt to enforce that which has not been specified and in a sense make a mockery of its own processes in an exercise in futility. And if that is so, it is difficult to see why, as a matter of discretion, a court should make a declaration that the Overseas Investment Commission and Overseas Investment Office had "failed adequately to monitor".

[64] In any event, the proposition was that the Powells would "begin the development" of this inchoate creature. It is common ground (as the Powells acknowledged in the request for information to the regulator) that the "high end international brand" has not been established. The Powells were asked if that had not been done, why had it not been done. The Powells said this was because their "focus and resources were necessarily diverted from establishment of a high end international brand because of the significant problems and disputes" which arose elsewhere in relation to the development of residential buildings and associated infrastructure on the property. But elsewhere in the same document it is said that the development "of a high end international brand had to be further *postponed*" (emphasis added). It seems from that document that the brand which was in contemplation initially was a "high end export brand of meat products". But then reference was made to the difficulties in getting suitable quantities of meat and resistance from established meat processing and export companies. These responses were not that there had been "no beginning", but rather that for the reasons enlarged on in Kensington Swan's letter of 15 June 2007 to the Overseas Investment Office, that feature had been abandoned. The short point here is that there is clearly a remedial problem for Mr Jeffries, in that there was a "beginning" of the enterprise but then it went off. But the precise terms of the formal condition (if such it was) were met.

[65] Like Chambers J I do not find it necessary to express a view on the difficult issue of standing.

[66] I agree with Chambers J on the disposition of the Official Information Act issue and with his reasoning with respect thereto.

[67] The panel is agreed that the appeal should be dismissed. Mr Jeffries is ordered to pay the Attorney-General costs for a standard appeal on a band A basis and usual disbursements.

BARAGWANATH J

[68] For the reasons given by Chambers J[10] I agree that no requirement for development of a "high end international brand" was included in the conditions of consent and the first part of Mr Jeffries' appeal fails for that reason.

[69] It is therefore unnecessary to determine the issue of his standing to sue. But I consider that there was much force in this part of Mr Jeffries' argument.

[70] Litigation imposes burdens on the parties and public resources alike. Restriction of standing to sue is a means used by the courts to restrain litigation where the plaintiff has no personal interest at stake, and where there is no sufficient public interest to justify the allocation of public resources to a hearing and to trouble the defendant with it. It can serve as a valuable curb on unnecessary or improper claims, stopping the proceeding at the outset. But a party who lacks a personal interest in a proceeding may be permitted to pursue it if able to satisfy the ultimate test of whether such leave is warranted by the public interest in the administration of justice and the vindication of the rule of law. Where there is such public interest the courts, since at least *Sommersett's case*,[11] have exercised discretion to permit a plaintiff with no interest other than the pursuit of justice to bring proceedings. A modern example is the Pergau Dam case.[12] Among the factors relevant to the assessment of the public interest are the apparent merits of the case.

[71] Had there been a condition of the consent which was enforceable but not enforced by the OIC and OIO, that would have been highly relevant to the decision

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[10] At [1]-[32] above.
[11] *Sommersett's case* (1772) 20 State Tr 1 (the case concerned habeas corpus on behalf of a slave held in irons on a ship in the Thames).
[12] *R v Secretary for State for Foreign Affairs ex parte World Development Movement* [1995] 1 WLR 368 (QB).

as to standing to sue[13]. The rule of law can require a court to examine failure by public authorities to give effect to their obligations and, in an appropriate case, grant remedial orders. Further, there is no obvious alternative means by which these questions can be ventilated.

[72] But because the point is not necessary to the decision I do not offer a concluded opinion upon its application in this case.

Release of documents to the Powells

[73] The other members of the Court have considered and rejected the appellant's argument as to the application of ss 6(c), 9(2)(ba) and 9(2)(g)(i) of the Official Information Act. Subject to the observations that follow I agree with them. The case is therefore determined on that basis. There is thus no purpose in inviting further submissions on what could be seen as a logically prior point which is now mentioned so it does not escape attention.

[74] I add that the Official Information Act 1982 concerns the release of official information to persons seeking access to it. At least in general, it is not concerned with what Crown officials may do with such information in the course of performing their general public functions. Absent any law to the contrary, Crown officials may select whatever means they reasonably consider will best serve the public role they are called on to perform. There may therefore be a short answer to the argument that the Crown officials should not have released to the Powells documents, including a letter from Mr Jeffries to the Attorney-General/Minister of Finance, being that no principle of law was cited to inhibit that course.

[75] Sections 6(c), 9(2)(ba) and 9(2)(g)(i), relied upon by Mr Jeffries in arguing that there was "good reason for withholding official information" from the Powells, are reproduced in the judgment of Chambers J.

[76] But those provisions bear on what defences the Government may have to withhold information from someone who requests it. They say nothing to inhibit the

[13] At 620.

Government from electing to release information for reasons that cannot be challenged as irrational. As Eagles, Taggart and Liddell succinctly put it:[14]

> By expressing the exemptions as 'reasons' for withholding the [Official Information Act] makes it clear that they are to be permissive rather than mandatory. The exemptions simply set the outer limits of the disclosure which may be compelled using the machinery provided in [the Act]. Nothing in the exemptions prevents the voluntary release of information which falls within their scope.

It is not, as is assumed in Mr Jeffries' argument, a privacy measure. It is arguable that, since the Powells' performance of their obligations under the OIA was of the essence of Mr Jeffries' complaints, it was open to the officials administering the regime to decide how best they might perform that task and, if they saw fit, to see what the Powells had to say about the complaints. Had they not done so and taken action against the Powells the information would very likely have had to be disclosed on discovery or in discharge of natural justice obligations.

[77] That said, both the evolving common law of privacy and Parliamentary policy expressed, for example, in the Privacy Act 1993, recognise the importance of personal privacy as an element of human dignity. To what extent such considerations might bear on the legality of Executive conduct in releasing official information is an issue for another day.

Result

I agree that the appeal should be dismissed.

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[14] Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Oxford, 1992) at 110. See also Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004) at 231.