IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-223

UNDER	the Dairy Industry Restructuring Act 2001
IN THE MATTER OF	an appeal under s 132 of the Act
BETWEEN	FONTERRA CO-OPERATIVE GROUP LIMITED Appellant
AND	THE GRATE KIWI CHEESE COMPANY LIMITED First Respondent
AND	KAIMAI CHEESE COMPANY LIMITED Second Respondent

Hearing: 23 November 2009

Counsel: J Every-Palmer and A M Glenie for the Appellant
No appearance for the Respondents
S Mills QC and B Hamlin for the Commerce Commission

Judgment: 8 December 2009

JUDGMENT OF MILLER J

Introduction

[1] The Commerce Commission held that The Grate Kiwi Cheese Company Ltd and Kaimai Cheese Company Ltd are "independent processors" to whom Fonterra Co-operative Group Limited must supply raw milk under the Dairy Industry Restructuring Act 2001 (**DIRA**) and the Dairy Industry Restructuring (Raw Milk) Regulations 2001.

[2] Fonterra has brought an appeal from that determination, saying that neither firm will actually process the raw milk; rather, they want it delivered to another firm, Open Country Cheese Company Limited, for the first stage or stages of processing. Open Country will process it on their behalf under toll-processing contracts. It seems that Open Country may be an independent processor in its own right. The Regulations fix an individual cap of 50m litres for each independent processor and its interconnected bodies, and an overall cap of 600m litres per annum on the quantity of raw milk that Fonterra may be required to supply.

[3] The appeal is the first under the DIRA. By determining what it means to be an "independent processor", the appeal will lend definition to Fonterra's obligation to facilitate competition in downstream markets by supplying raw milk to its rivals.

[4] The Commerce Commission now moves for joinder as a respondent. It acknowledges that under the High Court Rules it may not be named as a respondent, and that it may be heard without being joined, but it wants a right of further appeal should the decision go against it. Fonterra opposes, saying that the Commission's presence qua respondent is not necessary, and that as a party the Commission would assume a partisan stance inconsistent with its responsibilities as adjudicator in an inter partes dispute. The respondents have filed a memorandum of counsel supporting the application.

[5] The respondents' proceeding before the Commerce Commission includes a claim for compensation, which has not yet been heard.

The High Court Rules

[6] Rule 20.9 governs the contents of a notice of appeal. Under r 20.9(2) Fonterra was not permitted to name the Commission as a respondent:

> **20.9 Contents of notice of appeal**
>
> (2) The notice of appeal must not name the decision-maker as a respondent.

[7] A notice of appeal may be amended at any time by leave of a Judge: r 20.9(4).

[8] The Commission enjoys an exception to the rule that a decision-maker may not be named, but that is confined to proceedings under the Commerce Act 1986. Rule 20.9(3)(a) provides:

> **20.9 Contents of notice of appeal**
>
> (3) Subclause (2) does not—
>
> (a) apply to appeals to the court under the Commerce Act 1986:

[9] The prohibition on naming the decision-maker does not affect r 20.17, which allows the decision-maker to appear and be heard, unless the Court in its discretion directs otherwise, on all matters arising in appeals from their decisions:

> **20.17 Decision-maker entitled to be heard on appeal**
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> The decision-maker is entitled to be represented and heard at the hearing of an appeal on all matters arising in it, unless—
>
> (a) the decision-maker is a District Court; or
>
> (b) the court otherwise directs.

[10] It is common ground that jurisdiction exists to add the Commission under r 4.56(1)(b)(ii) on the ground that its presence may be necessary:

> **4.56 Striking out and adding parties**
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> (1) A Judge may, at any stage of a proceeding, order that—
>
> (b) the name of a person be added as a plaintiff or defendant because—
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> (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.

[11] The Commission does not say that this is a case not provided for in the Rules. The application rests on r 4.56(1)(b)(ii). However, Mr Mills did urge me not to treat the Rules as black letter law. Rather, their objective is the just, speedy, and inexpensive determination of proceedings, and their interpretation should be strongly

purposive. Where questions as to the application of any Rule apply, the Court is to give any directions it thinks just: r 1.4.

The general rule that decision-makers may not become protagonists

[12] The traditional rationale for the principle that a decision-maker ought not appear on an appeal from its own decision is that a judicial body "should strive not to enter into the fray in a way which might appear to favour the interests of one of the parties": *Engineers Union v Arbitration Court* [1976] 2 NZLR 283, 284. That concern may arise acutely when the appeal might lead to further proceedings before the decision-maker. In *Licensing Control Commission v Lion Breweries Limited* (1983) 3 NZAR 468, 472 Davison CJ held:

> It would, in my view, be quite wrong in any event for the Commission on an appeal by way of case stated to become a protagonist in the appeal. If it does so, it endangers the very impartiality which it is expected to maintain in subsequent proceedings. … How can the Commission be, or even appear to be, impartial in making that final decision in the light of the answers given by this Court if it has actively contended for different answers in this Court?

[13] In *Portage Licensing Trust v Auckland District Licensing Agency* [1997] NZAR 374, Tompkins J cited the appearance of impartiality and added that, a decision having been given, the authority was functus officio:

> ... the Authority is not a party to the appeal. Although there will be cases where the circumstances are such that the Authority through its counsel can properly appear to assist the court, this case was not one of them. The right of the Authority to appear by counsel should be sparingly exercised, and only in circumstances such as those referred to by the Court of Appeal in *New Zealand Paper Mills* and in *Tararua Foundation*. Otherwise the Authority should follow the long standing practice that the court or tribunal whose decision is subject to appeal, plays no part in the hearing of the appeal. This practice exists for two reasons. First, once the decision is given, the Authority is *functus officio*. It has no further role to play. Secondly, the Authority must be, and be seen to be, impartial. If, on an appeal from its decision, it appears to make submissions that support one party to the appeal, as it did in this case, that appearance of impartiality is compromised.

[14] In *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335, 336, McGechan J recorded that a practice had apparently developed of naming the Authority as a respondent in appeals from its decisions. The Authority complained

that the practice put it to some inconvenience and expense in obtaining advice and considering its position as a named party.

[15] The Rules were amended in 1998 to provide that the notice of appeal must not name the decision-maker as a respondent.

[16] Given this background, there can be no doubt that r 20.9(2) reflects a policy decision that decision-makers should not become protagonists in appeals from their decisions.

[17] A necessary corollary is that the decision-maker acquires no right of further appeal should its decision be reversed, no matter how wrong this Court's decision. *Lion Breweries*, for example, was a case in which the decision-maker, its decision having been reversed by the High Court, sought to appeal to the Court of Appeal. Rather, the decision-maker is expected to abide the Court's decision. *In re Baise-Moi* [2005] NZAR 214 supplies a striking example. The decision-maker in that case, the Film and Literature Board of Review, had ignored an earlier High Court judgment with which it disagreed. The Court of Appeal later held that the Board's opinion was correct, but nonetheless criticised it for not giving effect to the earlier judgment. The Court of Appeal held that it would nonetheless be inappropriate for the Board itself to seek party status, observing that if necessary the Attorney-General could be added as a party:

> [52] That raises the difficulty faced by an entity such as the Board where it disagrees with the outcome of a High Court appeal, but has no right to appeal the decision to this Court. Under the High Court Rules, the Board is not, and should not be named as, a respondent: R 709(2) and *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335. However, it is entitled to be represented and heard on the appeal: R 709(3) and R 717. Although it is represented and heard on an appeal, it is not a party, and therefore has no right of appeal. In that situation, where important issues of public interest arise, it may be that consideration needs to be given to the Attorney-General being added as a party under R 97 of the High Court Rules, and, if thought appropriate, exercising rights of appeal to this Court. It would not be appropriate for the Board itself to seek party status or to appeal, for reasons which have been given in cases such as *Licensing Control Commission v Lion Breweries Ltd* (1983) 3 NZAR 468 at p 471.

[18] An exception to the principle that the decision-maker should not become a protagonist in appeals from its own decisions has long been admitted for cases in

which it wished to be heard in support of its own jurisdiction: see for example *Engineers Union v Arbitration Court* (above, at 284). The Court has also traditionally allowed a decision-maker to appear where the Court feels it may benefit from its assistance, a practice now provided for in r 20.17. For example, in *New Zealand Paper Mills Ltd v Otago Acclimatisation Society* [1992] 1 NZLR 400, 403, the Court of Appeal observed that there may be circumstances in which it is in the public interest for the Court "in its discretion" to hear the decision-maker (in that case, the Planning Tribunal), particularly where questions affecting the "general administration" of the legislation arose. In *Tararua Foundation v Liquor Licensing Authority* [1995] 2 NZLR 296, the Court of Appeal heard counsel for the Authority, reasoning that he did not appear adversarially and there was no party opposing the applications.

[19] Several rationales for the principle that a decision-maker ought not become a protagonist in an appeal from its own decision emerge from the authorities and the Rules: involvement in an appeal from its own decision lends the decision-maker an appearance of partiality; in particular, it is difficult to be and appear impartial in proceedings before the decision-maker that may follow the appeal; alternatively, the decision-maker may be functus officio, with no further role to play in the case; the decision-maker can provide appropriate assistance without being named; it is for the Court to decide when such assistance is appropriate, and the Rules confer a discretion not to hear from the decision-maker so long as it is not a party; and the decision-maker may be put to unnecessary expense if named.

The unusual position of the Commerce Commission

[20] Mr Every-Palmer helpfully listed some of the decision-makers affected by r 20.9, and I have supplemented that list:

- Broadcasting Standards Authority
- Commissioner of Crown Lands
- Commissioner of Designs
- Commissioner of Trade Marks
- Copyright Tribunal
- District Court
- Film and Literature Board of Review

- Gambling Commission
- Health Practitioners Disciplinary Tribunal
- Human Rights Review Tribunal
- Immigration and Protection Tribunal
- Land Valuation Tribunal
- Legal Aid Review Panel
- Liquor Licensing Authority
- Minister of Immigration
- Plumbers, Gasfitters and Drainlayers Board
- Real Estate Agents Disciplinary Tribunal
- Registrar of Companies
- Registrar of Industrial and Provident Societies
- Taxation Review Authority

[21] These bodies include judicial tribunals. Some, such as the Taxation Review Authority or the Immigration and Protection Tribunal or the Human Rights Review Tribunal, hear cases in which a representative of the state or a prosecutor usually appears and is able to exercise appeal rights.

[22] The Commerce Commission is in a different position as regards its Commerce Act functions of authorising restrictive trade practices, granting clearances or authorisations for business acquisitions, inquiring into the need for regulation of price and quality of goods and services, implementing such regulation, and enforcing the Act by bringing proceedings in this Court: cf *Commerce Commission v Telecom Corporation* [1994] 2 NZLR 421 (CA). The object of the Act is the promotion of competition for the long term benefit of consumers. They frequently suffer when competition is attenuated by the acquisition or misuse of market power. However, consumers can seldom be relied upon to mount effective opposition. As a class they are diffuse and often poorly informed. The Attorney-General does not normally appear to represent consumers, although he might do so: *In re Baise-Moi*, *Canterbury Regional Council v Attorney-General* [2009] NZAR 611. Nor does the Attorney appear for the Commission; although it is a Crown entity, the Commerce Act prescribes that it must act independently in performing its statutory functions and duties. While other parties do appear, in many cases there may be no respondent with the interest and capacity to resist an appeal effectively.

[23] Soon after the Commerce Act was enacted, the Court of Appeal considered the Commission's standing in an appeal from a determination refusing clearance or

authorisation to a merger: *Goodman Fielder v Commerce Commission* [1987] 2 NZLR 10. The merger was friendly, and both parties appealed the Commission's determination to this Court. The Commission was the only named respondent. The appellants appealed to the Court of Appeal, which took the pragmatic view that the Commission might properly be named, at least where there were no other respondents, because public interest considerations arise on such an appeal. The Court held (at 13):

> It is unusual for a tribunal appealed from to be a party to an appeal, at any rate if the case is essentially a dispute between parties, and we have been referred to no provision in the Act or any regulations or rules specifically authorising this course under the Commerce Act; but it is a practice that has understandably grown up. Public interest considerations will obviously arise on such an appeal. Moreover, there may well be no objectors or opponents who can be cited as respondents.

The Court returned to the topic at 20:

> [Amicus] mentioned observations, said to have an inhibiting effect, in *New Zealand Engineering etc Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283, 284-285, about the well-established principle that judicial bodies should strive not to enter the fray in a way which might appear to favour the interests of one of the parties. Those observations do not apply in their terms or spirit to a case where considerations of public interest and the effective administration of an Act arise, especially if there is no other party to put those considerations adequately before the appellate Court. In such a case it is right that the Commission should help the appellate Court to whatever extent the Commission and that Court find consistent with the Commission's public responsibility.

The Court accordingly held that the scheme of the legislation justified joining the Commission as a party in the High Court. It observed that as such, the Commission would acquire a right of further appeal to the Court of Appeal, which also seemed desirable having regard to "the public aspect of such cases".

[24] Some doubt was cast on that approach in *Telecom Corporation v Commerce Commission* (1991) 4 TCLR 473, 496. The High Court noted that the then new r 718(9), the equivalent of r 20.17, might in future limit the Commission's right to be represented and heard on an appeal. But in *Commerce Commission v Southern Cross* [2004] 1 NZLR 491 the Court of Appeal referred to *Goodman Fielder*, and identified a public interest in having the Commission actively assist an appellate

Court when there would otherwise be no opposition to the appeal. As it was assisting the Court, it ought not be exposed to costs:

> [17] We agree that it is in the public interest to have the commission take an active part to assist an appellate Court when reviewing one of its determinations in circumstances where there would otherwise be no opposition to the appeal. It would be a matter of real concern if exposure to costs operated as a disincentive to the commission's active assistance in this situation. There would be additional expense to the public if an amicus curiae had to be appointed. The commission's current approach would seem to us to be consistent with the encouragement which the Courts have given to the commission to play such a part.

[25] Consistent with that approach, the rules do not require that the Commission be named in appeals from its determinations under the Commerce Act, although it routinely is. Rule 20.9(3) merely exempts it from the rule that the decision-maker must not be named. Following *Southern Cross*, the dominant consideration is likely to be whether there is another party with incentive and capacity to oppose the appeal.

[26] Rule 20.9(2) has been in effect since 1 February 1998 (initially as r 706(3)), and r 20.9(3) has been in effect since 2003 (initially as r 709(3)). The DIRA was enacted in 2001. In other words, the 2003 amendments offered the opportunity to extend r 20.9(3) so that it also applied to the DIRA, but that opportunity was not taken.

The Dairy Industry Restructuring Act 2001

[27] The background to the legislation was conveniently summarised in *Commerce Commission v Fonterra* [2007] 3 NZLR 767 (SC):

> [1] ...the Dairy Industry Restructuring Act 2001 ... implemented a substantial restructuring of New Zealand's dairy industry. The Act facilitated the amalgamation of the three main dairy cooperatives in New Zealand. The amalgamated entity was named Fonterra Co-operative Group Ltd ... . Fonterra controls over 98 per cent of milk produced by New Zealand dairy farmers. Its dominance in the relevant market was such that specific authorisation was required for the amalgamation. This was granted by s 7 of the Act. Some regulation of the new entity was seen as necessary. Among the measures introduced was an obligation on Fonterra to supply raw milk to independent processors at a price which, absent agreement, was to be determined by a formula set out in the regulations ... .

> [2] The 2001 Act expressly authorised the making of regulations requiring Fonterra to supply milk, prescribing the terms of supply and specifying the methodology for determining the prices to be paid. This authorising provision reflects the general statutory purpose of promoting the efficient operation of local markets for dairy goods by regulating Fonterra's activities in order to ensure contestability. This expression of legislative purpose is reiterated in the statements of purpose and principles in subpart 5 of the Act, which deals generally with dairy market regulation and Fonterra's obligations in that regard. These provisions are all plainly directed towards creating a level playing field for all processors in relation to their raw milk costs... .

[28] The merger although authorised by statute actually took the form of a deemed authorisation under s 67(3)(b) of the Commerce Act. The legislature also sought to constrain the merged entity's dominant position in New Zealand dairy markets. The purpose of subpart 5 of the DIRA is to promote the efficient operation of dairy markets in New Zealand, which corresponds broadly to that of the Commerce Act. To that end, independent processors must be able to obtain raw milk (and other dairy goods and services) necessary for them to compete in dairy markets: s 71(a). Some provisions of the Commerce Act are incorporated in the DIRA, such as those relating to investigations and proceedings in this Court: s 145.

[29] The DIRA confers distinct functions on the Commission. It is both a prosecutor, with power to investigate and to bring proceedings in this Court, and a decision-maker. In the latter capacity, some of its functions possess a traditional regulatory character. For example, the Commission may set the raw milk price. *Commerce Commission v Fonterra* was a judicial review application attacking a Commission determination that fixed Fonterra's cost of capital, a component of the raw milk price.

[30] The Commission also decides disputes between industry participants and Fonterra. The present decision is of that sort. The Commission made it on a complaint brought by the respondents under s 120(1), which provides that:

> **120 Determination to resolve conflict**
>
> (1) A person may apply to the Commission for a determination if the person has a dispute with new co-op about the application of this subpart or regulations made under section 115.

[31] Subpart 5, in which s 120 is found, also contains provisions regulating such proceedings. Although they are inter partes proceedings, they are not wholly within the parties' control. In particular, the Commission must decide whether to determine a complaint, having regard to ss 70 and 71, and it may deploy its investigative powers. For example, in this case it heard from other interested persons. Notwithstanding that the Commission has decided the case warrants determination, however, the applicant may withdraw at any time, and if it does so the Commission must do no more in relation to the application: s 128. The Commission has jurisdiction to award compensation, in addition to orders compelling the parties to take action: s 126. It must deliver a reasoned decision, although it is not bound by technicalities, legal forms, or rules of evidence. There is jurisdiction to award costs where a party has contributed unreasonably to cost or delays: s 129. Commission determinations are enforceable by the parties, and the Commission itself, as judgments of this Court: s 133.

[32] The right of appeal under subpart 5 is found in s 132, which provides that "a party to a determination" may appeal to this Court. Section 132(4) provides that this Court's decision is final unless leave to appeal to the Court of Appeal is given. No express right of further appeal is conferred on the Commission.

Necessity in this case

[33] It is now possible to turn to the question posed by r 4.56(2)(b)(ii): whether the Commission's "presence before the court" "may be necessary" to "adjudicate upon and settle" all questions involved in the proceeding.

[34] The Commission will be bound by this Court's judgment whether or not it is named, and it may be heard under r 20.17. It means to appear, and accepts that it can do everything necessary to assist the Court in that capacity. It is an expert body, so its counsel may assist the Court notwithstanding that the respondents will be represented. Its appearance can also be justified on traditional grounds, in that the issue both goes to the Commission's jurisdiction and affects the administration of the DIRA. Fonterra has not suggested that I ought exercise my discretion under r 20.17 not to hear from the Commission.

[35] Accordingly, the question can be restated as whether it is necessary, to adjudicate upon and settle the issues of law in this appeal, that the Commission be granted a right of further appeal. Mr Mills argued that the Rule does not state by whom the issues are to be finally adjudicated upon and settled, admitting the possibility that they may not be finally resolved until appeals are exhausted. Mr Every-Palmer accepted that the Rule confers jurisdiction to add a party in such circumstances.

[36] It seems to me that the Rule is designed to ensure all parties are joined whose presence may be necessary so *this* Court can finally determine the issues that the case presents. Mr Mills accepts that the Commission need not be joined for that purpose. Rather, the Commission wants the ability to appeal should this Court reach an adverse decision and no one else appeals. That lends a speculative quality to the application. But in light of counsels' submissions I will assume that r 4.56(1)(b)(ii) confers jurisdiction. I observe that in *Goodman Fielder* the Commission was not joined in the High Court so it might bring a further appeal; rather, it acquired a right of appeal as a consequence of being a necessary party in the High Court.

[37] Turning to the merits of the application, there is a powerful public interest in competition in dairy markets. The appeal engages that interest and so transcends the private interests of the industry participants. As the body charged with protecting that interest and administering the DIRA, the Commission is properly interested in the Court's decision.

[38] But to grant the Commission a right of further appeal so it can rectify an unsatisfactory precedent would be to place it in a unique position among tribunals, whose decisions also commonly raise questions of public interest or statutory administration. The Rules provide that decision-makers - including the Commission under the DIRA - generally may not be named in appeals from their decisions, principally because of the loss of apparent impartiality. The Courts have not held that that is an irrelevant consideration in cases involving the Commission. Rather, they have held that in certain specific contexts it may give way to other public interests, at least in cases where there is no one else to defend the determination. There is force in Mr Every-Palmer's submission that the Commission is

insufficiently sensitive to this point. Its stance in this case would result in it being named in every appeal.

[39] The public interest might justify joining the Commission in an appropriate case under the DIRA, which like the Commerce Act confers several functions on the Commission. However, the Commission's role in s 120 applications differs from its traditional functions. The applications are inter partes and, its inquisitorial powers notwithstanding, the Commission's jurisdiction is distinctly judicial in nature. The appearance of impartiality is accordingly all the more important. Yet by appearing as a party to defend its decision with an eye to a further appeal, the Commission would necessarily become a protagonist.

[40] In this case, the dispute is still part heard. The Commission has yet to address the respondents' compensation claim. For the reasons given in *Lion Breweries*, this is an important consideration. It may be illustrated by reference to the Commission's costs jurisdiction under the DIRA. As a party in this Court or the Court of Appeal, it would receive or pay costs. It might then be asked to award costs in the proceeding before it, on the basis that one party or another had contributed unreasonably to costs or delays of that proceeding. While its decision would not address the Court costs directly, the question may fairly be asked whether it could appear impartial in the circumstances.

[41] Further, the respondents may seek leave to appeal should Fonterra succeed in this Court, and there is no evidence that they will not stay the course. The memorandum of their counsel claims that they are small players with limited resources, that Open Country now has no spare production capacity, and that it is "unlikely" that they would be able to "justify the resources necessary to pursue a further appeal themselves". This is evidence, but not in admissible form, and I am not prepared to accept it. Affidavit evidence and credible commitments were wanted in circumstances where the respondents will manifestly benefit should the Commission shoulder the burden of defending its decision for them. I am also told that they are claiming millions of dollars in compensation before the Commission, a point acknowledged only obliquely by their counsel in his memorandum. The

compensation claim suggests they have sufficient incentive to appeal. Consistent with that, I observe that they do intend to appear in this Court.

[42] Lastly, if an independent right of further appeal is truly thought necessary here, the Attorney might be joined as suggested *In re Baise-Moi*.

Decision

[43] Assuming jurisdiction exists under r 4.56(1)(b)(ii), I am not persuaded that the Commission's presence as a party may be necessary to the final determination of the issues. Its application for joinder is dismissed. The Commission must pay the appellant's costs of that application only, on a 2B basis with provision for two counsel.

[44] This decision does not affect the timetable for the exchange of submissions, which includes the Commission. I record that I expect the respondents will assume the burden of the argument in opposition to Fonterra, with the Commission addressing the question of jurisdiction and otherwise assisting the Court as appropriate.

Further evidence

[45] Fonterra also seeks an order admitting further evidence. The respondents consent. The Commission abides, while drawing the Court's attention to the limited circumstances in which further evidence is admissible.

[46] The further evidence takes the form of an affidavit attaching correspondence between Fonterra and other parties, including Grate Kiwi Cheese Company.

[47] If admitted, the evidence will not lead to other affidavits being filed, or to cross-examination of witnesses, or otherwise affect the appeal, which is to be heard

on 2 February next. In the circumstances, I admit it provisionally, and will determine its admissibility in the substantive judgment.

Miller J

Solicitors:
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Commerce Commission, Wellington for the Intending Third Respondent