IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-361
[2020] NZHC 1324

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of decisions of the Guardians of New Zealand Superannuation
BETWEEN	FADEL KAMEL MOHAMED Applicant
AND	GUARDIANS OF NEW ZEALAND SUPERANNUATION Respondent

Hearing: 10 June 2020

Appearances: D R Kalderimis and N K Swan for the proposed intervener, the Fertiliser Association of New Zealand
J L W Wass and M C McCarthy for the applicant
V L Heine and J W Upson for the respondent

Judgment: 12 June 2020

JUDGMENT OF PALMER J

This judgment was delivered by me on Friday 12 June 2020 at 3.30 pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
J L W Wass, Barrister, Wellington
V L Heine, Barrister, Wellington
Te Aro Law, Wellington
Russell McVeagh, Wellington
Chapman Tripp, Wellington

Summary

[1] Mr Fadel Kamel Mohamed, a representative of the Polisario Front for Australia and New Zealand, challenges policies and decisions of the Guardians of New Zealand Superannuation (NZ Superannuation). The Fertiliser Association of New Zealand (the Association) applies to intervene. Mr Kamel Mohamed opposes the application.

[2] A Court's assessment of an application to intervene involves weighing the likelihood the intervener will assist the Court against the risk of prejudice or unfairness to the parties. It is guided by the overall interests of justice. A variety of considerations are relevant. The threshold is the same in public law and private law cases, but is more likely to be satisfied in public law cases. There is no reason why a first instance court, like an appellate court, should deprive itself of the benefit of a different perspective on a difficult issue where that outweighs any prejudice of its presence. If there is an appreciable prospect of material adverse findings being made about a proposed intervener, then the principles of natural justice will require the Court to hear the intervener.

[3] Here, the Association has a material interest, through its members, in a New Zealand judicial decision that touches on the lawfulness of official New Zealand decisions taken in relation to Western Sahara. I consider it would likely assist the Court to understand the Association's perspective, as long as the Association keeps to the narrow parameters of its proposed terms of intervention. I grant the application on conditions.

The proceedings and application

[4] Mr Kamel Mohamed is a representative of the Polisario Front for Australia and New Zealand, the liberation movement representing the Sahrawi people of Western Sahara. He applies for judicial review of decisions by NZ Superannuation concerning investments in businesses involved in the Western Sahara. The claim is that NZ Superannuation's Responsible Investment Framework is unlawful, its continued investments breach its statutory requirements, it has failed to adhere to the Framework and it has "abdicated its responsibility" under its statute.

[5] Underlying the claim is a question at international law about whether Morocco is in illegal occupation of Western Sahara. The statement of claim alleges it is and that the importation of phosphate by Ravensdown Ltd (Ravensdown) and Ballance Agri-Nutrients Ltd (Ballance) creates an incentive for Morocco to remain in occupation of Western Sahara. The hearing is set down for two days at the Auckland High Court commencing on 27 October 2020.

[6] The Association applies to intervene in the proceedings. Its members include cooperatives Ravensdown and Ballance which are the sole New Zealand importers of Western Saharan phosphate. NZ Superannuation abides the decision of the Court. Mr Kamel Mohamed opposes the application.

Law of intervening

Case law

[7] In summarising the law regarding intervention in judicial review cases, I stated in *Alpha Dairy NZ Ltd v Auckland Council*:[1]

> The High Court has inherent jurisdiction to grant leave to an interested party to intervene in a proceeding by providing evidence, written submissions and/or oral submissions on specified terms but has no right of appeal. In summary, in deciding whether to grant leave to intervene, the Court weighs the likelihood the intervener will assist the Court against the risk of prejudice or unfairness to the parties.[2] The decision is guided by the overall interests of justice.

[8] I also referred to principles for intervention distilled from the case law by Thomas J in *Capital and Merchant Finance Ltd v Perpetual Trust Ltd*:[3]

> (a) An applicant must show that its legal rights against or liabilities in relation to the subject matter will be directly affected. Commercial, financial, or reputational interests in the outcome will only be sufficient in exceptional circumstances.
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> (b) If the intending intervener's presence before the Court will not improve the quality of information before the Court, that will count heavily against its addition to the proceedings.

1 *Alpha Dairy NZ Ltd v Auckland Council* [2019] NZHC 2263 at [4].
2 *DN v Family Court at Auckland* [2019] NZHC 2028, [2019] NZFLR 150 at [11].
3 At [5], citing *Capital and Merchant Finance Ltd (in rec and in liq) v Perpetual Trust* [2014] NZHC 3205, [2015] NZAR 228 at [41].

(c) A relevant consideration is the extent to which the proposed intervener can rely on one of the parties to protect its rights and obligations.

(d) If either party would be prejudiced by the intervention, or if the intervention would create an impression of partiality, the application will not be granted.

(e) In cases where development of the law is likely, the application is more likely to be granted if the proposed intervener has special expertise to assist the Court on wider public policy issues.

(f) The underlying issue is whether it would be unjust to adjudicate on the matter in dispute without the intervener being heard. Several of the factors mentioned above tie into this issue.

(g) Where intervention is justified, the degree of participation granted to the intervener should be the minimum necessary to protect the intervener's interests.

[9] And I referred to a paragraph in a judgment of a full court of the High Court in *Taylor v Key (No 1)*:[4]

> The jurisdiction may be exercised when the Court is satisfied that intervention is likely to improve the quality of information before the Court on issues wider than those that the parties may wish to address. Intervention has been allowed where the party seeking leave has an interest in the outcome of the case that will be directly or indirectly affected or even where that party has a distinctly arguable case that they will be affected. In such cases, this Court has held it would be unjust to decide the issues in the absence of the party so affected, or potentially affected.

[10] In *Seales v Attorney-General*, Collins J identified and applied the following principles in granting three applications for intervention in a case seeking declarations regarding assisted dying:[5]

> [45] First, the power to grant leave to intervene is discretionary and should be exercised with restraint to avoid the risk of expanding issues, elongating the hearing and increasing the costs of the litigation.
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> [46] Second, in a proceeding involving issues of general and wide public importance, leave to intervene may be granted when the Court is satisfied that it would be assisted by the intervener.
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> [47] Third, it may be appropriate to grant leave to intervene where the proceeding is likely to result in the development of the law.

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4 *Taylor v Key (No 1)* [2014] NZHC 3306, [2015] NZAR 730 at [9].
5 *Seales v Attorney-General* [2015] NZHC 828.

> [48] Fourth, leave should not be granted when the proceeding is essentially one that involves statutory interpretation and is unlikely to involve broad questions of policy.

Submissions

[11] Mr Kalderimis, for the Association, submits that *Capital and Merchant Finance Ltd* concerned a commercial context where the proposed interested party had no legal rights or liabilities that were directly affected, only a contingent interest which was exactly aligned with one of the parties.[6] He submits that the test for intervening in a judicial review case does not require the same direct effect on legal rights and liabilities as it does in a commercial case.

[12] Mr Wass, for Mr Kamel Mohamed, submits that the basic test for intervention involves the Court balancing the assistance to be provided with the potential prejudice caused by the intervener. He submits that judicial review cases have the potential to impact a wider range of parties and are more likely to give rise to issues requiring development of the law, so the potential for intervention is greater. But, he submits, the test remains the same in relation to whether intervention is necessary to assist the Court, including by reference to the principles identified in *Capital and Merchant Finance Ltd*.

[13] Ms Heine, for NZ Superannuation, submits leave to intervene is granted where that may assist the Court by providing it with broader evidence and perspectives, especially in cases with a significant policy dimension. She submits intervention may also be appropriate to give a person whose rights or interests are directly affected an opportunity to be heard. She submits the "directly affected" requirement has been applied in the case law, no cases expressly reject it and it remains a valid requirement.

My assessment of the threshold for intervention

[14] I continue to consider that the overall assessment by the Court involves weighing the likelihood the intervener will assist the Court against the risk of prejudice or unfairness to the parties. That is guided by the overall interests of justice. Counsel did not disagree. The principles identified in *Capital and Merchant Finance Ltd,*

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6 *Capital and Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd,* above n 3, at [68].

Taylor v Key (No 1) and *Seales v Attorney-General* are relevant to that overall assessment. I agree with Mr Wass's submission that the threshold for intervention does not differ depending on whether a case involves issues of private or public law. Public and private law, though convenient labels, are more of a continuum than a distinction. But if the distinction is used, I consider intervention is more likely in a public law case only because it is more likely an intervener will assist the Court in a public law case than a private law case.

[15] In a private law case, an intervener is most likely to assist the Court when it has legal rights or liabilities, or other material interests, that are affected by the legal issues at stake. Such interests can mean the intervener has a perspective that is different to those of the parties and which it would assist the Court to hear in considering the implications of its decision. In a commercial context, those interests are most likely to be financial. In *Sanofi-Adventis Deutschland GMBH v AFT Pharmceuticals Ltd*, an application for intervention was declined where it was not unjust for patent rights to be determined in the absence of the applicant, who had not shown how its presence would assist the Court.[7] In *Alpha Dairy NZ Ltd,* the intervener had an interest in the planning regime, could improve the information before the Court and had a different perspective than the parties.[8] And in *Commercial Management Ltd v Commissioner of Inland Revenue,* the Commissioner of Inland Revenue's interest in protecting the integrity of the tax system, and likely considerable assistance to the Court, justified intervention.[9] Occasionally, a private law case with significant potential to develop that law might be fertile ground for interveners to argue they have a perspective, different to that of the parties, which the Court should hear. The development of the law almost always involves policy considerations.

[16] In a public law case, for-profit or non-profit organisations may have material interests in an issue of public policy that is affected by the legal issues at stake. Such interests can mean the intervener has a perspective that is different to those of the parties and which it would assist the Court to hear in considering the implications of its decision. As a full Court of the High Court said in *Wilson v Attorney-General*,

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7 *Sanofi-Adventis Deutschland GMBH v AFT Pharmaceuticals Ltd* HC Auckland CIV-2009-404-1795, 9 August 2011, at [39] and [42].

8 *Alpha Dairy NZ Ltd v Auckland Council,* above n 1, at [10].

9 *Commercial Management Ltd v Commissioner of Inland Revenue* [2020] NZHC 891 at [45].

"where the party's interest are, or may be, directly or indirectly affected by the judicial review application . . . it would be unjust to decide the issues in the absence of the party so affected, or potentially affected".[10] The "directness" of an intervener's interest is likely to be less important in a public law context. The more significant and multi-faceted the public policy implications of a decision, the more likely it is that a multiplicity of perspectives, rather than binary argument, will assist the Court. That has been so in cases raising issues of assisted dying, teaching Christianity in public schools, earthquake recovery, the Crown's overlapping Treaty claims policy and the validity of the Total Allowable Catch for fish stocks.[11]

[17] The considerations relevant to the appropriate threshold for intervention in public and private law cases are similar to those relevant to the law of standing, which I described as relaxed in relation to judicial review cases in *Smith v Attorney-General*:[12]

> A party who has a personal interest at stake, or whose personal rights and interests are affected, has standing to bring a proceeding. If not, he or she may be permitted to pursue a claim if that is warranted by the public interest in the administration of justice and the vindication of the rule of law.

[18] The threshold for intervention is the same in public and private law cases, but it is more likely to be satisfied in a public law case involving significant public policy implications. In practice, it may have been that appellate courts in New Zealand have been more likely to grant leave to intervene than first instance courts. But there is no reason in principle why a first instance court should deprive itself of the benefit of a different perspective on a difficult issue where that benefit outweighs any prejudice of its presence.

[19] Finally, I note that in either a public law or private law context, if there is an appreciable prospect of material adverse findings being made about a proposed

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10 *Wilson v Attorney-Genera (No 2)* HC Wellington CIV-2010-485-1147, 27 July 2010, at [20].

11 See: *Aotearoa Water Action Inc* [2019] NZHC 3187]; at [5]; *Seales v Attorney-General,* above n 5 ; *McClintock v Attorney-General of New Zealand* [2015] NZHC 1280; *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177; *Ngāti Whātua Ōrakei Trust v Attorney-General* [2019] NZHC 2363; *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2020] NZHC 741.

12 *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094.

intervener, then the principles of natural justice will require the Court to hear the intervener. Not to do so would be an error of law.

Submissions

[20] Mr Kalderimis, for the Association, submits its members' activities are central to the complaints against NZ Superannuation so there is a real risk that the outcome could affect Association members' legal rights and create commercial and reputational consequences for them. The claim alleges that Morocco's occupation of Western Sahara is unlawful at international law. Mr Kalderimis submits such a finding would create a platform to bring proceedings against the Association or its members. He points to public statements by Mr Kamel Mohamed and the Polisario Front about possible legal action against Ravensdown and Ballance, as has occurred in other countries such as South Africa.[13] He submits the claim makes specific criticisms directly implicating and naming the Association's members. He submits careful submissions will be required in order not to indirectly implead the sovereign immunity of Morocco and he submits the Association's submissions will assist the Court. The Association seeks the ability to make oral and written submissions on issues relevant to the wider public international law issues and to file limited evidence in reply to any adduced by the parties relating to Association members' importing, manufacturing, distribution or monitoring activities.

[21] Mr Wass, for Mr Kamel Mohamed, submits the Association's involvement in the proceedings is unnecessary and would be prejudicial to the parties in potentially expanding the scope of the issues or side-tracking the Court. He submits NZ Superannuation will address questions of public international law or, because the Association is not impartial and has no special relevant expertise, an amicus curiae could be appointed. He submits the case is not about development of the law and Mr Kamel Mohamed has confirmed he is not bringing this proceeding for a subsequent attack on the Association's members. He submits the Association cannot demonstrate on the pleadings that its members' interests justify intervention. But Mr Kamel

[13] *Saharawi Arab Democratic Republic v Owners and Charterers of the MV "NM Cherry Blossom"* [2017] ZAECPEHC; 2017 (5) SA 105 (ECP); [2018] 1 All SA 593 (ECP) (15 June 2017).

Mohamed would consent to the parties' evidence being served on the Association so it can apply again if it considers is members' interests are criticised unfairly.

[22] Ms Heine, for NZ Superannuation, submits that it abides the decision of the Court, given the narrow form of intervention sought. But she offers several points for my consideration. She submits NZ Superannuation holds equity investments in 10 companies with business interests in Western Sahara and owns, through subsidiaries, dairy farms which have shares in Ravensdown and Balance because of their cooperative structure. She submits the public international law issues in the proceedings should be left to NZ Superannuation to advance and it will be rare that the legal content of submissions will justify intervention.[14] If any additional assistance is required, Ms Heine submits an amicus could be appointed, but that has not been shown to be necessary yet. She submits there may be a basis for intervening if the applicant's evidence trespasses on the Association's members' conduct but we do not know that yet. She submits the reputational harm from the implied criticism of the Association's members is insufficient to warrant intervention.

Should I grant leave to the Fertiliser Association to intervene?

[23] Viewed narrowly, the legal issues at stake in this case require assessment of policies and decisions of NZ Superannuation and interpretation of New Zealand legislation. The issues are of a public law nature. It is not clear to me, at this stage, that the Court will be required to make findings about international law. That may become clearer once the evidence and/or submissions are filed and served. But it does seem that issues of international law and international relations underlie and constitute a significant aspect of the context of the case.[15] The South African *Cherry Blossom* judgment, to which Mr Kalderimis points, illustrates the complexity such background can involve.[16]

[24] The Association itself does not have any particular expertise in international law or international relations, though its counsel does. But the Association does have

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14 *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at [18].

15 The applicant alleges that Morocco's occupation of Western Sahara is illegal under international law at paragraphs [12], [63], [70] and [76] of the statement of claim.

16 *Saharawi Arab Democratic Republic v Owners and Charterers of the MV "NM Cherry Blossom"*, above n 13.

a material interest, through its members, in a New Zealand judicial decision that touches on the lawfulness of official New Zealand decisions taken in relation to Western Sahara. As a consequence, the Association's perspective of the issues can reasonably be expected to be different from that of the parties. I consider it would likely assist the Court to understand the Association's perspective of the evidence and issues in the case, as long as the Association keeps to the narrow parameters of its proposed terms of intervention. If it does, the prejudice to the parties from the Association's participation in the case is likely to be minimal. There is also a possibility that evidence filed by the parties may implicate the actions of the Association's members. If so, as counsel for the parties both recognised, that is likely to entitle the Association to respond.

Result

[25] I grant leave to the Association to intervene, on the basis that:

(a) By **4 pm Friday 4 September 2020**, the Association will file and serve any evidence, strictly in reply to any evidence filed by Mr Kamel Mohamed or NZ Superannuation, that relates only to Association members' importing, manufacturing, distribution or monitoring activities in relation to Western Sahara.

(b) By **5 pm Tuesday 15 September 2020**, the Association will file and serve its written submissions, on wider public international law issues, of no more than 20 pages.

(c) At the hearing commencing **10 am Tuesday 27 October 2020**, it will be up to the Judge to decide whether, and for long, the Association may present any oral submissions.

(d) The parties have leave to request any consequential variations to the timetable.

(e) The Association cannot claim or be subject to any award of costs for the substantive proceedings.

(f) The costs of this application will lie where they fell.

Palmer J