Supreme Court of New Zealand

SC

under the Hazardous Substances and New Organisms Act 1996 and under the Judicature Amendment Act 1972

in the matter of an appeal of the decision of the Court of Appeal in proceeding CA 380/2009

between

GE FREE NZ IN FOOD & ENVIRONMENT INCORPORATED
Appellant

and

AGRESEARCH LIMITED
First Respondent

and

ENVIRONMENTAL RISK MANAGEMENT AUTHORITY
Second Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

21 April 2010

LeeSalmonLong
Barristers and Solicitors
LEVEL 16 VERO CENTRE 48 SHORTLAND STREET
PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND
TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109
EMAIL: davey.salmon@lsl.co.nz SOLICITOR: DAVEY SALMON

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TO the Registrar of the Supreme Court

The appellant, GE Free NZ in Food & Environment Incorporated, gives notice that it applies for leave to appeal to the Supreme Court against the decision of the Court of Appeal in *AgResearch Limited v G E Free NZ in Food and the Environment Inc* [2010] NZCA 89, delivered on 23 March 2010 in proceeding CA 380/2009.

THE ISSUE

1. Under section 25 of the Hazardous Substances and New Organisms Act 1996 (**Act**), the importation, development and field testing of genetically modified organisms is prohibited absent specific approval from the second respondent (**ERMA**).

2. Applications for such approval are governed by section 40 of the Act. That section lists the type of information that must be included in every application including the host organisms to be modified, the genetic material and methods to be used and the modified organisms that will be produced. Information about the facilities at which modification and testing will take place is also required.

3. The first respondent (**AgResearch**), lodged 4 separate but interrelated applications for importation, development and field testing under section 40 (**Applications**). The Applications were generic in the extreme to the extent that they did not comply with the specific requirements of section 40.

4. Despite this, they were registered for consideration by ERMA.

5. The appellant (**GEF**), sought judicial review of ERMA's decision to register the Applications for consideration on the basis that they were incompliant with the Act. Relief was granted in the High Court (*GE Free NZ in Food & the Environment Inc v Environmental Risk Management Authority (ERMA) & Anor* HC Wellington CIV 2008-485-002370, 5 June 2009). AgResearch and ERMA appealed. The appeal was successful and the orders made in the High Court were quashed.

6. The essential issues in this appeal are:

   (a) What are the information requirements in section 40, and did the Applications comply with them?

   (b) What are the consequences of any non-compliance?

Competing positions

7. GEF's position is that:

   (a) The Act dispensed with the question whether genetic modification was on a general level acceptable in New

Zealand and instead focused attention on the particular facts of each and every proposal.

(b) The Act envisages meaningful public participation in the approval process where it has been identified that there is significant public interest in a proposal. This reflects the fact that a wide range of members of the public have an interest in the topic and are able to make considered and useful contributions to the approval process; including persons with significant scientific understanding.

(c) The Applications:

(i) Identified the host organisms by genera only and included most genera of large livestock farmed commercially in New Zealand.

(ii) Sought approval for an indefinite period of time.

(iii) Sought approval for an almost unlimited range of genetic modifications and did not specify what scientific techniques or methods where to be used but instead sought approval for the use of any or all techniques for genetic modification, whether existing or yet to be invented.

(iv) Did not specify the location or locations in New Zealand of facilities where the development and / or field testing of the genetically modified organisms would occur.

(d) A failure to enforce information requirements effectively precludes meaningful public participation. Without sufficient information, a submitter can only comment on the desirability of genetic modification in general or the fact that more information is needed.

(e) Further, without sufficient information, ERMA is unable to comply with its own obligations to keep a register of all applications made to it. This register must contain a sufficient description of the relevant organisms to uniquely identify them (section 20(2)(b)). The generic nature of the Applications made this impossible.

(f) The extent of the Applications' failure to comply with the section 40 requirements effectively excludes public participation in any meaningful way. Accordingly judicial intervention was appropriate to ensure that public participation could properly take place.

8. AgResearch's position in the Court of Appeal was that:

(a) The section 40 requirements exist for the purpose of ensuring that ERMA, as the relevant expert body, has sufficient information to consider the application.

(b) In consequence, as long as the information provided in the application was sufficient in the eyes of ERMA, failure to comply with the section 40 requirements would not necessarily render an application void or invalid.

9. Further, both AgResearch and ERMA took the position that the application for review was premature. The proper timing for review was argued to be the date of determination of the Applications.

10. The Court of Appeal agreed with AgResearch and ERMA and allowed the appeal. Their Honours considered that the scheme of the Act provided sufficient protection for public interests and, as a result, that the mere act of registering an application for consideration and publicly notifying it was not one which was suitable for judicial review.

GROUNDS FOR LEAVE

11. It is submitted that following the Court of Appeal's judgment, there are no safeguards for proper public participation in the approval process under the Act. While ERMA may request further information from applicants and extend public submission deadlines, the public lacks the power to compel it to do so.

12. In other words, the information requirements are the only guarantees that an application will contain sufficient information for the public to:

(a) decide whether or not to make a submission at all; and

(b) base a considered and meaningful submission upon.

13. If those requirements are not enforced, the public are left to rely on ERMA to protect the public right of participation by using its limited and discretionary powers to extend submission periods or request, and make available, further information. The present case shows that protection to be unsatisfactory.

Section 13 grounds

14. It is necessary in the interest of justice for the Supreme Court to hear and determine the appeal as:

Section 13(2)(a) – general or public importance

There is a significant public interest in the levels and strictness of control applied to genetically modified organisms in New Zealand. Further, the following issues also form part of the appeal and are of general and / or public importance:

(a) The level of compliance necessary with information requirements in legislation such as the Act, where meaningful public participation is required / envisaged.

(b) The extent to which courts will intervene to ensure that compliance and that public consultation can be meaningful at the "front end" of such process (rather than allowing them to take their cause on a potentially flawed basis).

Section 13(2)(c) – general commercial significance

(c) Genetic modification is an important aspect of agricultural research with a wide variety of commercial applications. Certainty around the approval application process in general, and the information requirements and consequences of not meeting them in particular, is a matter of general commercial significance.

GROUNDS FOR APPEAL

15. It is submitted that the Court of Appeal erred in its interpretation of section 40 and the effect of non-compliance because:

(a) The scheme of the Act envisages public participation in applications which have been deemed by it or by ERMA as being the subject of significant public interest.

(b) The Act envisages that submissions on an application should be directed to the specific risks and benefits of the proposed project rather than the merits of genetic modification in general.

(c) Sufficient information, as required by section 40, is a prerequisite for considered and meaningful participation by interested parties (other than applicants and ERMA itself).

(d) The Act does not provide members of the public with the power to compel ERMA to request further information from the applicant, to extend submission deadlines where insufficient information is provided or to establish expert commissions. Section 40 comprises all of the public's rights to information.

(e) As a result, the acceptance constitutes an important step in the process for the purposes of public participation in the process.

(f) The Applications were non-compliant in the following ways:

(i) Those of the Applications seeking approval for indoor and outdoor development and field testing of genetically modified organisms:

- Failed to clearly identify the biological nature of the organisms and the nature and degree of hazards intrinsic to them (section 40(2)(a)(i) and (b)(i)).

- Failed to identify all possible adverse effects of the organism on the environment (sections 40(2)(a)(v) and (b)(v)).

(ii) The applications for approval of indoor and outdoor development also:

- Failed to properly describe the project and the experimental procedures which were to be used (section 40(2)(a(ii)).

- Failed to provide details of the biological material to be used in the project (section 40(2)(a)(iii)).

(iii) The application for approval to field test genetically modified organisms failed to provide a proper description of the genetic modifications of the organisms which were to be field tested and the nature and methods of the proposed field tests (sections 40(2)(b)(iii) and (iv)).

(g) This non-compliance was patent and capable of identification at the application acceptance stage. Judicial review is justified at the application acceptance stage rather than being deferred to some later date.

JUDGMENT SOUGHT

16. GEF seeks a judgment from the Supreme Court allowing its appeal, and:

(a) An order reinstating the order of the High Court, preventing ERMA from further considering the Applications.

(b) Costs.

Dated 21 April 2010

Davey Salmon / Tom Bennion
Counsel for the Plaintiff

TO: The Registrar, Supreme Court

AND TO: The Respondents, by their solicitors

This document is filed by Davey Salmon solicitor for the appellant of the firm LeeSalmonLong.

Documents for the appellant may be served at the offices of LeeSalmonLong situated on Level 16, Vero Centre, 48 Shortland Street, Auckland, or may be posted to P O Box 2026, Shortland Street, Auckland.