IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-000361
[2021] NZHC 512

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 First Applicant
	M J BARTON Second Applicant
AND	GUARDIANS OF NEW ZEALAND SUPERANNUATION Respondent
	FERTILISER ASSOCIATION OF NEW ZEALAND INC Intervener

Hearing:	27, 28 and 30 October 2020 (Further evidence received 1 December 2020)
Appearances:	J L Wass and M C McCarthy for Applicants A Galbraith QC, V L Heine and J W Upson for Respondent D R Kalderimis and N K Swan for Intervener
Judgment:	15 March 2021

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Monday, 15 March 2021 at 3:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

[1] This is an application for judicial review of decisions made by the Guardians of New Zealand Superannuation to invest in assets connected with phosphate extracted from Western Sahara.

Overview of this proceeding

[2] The first applicant, Mr F K Mohamed, is the representative of the Polisario Front for Australia and New Zealand (Polisario Front). He is not a New Zealand citizen or resident. The Polisario Front is a Saharawi national liberation movement aiming to end the Moroccan presence in Western Sahara. The second applicant, Mr M J Barton, is the coordinator of the Western Sahara Campaign New Zealand, a non-profit group advocating for the interests of the people of Western Sahara. He is a New Zealand citizen. The respondent is the Guardians of New Zealand Superannuation (Guardians), a Crown entity established pursuant to s 48 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act) to manage the assets of the New Zealand Superannuation Fund (the Fund). Finally, the Fertiliser Association of New Zealand Inc (Fertiliser Association) appeared as an intervener.

[3] This case concerns phosphate sourced from Western Sahara. Western Sahara is defined by the United Nations as a Non-Self-Governing Territory. The applicants say it is unlawfully occupied by Morocco. The intervener says that Morocco is simply the de facto administrator of the territory. A Moroccan state-owned corporation, OCP SA (OCP) (formerly Office Chérifien des Phosphates), extracts phosphate from Western Saharan reserves. New Zealand fertiliser companies, Ballance Agri-Nutrients Ltd (Ballance) and Ravensdown Ltd (Ravensdown), use that phosphate to manufacture fertiliser. Guardians has financial links to Western Saharan phosphate in three ways: the Fund previously retained passive debt interests in OCP, currently holds equity interests in companies with premises in Western Sahara which directly or indirectly support the mining operation, and holds a current investment portfolio which includes New Zealand farms (the Fund farms) which are supplied by Ballance.

[4] The applicants seek to judicially review Guardians' investment decisions relating to Western Saharan phosphate. In particular, the review asks whether Guardians has complied with its obligations under the Act. The Act requires, inter

alia, that Guardians "manage and administer the Fund in a manner consistent with avoiding prejudice to New Zealand's reputation as a responsible member of the world community".[1] Further, the Act requires Guardians to establish, adhere to and review investment policies, standards and procedures to ensure compliance with that duty.[2]

[5] The applicants say that Guardians' investment in assets connected with phosphate extracted from Western Sahara incentivises Morocco's unlawful occupation of that territory and is contrary to its obligation to avoid prejudice to New Zealand's reputation. They seek relief by way of a declaration and an order requiring Guardians to reconsider both its general investment framework and its Western Sahara-related investments. The respondent and intervener reply that Guardians has complied with its statutory obligations to invest prudently so as to avoid prejudice to New Zealand's reputation as a responsible member of the world community. Guardians points to the Statement of Investment Policies, Standards and Procedures (SIPSP) and the Responsible Investment Framework (RIF) which it has developed, published, and implemented under the Act, as evidence of compliance with its statutory obligations. The respondent argues further that the applicants have no standing, and that the pleaded matters, which implicate the sovereign acts of Morocco, are inappropriate for consideration by a domestic court.

Status of Western Sahara

[6] A Spanish protectorate since 1884, Spanish Sahara was identified as a Non-Self-Governing Territory under Chapter XI of the United Nations Charter in 1963. Under Article 73e of the Charter, Spain as administering Power was responsible for transmitting technical and statistical information on the territory. A series of General Assembly resolutions on the question of Spanish/Western Sahara reaffirmed the applicability of the Declaration of the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV)) to the territory.

[7] On 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania (the Madrid

---

1 New Zealand Superannuation and Retirement Income Act 2001, s 58(c).
2 Section 60.

Agreement), whereby the powers and responsibilities of Spain, as the administering power of the territory, were transferred to a temporary tripartite administration. The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an administering power, a status which Spain could not have unilaterally transferred. The transfer of administrative authority over the territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory.

[8] On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in Western Sahara and relinquished its responsibilities over the territory, leaving it under the administration of both Morocco and Mauritania in their respective controlled areas. Upon the conclusion of the Mauritano-Sahraoui Agreement of 20 August 1979, Mauritania also withdrew from the territory, leaving Morocco to administer the territory of Western Sahara alone. Morocco, however, is not listed as the territorial administering Power in the United Nations list of Non-Self-Governing Territories. Consequently, Morocco has not transmitted information on the territory in accordance with Article 73e of the Charter of the United Nations.

Legality of Extraction of Phosphate from Western Sahara

[9] As to the legality of the extraction of phosphate from Western Sahara by Morocco, the United Nations Under-Secretary-General for Legal Affairs, Hans Corell, provided advice to the Security Council in the form of a letter dated 29 January 2002 (Hans Corell opinion). He stated:

> Where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein.

[10] The legal controversy arises over the issue of whether the extraction of phosphate from Western Sahara benefits the people of Western Sahara and is being undertaken on their behalf or in consultation with their representatives.

New Zealand Superannuation and Retirement Income Act 2001

[11] Section 3 of the Act sets out the purpose of the Act as follows:

> (a) to continue current entitlements to New Zealand superannuation:
>
> (b) to establish a New Zealand Superannuation Fund (the Fund) with sufficient resources to meet the present and future cost of New Zealand superannuation:
>
> (c) to provide for Government contributions to the Fund:
>
> (d) to establish a Crown entity called the Guardians of New Zealand Superannuation, which will manage and administer the Fund …:
>
> (e) to establish a process for signalling political agreement on the parameters for New Zealand superannuation entitlements and funding:
>
> (f) to bring together in one Act all of the provisions for each of those matters.

[12] Section 58 provides the following in relation to the investment of the Fund:

> (1) The Guardians are responsible for investing the Fund.
>
> (2) The Guardians must invest the Fund on a prudent, commercial basis and, in doing so, must manage and administer the Fund in a manner consistent with—
>
> (a) best-practice portfolio management; and
>
> (b) maximising return without undue risk to the Fund as a whole; and
>
> (c) *avoiding prejudice to New Zealand's reputation as a responsible member of the world community*.
>
> (emphasis added)

The applicants seek to rely, in particular, on subs (2)(c).

[13] Section 60 then provides for the means by which the Guardians must give effect to s 58:

> (1) The Guardians *must establish, and adhere to, investment policies, standards and procedures for the Fund that are consistent with their duty to invest the Fund on a prudent, commercial basis, in accordance with section 58.*

(2) The Guardians *must review those investment policies, standards, and procedures for the Fund at least annually*.

(emphasis added)

Counsel for Guardians refers to s 60 as the "operationalisation" of s 58. They point to the policies, standards and procedures established under this provision as evidence of compliance with their s 58 statutory duty.

[14] Section 61 of the Act sets out a non-exhaustive list of mandatory factors that a statement of investment policies, standards, and procedures under s 60 "must cover". Key factors relevant to this proceeding are as follows:

(a) the classes of investments in which the Fund is to be invested and the selection criteria for investments within those classes; and

(b) the determination of benchmarks or standards against which the performance of the Fund as a whole, and classes of investments and individual investments, will be assessed; and

(c) standards for reporting the investment performance of the Fund; and

(d) *ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community*; and

(e) the balance between risk and return in the overall Fund portfolio;

(emphasis added)

Again, the applicants rely, in particular, on the statutory obligation to cover ethical investment under sub 61(d), and the emphasis placed on avoiding prejudice to New Zealand's international reputation through the reiteration of s 58(2)(c).

Issues in this proceeding

[15] There are a number of procedural and substantive issues in this proceeding:

(a) First ground of review: Has Guardians established a general investment framework that complies with ss 58, 60 and 61 of the Act? This issue relates to the proper interpretation of Guardians' statutory investment obligations under the Act in a general sense.

(b) Second ground of review: Has Guardians complied with s 58(2)(c) in relation to its Western Sahara-related investments specifically?[3] That is, did Guardians consider whether it would be necessary to exclude the Western Sahara-related investments in order to comply with s 58(2)(c)?

(c) Third ground of review: As an alternative to (b), has Guardians properly adhered to the SIPSP and RIF, established in accordance with ss 60 and 61 of the Act, in relation to its Western Sahara-related investments specifically? That is, did Guardians consider whether it would be necessary to exclude the Western Sahara-related investments in order to comply with the SIPSP and RIF?

(d) Fourth ground of review: Has Guardians effectively abdicated its responsibilities under s 58 of the Act to Ballance and/or Ravensdown?

(e) Fifth issue: Do the applicants have standing to bring this claim?

(f) Sixth issue: Is Morocco indirectly impleaded in this proceeding such that the doctrine of state immunity applies?

(g) Seventh issue: Are the matters pleaded in this proceeding non-justiciable on the basis of the act of state doctrine?

First ground of review: Has Guardians established a general investment framework that complies with ss 58, 60 and 61 of the Act?

[16] The first ground of review relates to the proper interpretation of the Guardians' statutory investment obligations. The applicants say that "Guardians has misdirected itself in law, and that its [Responsible Investment] Framework does not comply with the mandatory requirements of ss 58 and 61". The applicants seek a direction requiring Guardians to "promulgate a new Framework and reconsider its Western Saharan Investments in light of it."

---

[3] For clarity, I note that the second and third grounds of review address Guardians' Western Sahara-related investments specifically. The applicants say the second ground of review relates to their interpretation of what the statutory investment obligations require; and the third ground of review relates, in the alternative, to the respondent's interpretation of those obligations.

[17] The applicants clarify that their first ground of review is based on an alleged error of law and is independent of their concerns about Guardians' decision-making process in relation to Western Sahara specifically. The applicants say that the RIF fails to properly consider whether its approach to managing and administering investments creates a risk of prejudice to New Zealand's reputation. In other words, the applicants say, Guardians has never asked itself whether its continued exposure to Western Saharan phosphate, through its investments, creates a risk of prejudice to New Zealand's reputation such that the investment should be addressed by exclusion from its portfolio.

[18] In reply, Guardians says that it has lawfully established, in its expert judgement pursuant to Parliament's express delegation, the relevant parts of the SIPSP to consciously respond to ss 58(2)(c) and 61(d). The SIPSP was first issued on 20 June 2019 and incorporates a number of other documents, including the RIF, as well as Investment Risk Allocation, External Managed Investments and Direct Invest policies.

[19] Anne-Maree O'Connor, who is employed by Guardians as Head of Responsible Investment, says in her affidavit sworn 3 September 2020 that the SIPSP and RIF are reviewed each year by the appropriate leaders within the business, the legal team, Ms O'Connor herself, the CIO, CEO and Board, in accordance with s 60(2) of the Act. She says further that while the SIPSP and RIF have evolved over time to reflect changes in best practice, a responsible investment approach has always been at the core of Guardians' response to its statutory investment obligations. As she states:

> 5.17 … Consistent with international practice, our responsible investment approach involves considering and giving effect to ESG [environmental, social and governance] factors, which in turn assists in managing reputational risk and is in line with best practice portfolio management.

Ms O'Connor's affidavit goes on to explain that while the Act does not refer explicitly to "responsible investment" there is considerable overlap between concepts of ethical and responsible investment in industry practice. She notes that these concepts are "not static" but are evolving alongside other current frameworks such as "socially responsible" investment and "sustainable finance". Terminology aside, all these concepts encourage recognition and consideration of ESG factors in investment decision-making. Ms O'Conner says that Guardians' SIPSP outlines a responsible

investment philosophy which includes ethical investment and attains the standard of an ethical policy. She says that Guardians "treat ESG as covering the full range of potential concerns about investee companies' activities" and use this framework as a "useful way of thinking about the potential harmful impact of business conduct".

> 5.21 Ethical investment generally includes exclusion as a tool which is why our SIPSP including the RIF permits exclusions, primarily focused on certain products, such as tobacco, through excluding the companies that produce them. In certain circumstances, exclusions can be made under the policy in response to the way a company may behave — that is, its corporate practices. Criteria for exclusion usually depend on investor context or mandate and ours are adapted for the New Zealand context and our statutory mandate. Responsible investment can also include a desire by investors to invest in companies that through their products or practices have a social or environmental benefit, for example, healthcare or renewable energy.

[20] Although evolving as both a concept and practice, responsible investment is well established and "well understood" within the global investment sector. However, Ms O'Connor notes that:

> 5.24 In contrast with Responsible Investment, there are no global standards specifically addressing what it means to manage and administer a sovereign wealth fund in a manner consistent with avoiding prejudice to a relevant country's reputation in the world community. That standard is, as far as I am aware, unique to New Zealand.

[21] Consequently, Guardians has set out responsible investment policies in the SIPSP (at paragraph 5.1) and established policies which seek to "integrate consideration of responsible investment issues" into the decision-making process. The SIPSP refers to and relies upon two international benchmark standards: the UN Principles for Responsible Investment (UNPRI) and the UN Global Compact (the Compact). The UNPRI benchmarks Guardians' own performance as a responsible investor; the Compact provides a set of standards by which Guardians can assess the ESG performance of the companies they invest in. Ms O'Connor's affidavit states:

> 5.28 … These standards are specifically intended to meet the requirements of our Act to adopt standards and to manage risk to the Fund's reputation and New Zealand's reputation from our activities.

UNPRI has over 3,000 signatories, including many other sovereign wealth funds. Guardians is one of UNPRI's founding members. According to Ms O'Connor, the "primary reason" for Guardians' membership of UNPRI is to fulfil their statutory duty

to invest ethically and responsibly under the Act.

[22] Ms O'Connor discusses investee "exclusion" as a practice or "tool" for responsible investment management. Guardians' SIPSP and RIF permit exclusions for ESG reasons, such as harmful products or unethical corporate practices. However:

> 5.69 It is, as a matter of fact, rare for us to exclude an investee company from the Fund due to its practises — (we have many companies excluded based on their products, eg tobacco) — because practices can improve. It is not often we actively consider this type of exclusion.
>
> 5.70 Our experience has been that engagement is effective and generally companies improve their ESG practices with engagement and in response to both shareholders and other stakeholders raising concerns. This may initially be to manage reputation risks but generally evolves into more fundamental improvements.

Ms O'Connor goes on to explain why divestment on ESG grounds is problematic. Firstly, divestment eliminates the possibility of promoting positive change through active engagement with the investee company. Shareholders are in a powerful position to identify problems, voice concerns and drive change. Shareholders can do this not only to protect their own reputational interests as investors, but on behalf of all external stakeholders.

[23] Secondly, the interconnection of global markets means that "very few businesses … cannot be linked in some way to undesirable ESG practice or impacts, often through supply or customer chains". In other words, if exclusion for corporate practice issues is exercised "too liberally" there will be nothing left to invest in. As Ms O'Connor notes, "a wide-reaching approach to exclusion can also unreasonably limit the diversity and number of stocks available, introduce volatility and effectively concentrate risk for investors" in ways which conflict with Guardians' duty to avoid risk and secure returns on a balanced investment portfolio. Finally, Ms O'Connor observes that excluding an investee on grounds of ESG breaches would depend upon the "severity of the breach" and the "closeness of the link" between investment and breach. In this context, she concludes as follows:

> 5.73 While we have used words like "severe" and "rare" to describe when exclusion is appropriate, we do so to emphasise that exclusion is not common among institutional investors and is generally not appropriate for less serious

> ESG issues. We do not apply them as fixed rules. As our RIF sets out, we exercise our judgement in making these decisions.

[24] In response, the applicants say that it is apparent from Ms O'Connor's evidence that Guardians has misunderstood its statutory duty. They say that asking whether investments meet ESG considerations is not sufficient. Guardians must go one step further and ask whether there is nevertheless a risk of prejudice to New Zealand's reputation. While ethical investment is plainly an essential element of that enquiry, merely considering the requirements of ethical investment or establishing a process consistent with international responsible investment practice is insufficient to achieve Parliament's objective of protecting New Zealand's reputation. It is not open to Guardians simply to assert that "ethical investment" and responsible investment are synonymous such that consideration of ESG factors automatically satisfies ss 58(2)(c) and 61(d). Similarly, Ms O'Connor's evidence that Guardians' consideration of whether to engage with or exclude investee companies depends on whether those companies have materially breached corporate standards misstates the Guardians' statutory duty. In this context, "corporate standards" appears to be a reference to the UN Global Compact, which Guardians cites in their SIPSP/RIF. Guardians relies upon the Compact to trigger its consideration of engagement and monitoring. However, the applicants say, investee companies that comply with the UN Global Compact principles might nevertheless engage in activities that make investing in them prejudicial to New Zealand's reputation. These shortcomings are exacerbated, the applicants allege, by Guardians fettering its own discretion by suggesting that exclusion will only be "rare".

Conclusion

[25] After due consideration, I am of the view that, in setting and applying its policies, standards and procedures under ss 60 and 61, Guardians has not misapplied the law or acted in a manner which cannot rationally be viewed as fitting within the statutory purpose.

[26] Guardians is an independent expert entity set up to manage and administer the Fund. Board members are required to have substantial experience, training, and

expertise in the management of financial investments. The Courts have consistently respected Parliament's choice in reposing decision-making power in an expert.[4]

[27] Guardians has a broad discretion to determine how to give effect to the requirement to administer the Fund in a manner consistent with avoiding prejudice to New Zealand's reputation as a responsible member of the world community in terms of s 58(2)(c). As the Act does not prescribe how Guardians should give effect to s 58(2)(c), the Courts are not well placed to assess its exercise of judgment in giving effect to the statutory mandate through its published policies, standards and procedures.

[28] In my view, Guardians cannot be criticised for adopting widely accepted international standards in formulating its own policies, standards and procedures. Guardians use the SIPSP and RIF to manage and administer the Fund in a manner consistent with avoiding prejudice to New Zealand's reputation as a responsible member of the world community. Further, Guardians is accountable through a statutory accountability and review regime in s 71, which includes consideration of its compliance with s 58.

[29] I do not consider that Guardians has fettered its judgment when it states that exclusion of investments will only be "rare" and for "severe breaches". The setting of a high threshold is not a fetter. Engagement with a company with ESG issues may be more effective in changing a company's practices for the better than withdrawal of investment in the company altogether (exclusion).

Second and third grounds of review: Has Guardians complied with s 58(2)(c), or the SIPSP and RIF, in relation to the Western Saharan investments?

[30] The applicants, in relation to their second and third grounds of review, say that Guardians has not given proper consideration to whether it is necessary to exclude the Western Sahara-related investments specifically. The second and third grounds of review are related, and concern compliance with s 58(2)(c) and the SIPSP and RIF

---

4 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55].

respectively. The SIPSP and RIF are established under s 60 of the Act and represent Guardians' own interpretation of its statutory obligations under ss 58 and 61.

[31] The applicants say the Fund has been exposed to Western Sahara in three ways: first, the Fund has at various times held bonds in OCP, the Moroccan state-owned corporation which extracts phosphate from Western Sahara; second, the Fund includes equity investments in a number of listed companies that operate in Western Sahara and support OCP's mining operations; and third, the Fund uses phosphate extracted from Western Sahara, and imported by Ballance and Ravensdown, on predominantly dairy farms that make up part of its agricultural investment portfolio. The applicants say Guardians has not given proper consideration to whether each, or any, of those investments should be excluded.

[32] In reply, Ms O'Connor, for Guardians, states as follows:

> 6.11 It is not the case that we have refused to consider exclusion. We did, in fact, specifically consider excluding companies involved in extraction. We remain open-minded to considering that exclusion of investments with material breaches of corporate standards relating to Western Sahara may in future be appropriate.

However, Ms O'Connor contends that it is inappropriate and "impractical" to suggest that the three types of investment exposure alleged by the applicants should be treated the same way. In particular, Guardians' connection with Western Saharan phosphate via the Fund farms is not an investment at all. The farms are managed by FarmRight, which purchases phosphate-based fertiliser from Ballance. Only members (that is, shareholders) in the Ballance co-operative can purchase this fertiliser. Thus, the Fund farms own shares in Ballance. The Ministry of Foreign Affairs and Trade (MFAT) are working with New Zealand's fertiliser co-operatives to seek alternative phosphate sources for the entire primary sector. As noted, the source of phosphate used in New Zealand's fertiliser industry "is not an engagement or exclusion issue for [Guardians'] portfolio" but a matter or industry practice to be managed by FarmRight.

[33] In response, the applicants say that despite being aware of ethical concerns with Western Saharan phosphate for "nearly nine years", Guardians have "allowed the OCP bonds to drift in an out of the portfolio" as well as investing in a number of other

companies which either purchase phosphate or support phosphate extraction. The applicants argue that there is no evidence – such as a formal record – that Guardians considered exclusion of OCP or any other company connected with it, during this period.

[34] While the applicants acknowledge that "Guardians' exposure to OCP has been relatively modest" they argue that any "material investment" in OCP is sufficient to "give rise to reputational implications". For this reason, they contend that Guardians "must consider actively excluding" OCP from their portfolio. In summary, they state:

> 94. The applicants' point in relation to OCP is simple: on the Guardians' own analysis and applying its own Framework, it is required to consider whether exclusion of OCP holdings from its portfolio is necessary in order to satisfy its statutory responsibilities. By its own admission, it has not done so.

[35] The applicants emphasise that the focus of their grounds of review is evidence of active consideration, rather than actual exclusion:

> 110. The applicants do not suggest that the Guardians must inevitably conclude that these investments should be excluded, or even that formal engagement is necessary. But the Court is entitled to have the Guardians properly consider the issue.

Discussion

[36] One of the difficulties for the applicants is that there is no single research paper, briefing paper, report, e-mail, file note, memorandum, letter or other document which contains a specific decision which may be amenable to judicial review. The amended statement of claim refers to "any, or any proper consideration". Guardians have undoubtedly given consideration to the question at issue. The assessment therefore concerns the standard imposed by "proper". Guardians have a continuous statutory function "to manage and administer the Fund in a manner consistent with avoiding prejudice to New Zealand's reputation as a responsible member of the world community" and there is no one particular decision under review. The inquiry, therefore, has the character of a merits assessment for which judicial review is not suited or appropriate.

[37] Ms O'Connor attaches a chronology of events and documents as Schedule 1 to her affidavit. Guardians' formal statement of position is contained in a briefing paper dated August 2018 and prepared for Crown Financial Institutions (CFI). This document sets out the background, outlines previous global and local engagement and recommends next steps, as follows:

> 1. Continuing to monitor the position of the New Zealand Government and the UN. Currently, New Zealand offers full support to the United Nations Mission for the Referendum in Western Sahara (MINURSO mission) to allow the people of Western Sahara to determine their future through a referendum.
>
> 2. Maintaining a watching brief of the situation in Western Sahara. This includes:
>
> a. Monitoring press on the situation;
>
> b. Continuing conversations with MFAT to keep abreast of the views of MPI, the Prime Minister and other Ministers on the issue;
>
> c. Monitoring any new commitments by companies to stop sourcing phosphate or other resources from the Western Sahara.
>
> 3. Continued engagement with listed companies that are held by the CFIs and that:
>
> a. Have resource extraction operations in the Western Sahara to ensure they are managing human rights risk, and;
>
> b. Source phosphates from Western Sahara to identify whether they are looking into commercially realistic alternatives available, in order to manage reputational risk.

OCP Bond

[38] In June 2016, Morgan Stanley Capital International (MSCI) alerted investors to the risk of reputational damage generated by severe controversy surrounding OCP's continued extraction of phosphate from Western Sahara. MSCI provides assessments of ESG controversies involving publicly traded companies and fixed income issuers. It assigned OCP a "red flag" to indicate the existence of at least one serious ESG controversy. MSCI noted that critics of Morocco's control over the territory claimed that extraction of phosphate from the region could be a violation of international laws.

[39] Guardians confirms that, as manager and administer of the Fund, it only held an OCP bond once, between 31 January 2020 and 31 May 2020. Guardians' holding of OCP was and is determined by its inclusion in a passive index and in accordance with Guardians' policies. The bond was removed from the Fund because its credit rating was downgraded. As a result, the bond was removed from the index Guardians used to gain exposure to fixed income investments. The OCP bond was consequently sold by the relevant investment manager, BlackRock.

[40] The applicants say that Guardians knew of OCP's "red flag" in 2016 and that the Fund was exposed to the OCP bond via a passive index. Once that exposure materialised in January 2020, the bond could re-enter the portfolio at any time. The applicants say Guardians have failed to properly consider whether they ought to direct the passive index manager to exclude the OCP bond, even though it is not currently held.

[41] It is not for this Court to determine whether or not OCP complies with the Hans Corell opinion as to the legality of phosphate extraction from Western Sahara. Guardians, likewise, cannot be expected to resolve such a difficult factual and legal question. Guardians has, however, consulted with MFAT on this matter. MFAT has provided informal advice that to its knowledge OCP's operations in Western Sahara comply with the wishes of the community and do benefit the community, as required by UN Charter obligations. Guardians has, nonetheless, added OCP to its CFI watchlist, sought further information and researched the issues more generally. Guardians says it has not specifically engaged with OCP because it only held an OCP bond for four months last year. Moreover, the bond was a debt holding, not an equity holding, which diminishes the influence an investor can exercise.

[42] The Fertiliser Association has, however, engaged with OCP for many years. Veronica Power, the Chief Executive of the Fertiliser Association, contends that this engagement has had a real impact on OCP's focus on responsible business itself. She cites many examples of visits, meetings and changes made.

[43] The MSCI red flag does not necessarily warrant exclusion of OCP from the Guardians' portfolio. A red flag draws concerns about a company's practices to

investors' attention. Since it was red flagged, OCP has only been excluded by a relatively small number of investment funds. Guardians continue to monitor the position. If the New Zealand government's position changes, then Guardians will undoubtedly take its revised position into account.

Investee Companies' Shareholdings

[44] The applicants say the Fund has invested in the following companies operating in Western Sahara:

(a) Nutrien Limited, which owns 22 per cent of Sinofert Holdings Ltd, which imports Western Sahara phosphate into China.

(b) Siemens AG, which constructed and maintains the wind farm supplying 95 per cent of OCP's energy needs for its mining operations in Western Sahara.

(c) Siemens Gamesa Renewable Energy SA, which maintains the wind farm with Siemens AG.

(d) Atlas Copco AB, which sold, and carries out maintenance of, drill rigs to OCP for use in OCP's mining operations in Western Sahara.

(e) Continental AG, a subsidiary of which maintains OCP's conveyor belt carrying phosphate from the mine to the port.

(f) Enel SpA, whose subsidiary Enel Green Power SpA, constructs wind parks in Western Sahara.

(g) ABB Ltd, who built a hybrid substation for a wind farm in Western Sahara.

(h) Wartsila OYJ ABP, which has produced diesel-generated power plants in Western Sahara pursuant to agreements with Morocco.

(i) ThyssenKrupp AG, which was awarded a contract for construction of a cement factory in Western Sahara.

(j) BNP Paribas SA, Société Générale SA and Crédit Agricole SA, French banks with offices in Western Sahara.

(k) Orange SA, whose subsidiary Orange Maroc has 10 offices in Western Sahara where it provides telecommunications services.

(l) AXA SA, whose subsidiary AXA Maroc operates in Western Sahara.

[45] None of these companies extract phosphate from Western Sahara. Some are direct suppliers of goods or services to OCP, but others, such as the French banks, simply operate throughout Western Sahara. None of the companies have been red flagged by MSCI.

[46] The applicants, in effect, submit that Guardians must consider excluding any company with a presence in Western Sahara. In my view, this demonstrates the unworkability of the applicants' statutory interpretation and approach to the SIPSP and RIF. The applicants draw no distinction between companies directly involved in phosphate extraction and those simply operating in Western Sahara.

[47] The applicants have not proven that exclusion would be inevitable or necessarily appropriate under the RIF. As far as Guardians is aware, there are no material ESG issues relevant to these companies. I agree that it is not necessary to include companies which have not materially breached corporate standards on an engagement focus list.

Fund Farms

[48] NZSF Rural Holdings Limited is a fund investment vehicle (FIV) formed by Guardians for the purpose of holding, facilitating or managing Fund investments. It is the holding company for four other FIVs which own the Fund's rural properties in New Zealand: NZSF Southland Farms Ltd, NZSF Canterbury Farms Ltd, NZSF Waikato Farms Ltd and NZSF Rural Land Ltd (collectively Fund farms). As at

28 February 2020, the Fund's shareholding in NZSF Rural Holdings Ltd comprised 0.96 per cent of the value of the Fund.

[49] FarmRight Ltd (FarmRight) is an independently owned entity appointed to provide farm management, property and asset management services to the Fund farms. FarmRight arranges for the purchase of fertiliser from Ballance for application on the Fund farms.

[50] The applicants say that continued investment in Fund farms that apply fertiliser derived from phosphate extracted from Western Sahara is in breach of Guardians' statutory obligation to manage and administer the fund in a manner consistent with avoiding prejudice to New Zealand's reputation as a responsible member of the world community. They also say that Guardians has refused to consider ceasing to purchase (through FarmRight) phosphate extracted from Western Sahara, or the costs of doing so. They therefore seek an order that Guardians cease purchasing phosphate extracted from Western Sahara.

[51] The purchase of fertiliser by FarmRight is not, strictly speaking, an investment by Guardians. The Fund has a rural investment portfolio valued at $418 million. FarmRight spends $1.6 million per year (0.38 per cent of the value of the Fund's rural investments) on fertiliser and lime. That fertiliser includes superphosphate, which is largely derived from Western Sahara phosphate. Fertiliser is an operational cost managed by an independently owned entity, FarmRight, rather than Guardians.

[52] Nonetheless, Guardians recognises that, as a responsible investor, it can direct FarmRight to use or not use certain products. For instance, it has committed to stop the use of palm kernel extract on Fund farms. In the case of Western Sahara phosphate, it has recognised the reputational risks involved. The chronology attached to Ms O'Connor's affidavit shows that Guardians has not only engaged with MFAT, but also the fertiliser companies, and specific primary sector entities such as Fonterra.

[53] MFAT describes the question of alternatives to Western Sahara phosphate "as a matter of policy". Its advice to the fertiliser companies is that they must comply with international law and should take independent legal advice on the matter. MFAT

warns that New Zealand companies import phosphate from Western Sahara at their own risk.

Conclusion

[54] After due consideration, I am of the view that the applicants have not proven their claims under the second and third causes of action. Guardians has given proper consideration to whether maintaining the Western Sahara investments is consistent with its obligation under s 58(2)(c). Guardians has also adhered to the SIPSP and RIF as required by s 60.

[55] There is ample evidence that both the manufacturers and major users of superphosphate, which is derived from Western Sahara phosphate, have considered and are considering alternatives. However, I accept there is no cogent evidence of an immediately available alternative.

[56] Ultimately, a reputational risk to wider New Zealand interests remains. There is, however, no suggestion that the risk is due to management and administration of the Fund. Therefore, Guardians has not failed to comply with its statutory obligations in the use of superphosphate on Fund farms.

Fourth ground of review: Has Guardians effectively abdicated its responsibilities under s 58 of the Act to Ballance and/or Ravensdown?

[57] The applicants, in relation to their fourth ground of review, say that Guardians has effectively and unlawfully abdicated its statutory responsibilities under the Act to Ballance and/or Ravensdown. The Amended Statement of Claim alleges:

> 77. In the circumstances where continued importation of Western Saharan phosphate sustains Morocco's illegal occupation of Western Sahara, and the Guardians has recognised that engagement will not address the issue of ownership, the Guardians' decision to engage with investee companies, instead of excluding the Fund's Western Saharan Investments [which the applicants define to include the Guardians' holdings in the Fund Farms], in order to encourage those companies to:
>
> (a) identify and manage the risks associated with the importation of Western Saharan phosphate; and
>
> (b) explore and consider alternative sources of phosphate;

> amounts to an unlawful delegation to those companies of the Guardians' obligation to avoid prejudice to New Zealand's reputation as a responsible member of the world community.

In reply, Guardians says it has genuinely engaged with the issue and has not simply waited for Ballance and/or Ravensdown to present a solution. It says that seeking information from third parties does not equate to abdication, or delegation, of statutory obligations, as the applicants allege. Rather, as Ms O'Conner notes, "seeking as much information as feasible is an important part of good RI practice". Further, the respondents submit that "It has been consistently recognised by the courts that seeking information to assist in decision-making is proper."[5] Guardians repute the applicants' fourth allegation as follows:

> 8.8 The fourth ground of review amounts to a submission that Ballance and Ravensdown invest, manage and administer the Fund. There is no such basis for that assertion. Neither entity can or could direct the investment, management or administration of the Fund.
>
> 8.9 Ballance supplies the Fund Farms with phosphate based fertiliser. It does so because Guardians' manager has determined that the Fund Farms need fertiliser and that specific type is the best available, taking into account a number of factors. Ballance is a number of steps removed from Guardians' investment, management and administration of the Fund. Ballance is merely a supplier of an input into a Fund investment's business.
>
> 8.10 Ravensdown has no contractual or other connection to the Fund. [D]ocuments [submitted by Guardians] clearly show Ravensdown was not investing, managing or administering the Fund.

Conclusion

[58] There is no substance in this ground of review. Guardians' actions do not amount to abdication of its statutory obligations under s 58 to Ballance and Ravensdown. Guardians has genuinely engaged with the issue and has not simply waited for Ballance and Ravensdown to present a solution. Ms O'Connor attaches a chronology to her affidavit, dated 3 September 2020, which lists the various actions taken by Guardians.

[59] It has carried out research into the Western Sahara issue, sought advice from MFAT on the Government's position, engaged with the New Zealand primary sector,

---

5 *Wellington International Airport Ltd v Commerce Commission* (2002) 10 TCLR 460 (HC) at [46]; and *Walsh Pharmaceutical Management Agency* [2010] NZAR 101 (HC) at [161].

including Ballance, and raised the issue with FarmRight Ltd, the manager of the Fund farms. FarmRight is consequently considering whether the source of phosphate for fertiliser purchased for the Fund farms can be managed. Engagement with the primary sector has focused on the consideration of viable alternatives to phosphate sourced from Western Sahara.

Fifth issue: Do the applicants have standing?

[60] Next, I turn to the issue of standing: Guardians say the applicants have no standing. The principles on standing are settled in New Zealand. There are broadly two types of standing: personal and public interest. Personal standing is concerned with whether an applicant's personal rights and interests are affected by the decision under challenge. Public interest standing, on the other hand, is more concerned with whether the decision under challenge is, or may be, unlawful.

[61] While the requirements of standing in judicial review proceedings have been significantly relaxed in New Zealand, it is not so relaxed that it is horizontal.[6]

[62] The House of Lords considered the issue of standing in judicial review cases in depth in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*.[7] There, Lord Wilberforce, in his speech reflecting the views of the majority of the House, summarised the standing requirements as follows:[8]

> There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule [of court] requires sufficient interest *in the matter to which the application relates*.

---

6 *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094 at [2] and [18].

7 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

8 At 630 (emphasis in original).

[63] His Lordship's speech was soon adopted by the New Zealand Court of Appeal.[9] Accordingly, Somers J summarised the position in New Zealand as follows:[10]

> It may now be said that until the nature and scope of the statutory duty in issue has been ascertained and the nature and quality of its breach (if any) found it will not ordinarily be practicable or right to determine whether there is standing to maintain an action.

[64] Therefore, the context and substantive law are relevant to standing. And, except in relation to clearly untenable claims to standing, challenges to standing are determined as part of the substantive hearing of the case. Indeed, as Palmer J recently observed, "it is difficult to divorce questions of standing from the merits of the application of the law of judicial review to a particular factual context".[11]

[65] Presently, Guardians disputes the applicants' standing on both personal and public interest grounds. If applicants with no direct interest can challenge investment decisions by way of judicial review, Guardians is concerned that this will negatively affect its management and administration of the Fund. Unusually, this proceeding was commenced by an applicant who is neither a New Zealand citizen or permanent resident nor currently resident in New Zealand. Mr Kamel Mohamed initially brought the proceeding on his own behalf; the second applicant, a New Zealander, was joined to the proceeding in response to the raising of the standing defence.

[66] First, the applicants' claim appears to rest on two propositions relating to rights of self-determination:

(a) The first proposition is that to invest in companies participating in the extraction of phosphate contributes to the removal of phosphate from the "patrimony of the Saharawi people". This, the Guardians says, appears to be a reference to the Hans Correll opinion that extraction of resources from non-self-governing territories must be for the benefit of and consistent with the interests and wishes of the Saharawi people.

---

9 *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); and *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1 (CA).

10 *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1 (CA) at 6.

11 *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094 at [26].

(b) The second proposition is that the challenged investments effectively sustain Morocco's "occupation" of Western Sahara.

[67] In reply, Guardians says that, as a starting point, these propositions need to be understood in the context of the duty which Guardians is said to have breached. The duty, according to Guardians, concerns the *way* in which Guardians performs its mandate (that is, the establishment of, adherence to and review of the investment framework), not its particular investment decisions.

[68] Secondly, as to Mr Barton's personal standing, Guardians says that his concerns are indistinguishable from the concerns any other New Zealand citizen might have about the management of the Fund. He has no greater interest in the management of the Fund than any other citizen. This level of interest is insufficient for personal standing.

[69] In response, the applicants say that the Court has long taken a liberal approach to standing in judicial review. Provided that the claim is brought bona fide and involves a matter of public interest, the Court will consider the application on its merits. If a ground of review is made out, it will not deny relief on standing grounds.

[70] Thirdly, as to public interest standing, Guardians do not deny the applicants' genuine interest, and acknowledge authority to the effect that genuine interest may be enough to justify public interest standing.[12] However, Guardians argue that genuine interest is insufficient in this case because the application has been brought for collateral purposes, namely to promote Saharawi rights and independence. The use of judicial review proceedings for collateral purposes has been recently characterised as "lawfare".

[71] How Crown funds are deployed is ultimately a matter for Parliament. The structure of the Act, and the extent to which Parliament endorses Guardians' investment, management and administration powers, seeks a balance between ethical constraints and commercial independence and freedom. As noted in parliamentary debates surrounding the introduction of the Bill, the select committee did not intend

---

12 *O'Neill v Otago Area Health Board* HC Dunedin CP50/91, 10 April 1992.

to "pin the fund down with so many conditions and criteria that it is unable to generate the level of returns it need to perform its primary function".[13] Further, Parliament has prescribed specific accountability mechanisms making Guardians accountable to Parliament through the independent review process in the Act. However, as Lord Diplock once noted:[14]

> It is not … a sufficient answer to say that judicial review of the actions of [Crown entities] is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the judge.

[72] Ultimately, however, in this case, the question of standing is "academic" as, for the reasons discussed above, the applicants have failed on the substantive issues.[15]

Sixth issue: Is Morocco indirectly impleaded in this proceeding such that the doctrine of state immunity applies?

[73] New Zealand recognises the doctrine of state immunity through the incorporation of relevant principles of customary international law into New Zealand common law.[16] In essence, a sovereign state "will not be impleaded in the courts of another country (in this instance New Zealand) against its will and without its consent; the exercise of jurisdiction is seen as incompatible with the dignity and independence of the foreign state".[17] State immunity is a personal immunity possessed by a state in respect of its sovereign activities. Therefore, a valid claim to state immunity deprives the Court of jurisdiction over the proceeding.[18]

[74] The intervener submits that the pleaded matters engage the doctrine of state immunity; Guardians adopts the intervener's submission. They say that the applicants' pleadings invite the Court to make determinations regarding the territorial status of

---

13 (13 December 2000) 589 NZPD 7422.

14 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 644.

15 See *O'Neill v Otago Area Health Board* HC Dunedin CP50/91, 10 April 1992 at 4.

16 See Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) at 616, n 96; and *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [27].

17 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 428.

18 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [24].

Western Sahara. Moreover, by pleading that "the exploitation of phosphate is not done for the benefit of and consistent with the wishes of the Saharawi people", the applicants appear to put in issue Morocco's compliance or otherwise with the conditions set out in the Hans Corell opinion, which concerns the obligations of administering Powers of Non-Self-Governing territories under international law. The intervener and Guardians say these questions pertain to the legal rights (or interests) of Morocco and are therefore subject to the protection of state immunity.

[75] In reply, the applicants submit that the doctrine of state immunity is irrelevant to this proceeding. The doctrine prevents a foreign state being "impleaded" because the exercise of jurisdiction over a foreign state by a domestic court is seen as inappropriate. The applicants add that the doctrine generally only applies where the foreign state is named as a defendant, which is not the case here. To the extent a state can be "indirectly impleaded", the applicants say that there has been no such New Zealand case, and the English courts have only applied that doctrine where the proceedings involved *in rem* claims against state-owned property within the jurisdiction of the domestic court purporting to exercise jurisdiction.

[76] In response, the intervener notes that the concept of indirect impleading was codified in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Properties (which has yet to come into force).[19] Article 6(2)(b) provides:

> A proceeding before a court of a state shall be considered to have been instituted against another state if that other state … is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other state.

[77] Despite counsel for the intervener's comprehensive and cogent submissions on the doctrine of state immunity, I consider that the doctrine does not apply in this case. Whether or not the doctrine may apply where a state is indirectly impleaded in matters other than *in rem* claims against state-owned property, is academic. In the end, as the applicants clarified in their written and oral submissions, the Court is not required to

---

[19] The Convention is not yet in force. To date, 22 of the required 30 ratifications have been deposited; New Zealand has not ratified the Convention. Notwithstanding "its embryonic status", the House of Lords described the Convention as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases": see *Jones v Saudi Arabia* [2006] UKHL 26 at [26].

determine, for the purposes of this judicial review application, the status of Western Sahara. In my view, the real issues are much narrower than the intervener and Guardians contend. There may well be legitimate reason for this confusion given some of the wording in the applicants' pleading. At their core, the applicants' grounds of review ask whether Guardians has established, and adhered to, an investment framework consistent with its obligations under s 58(2)(c) of the Act to avoid prejudice to New Zealand's reputation as a responsible member of the world community. The preceding discussion shows that the state of Morocco is not impleaded, whether directly or indirectly, in those grounds of review.

Seventh issue: Are the matters pleaded in this proceeding non-justiciable on the basis of the act of state doctrine?

[78] The act of state doctrine is premised on the principle that every sovereign state is bound to respect the independence of every other sovereign state. The doctrine precludes the Court from investigating the propriety of any legislative or other act of a foreign government within that government's territorial limits.[20] It is primarily applied as a principle of non-justiciability.[21] In *Air New Zealand v Director of Civil Aviation*, Baragwanath J summarised the doctrine as follows: "if the conduct sought to be challenged is properly characterised as a public law function of one state, the act of state doctrine will prevent the Courts of another state from adjudicating as to its validity".[22]

[79] This issue can be dealt with briefly. As I have said in relation to the doctrine of state immunity, the crux of the grounds of review is whether Guardians has established, and adhered to, an investment framework consistent with its obligations under s 58(2)(c). The matter is not so much concerned with the acts of the state of Morocco as it is with the acts of Guardians, the latter of which is justiciable.

---

20 Hazel Fox and Philippa Webb *The Law of State Immunity* (3rd ed, Oxford University Press, Oxford, 2015) at 50–74; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at 146–148; and Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at 261.

21 Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at 523–524 and 539–541.

22 *Air New Zealand v Director of Civil Aviation* [2002] 3 NZLR 796 at [56].

Result

[80] The application for judicial review is dismissed. Costs are to follow the event.

_____

Woolford J

Solicitors: Te Aro Law (R N Zwaan), Wellington

Counsel: J L W Wass and M C McCarthy, Stout Street Chambers, Wellington