



To: Michael Appleyard, Manager Applications, Overseas Investment Office

From: Daniel Mumford, Senior Solicitor

ASSESSMENT REPORT: Creswell NZ Limited

Date	9 December 2021	Classification	IN CONFIDENCE: Commercially sensitive
OIO reference	201620096	Deadline	15 December 2021

A. Proposal to vary consent conditions

Consent

1. Creswell NZ Limited ("**Applicant**") was granted consent on 30 May 2018 ("**OIO Consent**") to acquire a freehold and leasehold interest in approximately 6.2719 hectares of sensitive land located at 57 Johnson Road, Otakiri, Bay of Plenty ("**Land**").
2. The Applicant is wholly-owned by Nongfu Spring Co., Limited ("**Nongfu**"), a Chinese company that produces and markets bottled natural water and other beverages in China. Nongfu is one of China's leading bottled water manufacturers and one of the best known domestic brands in consumer goods industry in China.
3. The Applicant's investment involves the acquisition of the Land and the water bottling business operated by Otakiri Springs Limited ("**Otakiri**"). The Applicant intends to leverage Otakiri's existing brand and access to high quality water, and combine this with Nongfu's large scale manufacturing and distribution capacity.

Variation Application

4. Consent conditions require the Applicant to acquire the Land within six months of the date that the last required resource consent commences or February 2022 (if earlier).
5. The Applicant has acquired most of the resource consents needed (there is a hazardous substances consent the Applicant expects to obtain by the end of 2021), but there have been a number of legal challenges to the granting of the resource consents. These challenges have delayed the Applicant's intended acquisition of the Land.
6. Following the initial litigation, the Environment Court issued an interim decision in the Applicant's favour on 10 December 2019, subject to consent conditions being finalised. Those conditions were finalised in an Environmental Court decision on 26 June 2020.
7. The Applicant submits that the resource consents that have been appealed ("**Appealed Resource Consents**") technically commenced on 26 June 2020 when the Environmental Court issued its final decision. As the Applicant expects to also have the hazardous substances consent by the end of 2021, it submits that technically it could acquire the Land before February 2022 in order to meet the timeframe of the OIO Consent.

8. However, the Appealed Resource Consents are currently subject to a further appeal to the Court of Appeal (that has yet to be determined). Due to the uncertainty around the outcome and duration of the litigation process, the Applicant has requested a variation to Special Condition 2 to allow it to acquire the Land after the resource consents litigation has been resolved. The Applicant's preference is to allow the appeals to be completed before it acquires the Land.
9. The Applicant has also requested that the definition of 'Resource Consent Date' is changed to refer to the day after the date when all appeals relating to the resource consents have been determined and all avenues for further appeals have been exhausted.

B. How to approach the decision

10. Section 27 of the Overseas Investment Act 2005 provides that conditions of consent may be:
 - (a) varied with the agreement of the Consent Holder, or
 - (b) revoked.
11. Conditions which the Act required to be imposed (for example in relation to residential outcomes) may be varied but may not be revoked.
12. The Act does not spell out what the decision-maker must take into account in considering whether to vary a consent. Applying general principles of administrative law, the discretionary power should be exercised reasonably, and consistently with the purpose of the Act:

3 Purpose

- (1) The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—
 - (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
 - (b) imposing conditions on those overseas investments.
- (2) This Act also has the purpose of managing certain risks, such as national security and public order risks, associated with transactions by overseas persons.

C. Our assessment

13. We accept the Applicant's reasons for the need for a variation and consider the variation to be reasonable in the circumstances:
 - (a) The variation applied for appears reasonable and is consistent with the purpose of the Act.
 - (b) The variation request relates to delays in the resource consent process resulting from third party legal challenges.
 - (c) The Applicant has taken steps to expedite the outcomes of the legal challenges in order to resolve the matters as promptly as possible. The Applicant has also been successful at all stages (to date) of the legal proceedings.
 - (d) The variation would help resolve matters that are prerequisite to the Applicant commencing the investment, which is likely to result in the benefits stated in its investment plan.

- (e) The variation would not affect the criteria considered under the OIO Consent (it would only provide further time for the Applicant to start the investment).
14. We consider this variation would not impact the substantial and identifiable benefit threshold for the investment, as the same level of benefit is still expected (except that the time for completion has been delayed by the requirement for the Applicant to acquire the Land only after obtaining the necessary resource consents).
15. We have recommended that the annual reporting in Special Condition 7 is varied so that the final report is due on 31 July 2028 (instead on 31 July 2024). This will provide further time for the Applicant to update us on progress towards compliance with the special conditions of consent. The Applicant has agreed to this additional change.

D. Recommendation

16. We recommend that the conditions of consent be varied as set out in **Attachment 1**.

E. Decision

17. I agree to vary the conditions of the Consent as set out in **Attachment 1**.

Agree / Disagree

M Appleyard.

Michael Appleyard
Manager Applications
Date: 10/12/2021

Attachment 1 - Proposed Varied Notice of Decision

OVERSEAS INVESTMENT OFFICE



Toitū Te Whenua
Land Information
New Zealand

Notice of Decision

Case: 201620096

Decision Date

Original Decision: 30 May 2018

Varied: [TBC]

Decision

Consent is granted to Creswell NZ Limited to acquire a freehold and leasehold interest in approximately 6.2719 hectares of land at 57 Johnson Road, Otakiri, Bay of Plenty and comprising the following computer freehold register: SA25C/985 (South Auckland).

Only the named consent holder may give effect to the investment, not a subsidiary of the consent holder, a trust, or other entity.

Consent is granted subject to the following conditions:

Statutory Conditions of Consent

Section 28 of the Overseas Investment Act 2005 (**Act**) provides that it is a condition of every consent, whether or not it is stated in the consent, that:

- (a) the information provided by each applicant to the Overseas Investment Office or the relevant Ministers in connection with the application was correct at the time it was provided; and
- (b) each consent holder must comply with the representations and plans made or submitted in support of the application and notified by the Overseas Investment Office as having been taken into account when the consent was granted, unless compliance should reasonably be excused.

For the purposes of section 28(1)(b), the representations and plans made or submitted in support of the application and taken into account when consent was granted are those contained in the correspondence listed in the statutory declaration of Michael Hilkja Joachim Gleissner of 27 June 2017 and in all attachments annexed to that correspondence.

Special Conditions

Interpretation

Any term or expression that is defined in the Overseas Investment Act 2005 and used, but not defined, in this consent has the same meaning as in the Overseas Investment Act 2005.

Act means the Overseas Investment Act 2005.

Application Letter means the application letter dated 20 December 2016 and all subsequent correspondence relating to this application for consent, sent by, or on behalf of, the Consent Holder.

Business Plan means the business plan set out in Appendix 14 of the Application Letter.

Consent Holder means Creswell NZ Limited.

Individuals with Control means:

- (a) the individuals who have, directly or indirectly, a 25% or more ownership or control interest in the Consent Holder or a Parent of the Consent Holder;
- (b) the members of the governing body of the Consent Holder or a Parent of the Consent Holder; and
- (c) includes, for the avoidance of doubt, Shanshan Zhong and the members of the governing body of the Consent Holder and Nongfu Spring Co., Limited.

Inspector means a person appointed by the Regulator to undertake an Inspection on the Regulator's behalf.

Inspection means a visit to a property by an Inspector for the purpose of monitoring these conditions.

Investment means the Land.

Land means a freehold and leasehold interest in approximately 6.2719 hectares of land at 57 Johnson Road, Otakiri, Bay of Plenty and comprising the following computer freehold register: SA25C/985 (South Auckland).

OIO means the Overseas Investment Office.

Parent of Consent Holder means a person that has, directly or indirectly, a 25% or more ownership or control interest in the Consent Holder, and includes a person that has, directly or indirectly, a 25% or more ownership or control interest in any Parent of the Consent Holder.

Regulations means the Overseas Investment Regulations 2005.

Resource Consents means the resource consents from the Whakatane District Council and the Bay of Plenty Regional Council which the Consent Holder needs to implement the Business Plan.

Resource Consent Date means the date that is the day after all appeals on the Resource Consents have been determined and all avenues for further appeals have been exhausted.

Settlement Date means the date the acquisition of the Investment took place.

Special Conditions

When the transaction must be given effect to

- 1. The Consent Holder must not give effect to the transaction until all Resource Consents have been obtained.
- 2. The consent will lapse if the Investment has not been acquired by and transferred to the Consent Holder within 6 months after the Resource Consent Date.

Good character

- 3. The Individuals with Control must:
 - (a) continue to be of good character; and
 - (b) not become an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009.

Additional investment

- 4. The Consent Holder must introduce into New Zealand capital expenditure of at least:
 - (a) [s 9(2)(b)(ii)] and
 - (b) [s 9(2)(b)(ii)]

for the following developments:

- (c) bottling plant development and construction;
- (d) two new high speed bottling lines; and
- (e) a blow molding machine.

Job creation

5. The Consent Holder must ensure that the following full time equivalent (**FTE**) jobs are created or retained on the Land:

- (a) [s 9(2)(b)(ii)] and [s 9(2)(b)(ii)]
 - (b) [s 9(2)(b)(ii)]
- and which [s 9(2)(b)(ii)]

Reporting to the OIO

6. The Consent Holder must notify the OIO in writing as soon as practicable, and by no later than 6 months after the relevant lapse date specified in condition 2, whether settlement of the acquisition of the Investment took place. If settlement of the acquisition of the Investment did take place, the notice must include:

- (a) the Settlement Date;
- (b) final consideration paid (plus GST, if any);
- (c) the structure by which the acquisition was made, and who acquired the Investment;
- (d) where applicable, copies of transfer documents and settlement statements; and
- (e) any other information that would aid the OIO in its function to monitor conditions of consent, including (as relevant) the Resource Consent date.

Annual reporting

7. The Consent Holder must report in writing annually to the OIO detailing progress of its Business Plan (**Annual Report**), including:

- (a) the Consent Holder's compliance with condition 4;
- (b) the Consent Holder's compliance with condition 5, in particular, for each 12 month period the Settlement Date, provide to the OIO details of each new FTE job created, and each FTE job retained, on the Land, including a role title and description, weekly hours, and annual salary);
- (c) metrics which show the Consent Holder's progress (in relation to the business carried out on the Land) with respect to:
 - (i) improvements in productivity;
 - (ii) improvements in efficiency;
 - (iii) improvements in efficiency;
 - (iv) increased export receipts, as compared with the representations made by the Consent Holder in the Application Letter; and
 - (v) the amount of expenditure on plant construction and development spent with business carried on in whole or in part in New Zealand;
- (d) the following information relating to Otakiri Springs' products destined for the New Zealand market:

- (i) the total number of bottles produced by Otakiri Springs;
- (ii) the number of bottles produced by Otakiri Springs that are PET/plastic; and
- (iii) the number of bottles produced by Otakiri Springs that are glass.

The first Annual Report is due on 31 July 2019 and the final report is due on 31 July 2028 (or such other date as advised by the OIO in writing).

8. The Consent Holder must notify the OIO in writing within 20 working days if:
- (a) the Consent Holder, any Individual with Control, or any person in which the Consent Holder or any Individual with Control has, or had at the time of the offence or contravention, a 25% or more ownership or control interest, commits an offence or contravenes the law (whether convicted or not); or
 - (b) any Individual with Control:
 - (i) ceases to be of good character; or
 - (ii) commits an offence or contravenes the law (whether convicted or not); or
 - (iii) becomes aware of any other matter that reflects adversely on an Individual with Control's fitness to have the Investment; or
 - (iv) becomes an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009;
 - (c) the Consent Holder:
 - (i) ceases to be an overseas person; or
 - (ii) disposes of the Investment.
9. If requested in writing by the OIO, the Consent Holder must provide a written report within 20 working days (or such other timeframe as specified) on any matter relating to its compliance with:
- (a) the representations and plans made or submitted in support of the application and notified by the regulator as having been taken into account when the consent was granted; or
 - (b) the conditions of this consent.

Disposal Process

10. If in our opinion, condition 4 and/or 5 are not complied with (**Non-Compliance**), the Consent Holder must dispose of the Investment as follows:
- (a) The Consent Holder must, within six weeks of receiving notice from the OIO that in its opinion there has been Non-Compliance (the **Notice Date**):
 - (i) procure from an independent New Zealand registered valuer, and provide to the OIO, a written market valuation of the Investment; and
 - (ii) appoint licensed real estate agents to actively market and appropriately advertise the Investment for sale on the open market; and
 - (b) The Consent Holder must dispose of the Investment within eighteen months of the Notice Date to a third party who must not be an associate of the Consent Holder. If the Consent Holder has not disposed of the Investment at the expiry of the eighteen month period, the Consent Holder must offer the Investment for sale by auction or tender within a further three months (with no reserve price or minimum bid set for the auction or tender) and dispose of the Investment.

- (c) The Consent Holder must provide a written report to the OIO quarterly (by the last day of March, June, September and December) about the marketing activities undertaken and offers received for the Investment. The Consent Holder must also report at any other time if required by the OIO.
- (d) The Consent Holder must provide a written report to the OIO within two months of the Investment being disposed of, providing evidence that:
 - (i) the Consent Holder has disposed of the Investment (including copies of any sale and purchase agreements, settlement statements and titles showing the purchaser as registered proprietor); and
 - (ii) the purchaser is not an associate of the Consent Holder.

Inspection for the purposes of monitoring these conditions

- 11. The Consent Holder must allow an Inspector to conduct an Inspection, provided that the Consent Holder has been given at least two working days' notice of the Inspection.
- 12. For the purpose of conducting the Inspection, the Consent Holder must allow an Inspector to:
 - (a) gather information and provide that information to the OIO;
 - (b) enter any building on the Land other than a dwelling;
 - (c) remain for as long as is reasonably required to conduct the Inspection;
 - (d) conduct surveys, inquiries, tests, and measurements;
 - (e) take photographs and video recordings; and
 - (f) do all other things that are reasonably necessary to enable an Inspector to carry out an Inspection.
- 13. The Consent Holder must take all reasonable steps to facilitate an Inspection, including:
 - (a) directing its employees or agents to permit an Inspector to conduct an Inspection; and
 - (b) being available, or requiring its agents or employees to be available at all reasonable times during an Inspection to facilitate access by an Inspector onto and across the Land, including providing transport across the Land if reasonably required.
- 14. For the avoidance of doubt:
 - (a) an Inspector will not inspect, copy or take documents during an Inspection, unless the Consent Holder or an employee or agent of the Consent Holder agrees to the document being inspected, copied or taken;
 - (b) the Consent Holder, its employees, and agents are not required to answer an Inspector's questions, but may do so if they wish.