IN THE COURT OF APPEAL OF NEW ZEALAND

CA366/2013
CA717/2013
[2014] NZCA 266

BETWEEN	JOHN GILBERT STURGESS Appellant
AND	ROBERT MARK PATRICK DUNPHY First Respondent
	GREYMOUTH HOLDINGS LIMITED Second Respondent
	RICHARD SHANE DUNPHY AND WENDY DUNPHY Third Respondents
	JUGEN KADEL Fourth Respondent
	TOWER HILL INVESTORS LLP Fifth Respondent
	GERMANDA HOLDINGS LIMITED Sixth Respondent
	PETER HANBURY MASFEN AND JOANNA ALISON MASFEN Seventh Respondents
	GREYMOUTH PETROLEUM HOLDINGS LIMITED Eighth Respondent
	JET TRUSTEES LIMITED Ninth Respondent
	JOHN STURGESS AND ASSOCIATES LIMITED Tenth Respondent

CA367/2013

AND BETWEEN	JET TRUSTEES LIMITED Appellant
AND	JOHN STURGESS AND ASSOCIATES Second Appellant
	ROBERT MARK PATRICK DUNPHY First Respondent
	GREYMOUTH HOLDINGS LIMITED Second Respondent
	RICHARD SHANE DUNPHY AND WENDY DUNPHY Third Respondent
	JUGEN KADEL Fourth Respondent
	TOWER HILL INVESTORS LLP Fifth Respondent
	GERMANDA HOLDINGS LIMITED Sixth Respondent
	PETER HANBURY MASFEN AND JOANNA ALISON MASFEN Seventh Respondent
	GREYMOUTH PETROLEUM HOLDINGS LIMITED Eighth Respondent

Hearing:	24, 25, 26 and 27 March 2014
Court:	Randerson, White and Miller JJ
Counsel:	F E Geiringer for Appellant in CA366/2013 and CA717/2013 and Second Appellant in CA367/2013 P G Skelton QC and A Borchardt for First Appellant in CA367/2013 J A Farmer QC, M D O'Brien and S M Consedine for First, Second, Seventh and Eighth Respondents J F Anderson for Third, Fourth, Fifth and Sixth Respondents
Judgment:	24 June 2014 at 11.00 am

INTERIM JUDGMENT OF THE COURT

A **The form of relief in relation to orders 1 and 3 is reserved for further argument. A short timetable will be fixed by minute accompanying this judgment. Leave is reserved to apply. The appeals in CA366/2013, CA367/2013 and CA717/2013 are otherwise dismissed.**

B **The cross-appeals in CA366/2013, having been abandoned, are formally dismissed.**

C **Costs are reserved.**

REASONS OF THE COURT

(Given by Miller J)

TABLE OF CONTENTS

INTRODUCTION

[1] Mark Dunphy, Peter Masfen and John Sturgess founded Greymouth Petroleum Holdings Ltd (Greymouth) in 2002 as the vehicle for a joint venture. They come to law because they have fallen out, with Mr Sturgess on one side and Messrs Dunphy and Masfen on the other, and the co-operation that the venture requires is now beyond them.

[2] The three men are associated with Greymouth's three shareholding groups; the Dunphy or Group 1 interests (the first to sixth respondents in CA366/2013) hold 52.144 per cent, the Masfen or Group 3 interests (the seventh respondents) 34 per cent, and the Sturgess or Group 2 interests (the appellant and ninth respondent) the remaining 13.856 per cent. The Group 2 shares are held by Mr Sturgess (two per cent) and Jet Trustees Ltd ("Jet"), a corporate trustee for his two family trusts (11.856 per cent). They were separately represented before us, but not at trial before Gilbert J.[1]

[1] The third to sixth respondents were also separately represented before us, as they were at trial, but we need not dwell on them. For our purposes, as will be seen, they need not be distinguished from Mr Dunphy.

[3] The three were also until recently Greymouth's directors and two of them were its principal executives. Mr Dunphy was and remains the Executive Chairman, and Mr Sturgess was the Chief Operating Officer (COO). Their executive positions were held under management services contracts between Greymouth and companies that they or their interests owned, being respectively Greymouth Holdings Ltd and John Sturgess and Associates Ltd (JSAL).

[4] Greymouth explores for and produces petroleum. Although established as recently as 2002, it owns substantial exploration and/or production interests in New Zealand and Chile. By any measure it has been successful. Just how successful is controversial. That controversy motivates this appeal, in which the central question is not whether but on what terms the Sturgess interests will sell their shares; to whom, subject to which conditions, and at what price. (This is not to dismiss other, logically prior, questions that must be answered before we reach relief.)

[5] We have described Greymouth as a joint venture. That is an apt but informal characterisation. Arrangements among the three men and their interests are or were governed by a shareholder agreement, the company's constitution, the management services contracts, and the general law. We must discuss those documents in some detail. For present purposes, it is enough to highlight certain features.

[6] First, although directors may act in the interests of the shareholder who nominated them, the shareholder agreement obliges shareholders to use reasonable endeavours to see that their directors take all reasonable steps to honour certain provisions of the agreement, including those dealing with decisions vested in the Board. Shareholders must also protect the confidentiality of Greymouth's information, and they may not compete with the company or be interested in any business that does. This last obligation prevents a shareholder selling its shares to a competitor without the Board's consent, but naturally does not inhibit sale of the company as a whole.

[7] Second, the shareholder agreement generally vests governance in the Board, whose decisions must be unanimous. It reserves certain specified matters for the shareholders, and any shareholder resolution requires the votes of an ordinary or

special majority of shares in each of the three groups. So any one director or shareholding group may veto any decision of the Board or, as the case may be, the shareholders.

[8] Third, the resulting risk of corporate paralysis has been addressed via several mechanisms which collectively create powerful incentives to cooperate. Should a resolution submitted to the Board by a director not be resolved within 90 working days, any shareholder may by notice require that all the shares in the company be sold to a third party. This is known as the deadlock provision. Should a shareholder commit an event of default under the shareholder agreement, then fail to remedy the default on notice, the others may require that the defaulter transfer its shares to them at fair market value. This is known as the event of default provision. Fair market value is calculated by determining (by arbitration if necessary) the fair market value of the company as a whole, so that no regard is had either to any premium or discount for control or the lack of it, or to the prohibition on sale to a competitor. Finally, although the agreements make no reference to it, the shareholders retain access to the general law, notably the shareholder oppression remedy in s 174 of the Companies Act 1993.

[9] Fourth, the agreement contains pre-emptive rights, under which any shareholder wishing to sell must first offer the shares to the others. Should the remaining shareholders not exercise their rights the selling shareholder may offer the shares to third parties at a price, and on terms, no more favourable than were offered to the remaining shareholders. If the terms of sale alter so as to become any less favourable, the shares must again be offered to the remaining shareholders before they may be sold to a third party.

[10] The directors worked harmoniously for some years, but by 2011 there was serious trouble. Quite why is unclear. Mr Sturgess says that in 2009 Mr Dunphy abandoned the company for a time to live in Rome, and also that the other directors broke a promise to give him an enhanced shareholding in a Chilean venture. Messrs Dunphy and Masfen say rather that the directors fell out because Mr Sturgess began to act unilaterally and irresponsibly. Their account was substantially accepted by the trial Judge. After a trial of seven weeks duration Gilbert J found, in a

judgment both inevitably lengthy and admirably concise, that Mr Sturgess had failed to report to Mr Dunphy and the Board, had conducted operations without approval and sometimes negligently, and had committed the company to unauthorised capital expenditure.[2] These difficulties caused or contributed to significant problems with the company's drilling operations.

[11] The Board having been unable to work things out, Mr Dunphy unilaterally suspended the management services contract with JSAL in February 2011, purporting to do so on behalf of the Board as executive chairman. He later purported to terminate it.

[12] One action (known as the 5309 proceeding[3] began in late August 2011 with the Dunphy and Masfen interests seeking relief under s 174 requiring the Group 2 shareholders to sell their shares. The claim included a derivative action, brought by leave, alleging negligence and breach of the JSAL management services contract. The relief sought was an order that the Group 2 shares be sold on the open market, but subject to the shareholder agreement (whose provisions we refer to in detail below). The plaintiffs also sought transitional orders which would allow the Board to make decisions by majority, and shareholders to make decisions by a simple 75 per cent majority. Importantly for our purposes, they did not seek an order removing Mr Sturgess as a director.

[13] Mr Sturgess and Jet responded with a second action (known as the 5442 proceeding). They invoked the deadlock provision, saying that the Board failed to deal with a resolution put by Mr Sturgess relating to the suspension of the JSAL management services contract.[4] They also invoked the event of default provision, saying that in January 2011 Messrs Dunphy and Masfen supplied confidential information to a competitor, Methanex, in breach of the shareholder agreement. They eventually abandoned an application for relief under s 174. The relief which they sought at trial was specific performance of the event of default provision, requiring that the Group 1 and 3 shareholders transfer their shares to the Group 2

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2 *Greymouth Holdings Ltd v Jet Trustees Ltd* [2013] NZHC 1013 [First High Court judgment].

3 That being the file number assigned to it in the Auckland registry of the High Court.

4 Other claims were made, but we confine ourselves to those that were eventually pursued at trial and on appeal.

shareholders; alternatively, specific performance of the deadlock provision, requiring that all of the shares be sold; alternatively, liquidation under s 241 of the Companies Act.

[14] An arbitration is taking place in the shadow of the court proceedings. It was commenced following a stay application and resulting orders made by Rodney Hansen J, by consent, on 18 May 2012. The arbitrator, Mr Casey QC, is to establish the fair market value of Greymouth (including 35 other companies in the Greymouth group) under the shareholder agreement, without prejudice to the parties' positions on liability and remedy in the court proceedings. The sum paid for the Group 2 shares will of course be their proportionate share of Greymouth's fair market value. At the time of the hearing before us, the arbitrator was soon to begin the oral hearing. We have since been advised that an award is expected on 24 June 2014. For reasons explained subsequently, we have chosen to deliver this interim judgment.

[15] Returning to the narrative, the High Court trial began on 29 October 2012. Mr Skelton QC was trial counsel for all the Sturgess interests (Mr Sturgess, JSAL, and Jet Trustees). Messrs Dunphy and Masfen were among the many witnesses, but Mr Sturgess was not. His proposed evidence had been exchanged and Mr Skelton cross-examined extensively upon it, but he eventually chose not to go into the witness box. Mr Skelton explained before us that the decision was taken because most of the negligence claims against Mr Sturgess had been challenged to good effect during the 5309 plaintiffs' case. Be that as it may, the record does not include evidence that Mr Sturgess might have given about the issues that now concern us.

[16] Under the 5309 proceeding the Judge was confronted with 12 specific allegations of failure to report or misreporting by Mr Sturgess, eight of mismanagement or negligence, and nine of unauthorised capital expenditure. Most of these overlapped, in that any given well or permit often produced allegations under each head. The Judge dismissed a number of the claims, or found that they did not warrant relief under s 174, but generally speaking he did so without exonerating Mr Sturgess of misconduct. In some cases the Judge found that Mr Sturgess was not negligent, but had failed to report. Some claims falling into that category, and others

where Mr Sturgess was held to be negligent, failed because the Judge was not persuaded that the company had suffered any loss. An inquiry into damages was ordered for two specific matters, known as Midhurst and Radnor. Both involved exploration permits under which Greymouth was drilling wells.

[17] Gilbert J rejected the 5442 claims, reasoning that substantive and procedural requirements associated with the deadlock provision had not been complied with, the Dunphy/Masfen interests had committed no breach of the shareholder agreement upon which the event of default provision might operate, and it would not be just and equitable to order liquidation, which would destroy value to no one's advantage. He found inappropriate, as do we, Mr Sturgess's request for a liquidation order that would lie in court for a time so the parties might negotiate "a better outcome".

[18] The Judge found the suspension and later termination of the JSAL management services contract unlawful and ordered that arrears of management fees be paid,[5] but he also held that Mr Sturgess had behaved oppressively and that the Group 1 and 3 shareholders should have relief under s 174. He accordingly cancelled that contract. He considered leaving the shareholding as it stood, but assumed that Mr Sturgess would remain a director unless the Group 2 shares were sold. He was satisfied that the Board was dysfunctional, a result of Mr Sturgess's behaviour, and would likely remain so; further, the Group 2 shareholders had said they were willing to sell provided they got fair market value. He accordingly decided that it was appropriate to order sale of the Group 2 shares.

[19] As to what form the sale might take, the Judge recorded that the Groups 1 and 3 shareholders sought a sale on the open market, alternatively at the fair market value to be established by the arbitrator. Guided by expert evidence and the philosophy of the shareholder agreement, he concluded that the alternative remedy was more appropriate.[6] He accordingly ordered that the Group 2 shareholders sell at the fair market value to be determined by the arbitrator. It will be necessary to review that decision in some detail in this judgment.

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5 These findings and orders were made in the 5442 proceeding.

6 At [468].

[20] The parties were invited to file submissions as to the precise form of the orders to be made. That led to a second judgment, issued on 24 September 2013.[7] By that time Mr Sturgess was unrepresented and Mr Skelton represented Jet. Contrary to the Judge's evident expectation at trial, the parties had agreed that Mr Sturgess would resign as a director and Group 2 would appoint a director suitable to the other directors, failing which the President of the Institute of Directors would make the appointment.

[21] The decision to order sale of the shares was not revisited, however. Indeed, the parties were largely in agreement as to the orders needed to implement the first judgment. The Judge accordingly ordered that the Group 2 shareholders must sell at fair market value, offering their shares to Greymouth in accordance with the pre-emptive rights in the shareholder agreement. He declined to order that the company buy at fair market value; it would have the option to do so, and if it did not the shares might be offered to third parties. He granted leave to apply as to implementation of the orders or for further or ancillary orders.

[22] Since then the President of the Institute of Directors has appointed a director to represent the Group 2 shareholders. It is not suggested that there have been any problems at Board level, or any failure to pursue business opportunities. The company has paid some dividends, although not as many or as much as Mr Sturgess would like.

[23] Many of the Judge's findings and conclusions are not now challenged, although the precise extent to which that is so was the subject of some controversy before us. As we have observed, there was and is no evidence from Mr Sturgess, apart from what can be found in the agreed bundle of documents and parts of some interlocutory affidavits which were used in evidence by consent, to challenge the Judge's findings. Confronted with this formidable obstacle, Mr Geiringer did his best. He challenged the Judge's Midhurst and Radnor findings, and the conclusion that Mr Sturgess's conduct justified relief under s 174. He also pursued the attempt to invoke the deadlock provision and the event of default provision, and to have the

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7 *Greymouth Holdings Ltd v Jet Trustees Ltd* [2013] NZHC 2497 [Second High Court judgment].

company wound up, with the order to lie in court for a time so that Mr Sturgess might force the Dunphy/Masfen interests to compromise.

[24] On appeal the Group 2 shareholders no longer presented as willing sellers. Mr Skelton asserted that Jet wishes to remain a shareholder. He resisted a winding up order, and focused Jet's case on the proposition that sale of the Group 2 shares is unnecessary and disproportionate. Mr Geiringer advised that Mr Sturgess does not wish to sell his shares either. In support of the proposition that Mr Sturgess's conduct does not justify forced sale of the Group 2 shares, Mr Skelton agued that his misconduct happened as manager and emphasised that he accepts the termination of the management services contract; further, he is no longer a director. Counsel further advised that Mr Sturgess will allow the President of the Institute of Directors to make any future appointment that is necessary. The reader will observe that the issues have evolved somewhat since trial.

THE ISSUES

[25] As noted, the appellants did not contest a number of the High Court Judge's conclusions. Cross-appeals were abandoned before us (and will be dismissed accordingly).[8]

[26] There remain a substantial number of issues, however. We will begin with Mr Sturgess's claims under the shareholder agreement:

(a) the alleged event of default through disclosure to Methanex; and

(b) the alleged Board deadlock over the resolution relating to cancellation of the JSAL management services contract.

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[8] Some issues were not pursued before us. These include: Mr Dunphy's lawyers' conflict of interest as they also worked for Greymouth; consolidation of the proceedings; the status of Mr Dunphy as executive chairman; the ability of a director to act in the best interests of particular shareholders in joint venture companies pursuant to s 131(4) of the Companies Act 1993; the validity of the arbitration and the relevant valuation date for that arbitration; the attempt to reinstate the management services contract; and an attempt to receive compensation for its termination.

[27] We will then examine the grounds of appeal relating to the conduct of Mr Sturgess:

(a) A preliminary issue is whether Mr Sturgess was COO of certain Greymouth group companies whose operations were the subject of complaint; he alleges that he was never appointed to those positions, but the Judge found that he was COO in fact.

(b) Midhurst: negligence and failure to report.

(c) Radnor: negligence and failure to report.

(d) Other allegations of misconduct.

(e) Other adverse findings of the Judge which influenced his decision on oppression and relief.

(f) Whether the conduct of Mr Sturgess was oppressive, unfairly discriminatory or unfairly prejudicial under s 174.

[28] We will then turn to relief:

(a) Whether liquidation is an appropriate remedy.

(b) Whether Group 2 (Jet and Mr Sturgess) should be ordered to sell their shares in all the circumstances.

[29] The appropriate terms and conditions of any sale of the Group 2 shares. As will be seen, we have reserved this issue for later decision.

CLAIMS UNDER THE SHAREHOLDER AGREEMENT

Event of Default: the Methanex disclosure

[30] We begin with the facts, then turn to the shareholder agreement provisions on which this ground of appeal rests.

The facts

[31] Clause 15.2 of the shareholder agreement relevantly provides that each shareholder will always keep confidential, subject to certain exceptions, any information developed or held for the purposes of Greymouth and will require its representatives to comply with this obligation.

[32] It is not in dispute that Mr Dunphy supplied such information to Methanex, a major customer, in connection with a proposal to sell all of the shares in Greymouth. The information included the most recent audited financial statements, a set of management accounts, 2010 forecasts and annual reserves, 2009–2012 production data for various New Zealand fields and a 38 page portfolio overview containing a broad range of information about hydrocarbon reserves, prospects of further exploration, recent and planned activities in New Zealand and Chile and a list of the company's main gas customers. This manifestly confidential information was supplied in January 2011. The disclosure was subject to a deed which obliged Methanex to keep it confidential, to destroy it should the proposal not proceed, and to not disclose to any person, including any Greymouth shareholder, the existence or content of any negotiations or discussions about it.

[33] All Board members were made aware of the Methanex proposal, which took shape following a meeting between Mr Dunphy and Mr Aitken, the Chief Executive Officer of Methanex, in Vancouver in November 2010. Mr Sturgess knew of the proposed meeting and the Methanex interest. He suggested that two Greymouth directors should attend. Mr Dunphy went alone, having explained that it was not a formal meeting but rather a personal invitation to dine with Mr and Mrs Aitken at their home. During the evening, however, Mr Aitken expressed interest in buying Greymouth, and the expression of interest was discussed at Greymouth board meetings on 14 and 16 December 2010.

[34] It was an issue at trial whether Mr Sturgess consented to the subsequent disclosure of company information to Methanex, or whether Messrs Dunphy and Masfen believed that he had. Relying on a covert recording which Mr Sturgess

made of part of the 14 December board meeting,[9] the Judge found that Mr Sturgess did not agree to the disclosure; rather, he was prepared to consider sale, but not to take the proposal any further unless Methanex first demonstrated the ability to pay a price that all directors agreed upon.

[35] The Board having not consented to the disclosure of confidential information, the Judge found that the disclosure, when it happened, was contrary to the shareholder agreement.[10]

[36] The Judge found that Mr Masfen understood that a consensus had been reached at the December 2010 board meetings that Mr Dunphy should progress discussions with Methanex, and understood that this would involve disclosure of confidential information. Mr Masfen's evidence was not challenged in cross-examination. The Judge's finding was material because, for reasons discussed below, it was necessary that Mr Sturgess show that the Dunphy and Masfen interests had both committed events of default.

[37] Not until 9 July 2012 did the Sturgess interests seek to rely on the alleged event of default.

The shareholder agreement

[38] We have mentioned the duty of confidentiality provision (cl 15.2) above. The relevant event of default for a shareholder is found in a schedule to the agreement; it provides that an event of default occurs in respect of a shareholder if:

> (a) that Shareholder or any Related Party of that Shareholder commits any breach of or fails to observe any of the obligations under this agreement and (if that breach or failure is capable of remedy) does not remedy that breach or failure within 10 Working Days of notice from any other Shareholder specifying the breach or failure and requiring remedy or (if that breach or failure is not capable of remedy) that breach or failure is material in the context of the obligations of that Shareholder or Related Party under this agreement or that Related Agreement.

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9 It appears that he may have taped further discussions but the entire record was not produced.

10 First High Court judgment, above n 2, at [54].

It will be seen that an event of default happens only if a shareholder breaches the agreement and, where the breach is capable of remedy, does not remedy the breach within 10 working days of notice from any other shareholder specifying the breach and requiring remedy. If the breach is incapable of remedy then an event of default happens only if the breach is material in the context of the shareholder's obligations under the agreement.

[39] Clause 13.1 provides that should an event of default occur in respect of a shareholder then non-defaulting shareholders may, while that event of default continues, by notice in writing to the defaulting shareholder require that the defaulter transfer all of its shares to the non-defaulters. We will return to this provision later; it is set out at [149] below. For present purposes it is enough to note that when the non-defaulters make such demand the defaulter is deemed to have given a sale notice offering to transfer all of its shares to them at Fair Value. With necessary modifications, certain clauses associated with the agreement's pre-emptive rights then apply. Those clauses are cl 8.3 to cl 8.5, which relevantly provide that the recipient of a sale notice who wishes to accept the offer must give notice of its desire to buy. Such acceptance notice must be given within 10 working days after receiving the sale notice. It followed that if the Sturgess interests were to buy the defaulters' shares, they would have to give an acceptance notice timeously.

[40] As mentioned earlier, it was necessary for Mr Sturgess's purposes that not only the Dunphy but also the Masfen shareholders should be categorised as defaulters. That is so because cl 13.2 provides that any notice which may be given by the non-defaulting shareholders may only be given by shareholders which hold more than half the shares held by all non-defaulters. Unless the Masfen shareholders were also defaulters, the Sturgess shareholders, who hold only 13.856 per cent, would not be able to give notice under cl 13.1.

The High Court's conclusions

[41] As noted, Gilbert J found that Mr Dunphy had breached the shareholder agreement, or caused it to be breached, by disclosing the company's confidential

information to Methanex without unanimous board approval. However, he did not accept that an event of default had been proved, for several reasons.

[42] First, the Judge did not accept that the Masfen interests were defaulting shareholders, for they did not provide confidential information to Methanex.[11] It followed that the Sturgess interests did not qualify under cl 13.2 to give notice on behalf of non-defaulting shareholders. The Judge was not prepared to allow the Sturgess interests to plead in the alternative that Mr Masfen had breached the shareholder agreement by authorising Mr Dunphy to make the disclosure as his agent. Such allegation was not pleaded, and the Judge refused an amendment which the Sturgess interest sought to make after closing submissions. (This decision was not challenged on appeal.) He noted that the default notice which the Sturgess interests had served on 9 July 2012 did not assert any breach by the Masfen interests. He also found on the facts that the agency allegation could not be sustained.

[43] Second, the Judge reasoned that a valid notice under cl 13.1 can be served only while the event of default continues and the provision of information to Methanex was not a continuing default. It happened in January 2011, and notice was not given until 9 July 2012. Long before that date Methanex had destroyed the confidential information in accordance with the confidentiality agreement.

[44] Third, the Judge noted that even if the notice of 9 July 2012 was valid, it would have had the effect under cl 13.1 of deeming the Dunphy and Masfen interests to have given a sale notice offering to transfer all of their shares to the Sturgess interests at fair value. Clause 8.3 states in those circumstances that the recipients of the sale notice (that is, the Sturgess interests) might acquire the defaulters' shares by giving an acceptance notice. No such notice was given, and the 10 working day period for giving it had long expired.

[45] Finally, the Judge noted that the remedy sought was specific performance of the event of default provisions, and in the exercise of his discretion he would not be

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[11] At [61].

prepared to grant that remedy.[12] Delay by Mr Sturgess and Jet Trustees Ltd in seeking relief was such as to disentitle them to the remedy.

Assessment

[46] The claim that Mr Dunphy acted as agent for the Masfen interests in making the disclosure was abandoned in argument before us. In any event our attention was drawn to nothing that justifies interfering with the Judge's findings on this issue. Nor did counsel challenge the Judge's finding that Mr Masfen did not himself supply confidential information.

[47] However, Mr Geiringer maintained that the Masfen interests were in default, arguing that Mr Masfen allowed or authorised the disclosure because he knew it was to happen and did nothing to stop it. It was implicit in his argument that such inaction is an event of default.

[48] This argument confronts two difficulties. First, the claim at trial was that Messrs Dunphy and Masfen were in default because they provided Methanex with confidential information. There was no pleading that Mr Masfen was in default because he authorised or allowed Mr Dunphy to do so. The evidence established, however, that Mr Masfen played no part in the disclosure. The Judge refused an amendment which would have allowed a pleading of agency, and that decision has not been appealed. The argument now advanced is not relevantly different from the agency allegation; it too alleges a different and indirect breach of the shareholder agreement.

[49] Second, the evidence does not say that Mr Masfen allowed or authorised the disclosure. Mr Geiringer pointed only to evidence that Mr Dunphy briefed Mr Masfen in January 2011 on what had occurred in Vancouver. He invited us to infer that Mr Masfen must have authorised the disclosure at that time, and suggested that Mr Masfen "did not even contest the suggestion that he allowed the information to be disclosed". It is true that Mr Masfen stated that he understood negotiations would be pursued and that this would involve some disclosure, but that falls short of

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[12] At [69].

an authorisation to Mr Dunphy to make the disclosure. It must be borne in mind that Mr Masfen's evidence was that he thought the entire Board had agreed to progress discussions with Methanex, including any necessary disclosure.

[50] This second point illustrates the significance of the first. Had it been alleged that Mr Masfen was in default because he allowed Mr Dunphy's disclosure to happen the evidence would likely have responded squarely to the allegation. It would be unfair in the circumstances to draw the inference which counsel urged upon us.

[51] These conclusions dispose of this ground of appeal. We deal briefly with the remaining arguments, in respect of which we also agree with the Judge.

[52] First, the right to acquire a defaulter's shares continues only while the breach continues, and this breach was not a continuing one, for the information disclosed was subject to strict confidentiality obligations and had since been destroyed in accordance with those obligations. Mr Geiringer did not argue that a breach of this kind is incapable of remedy.

[53] Second, the Sturgess interests did not comply with the procedural requirements of the shareholders agreement, which required that they give an acceptance notice within 10 working days of a deemed sale notice. It is no answer to this to say, as Mr Geiringer did, that Mr Sturgess acted sensibly by seeking first to determine the disputed claim whether an event of default had happened. On that approach the non-defaulting shareholder might keep a deemed sale notice alive indefinitely. The shareholders agreement understandably grants no such right. Its processes are strict and swift.

[54] Finally, we are not persuaded that the Judge was wrong to conclude that specific performance should be denied in the exercise of discretion. It may be true that not for some time did Mr Sturgess learn of the breach, but he undeniably knew by 29 April 2011 and the notice of default was not issued until 9 July 2012. In the meantime the company had carried on business, committing to major operational

expenditure. For reasons which will become apparent, we are also satisfied that Mr Sturgess does not come to equity clean-handed.

Deadlock: the unresolved Board resolution

[55] Again, we begin with the facts, then turn to the relevant provisions of the shareholder agreement.

The facts

[56] The deadlock issue concerns the suspension of the JSAL management services contract. As noted earlier, Gilbert J found the suspension unlawful. The deadlock at board level is said to have arisen because Mr Sturgess challenged the suspension immediately by proposing a resolution to the effect that the company supported suspension of the contract but Messrs Dunphy and Masfen, knowing of course that the board would not unanimously support the resolution, declined to put it or to allow it to be resolved, then or at subsequent meetings.

[57] The Judge found the facts as follows:

> [74] In late January or early February 2011, Mr Dunphy and Mr Masfen decided to suspend Mr Sturgess as COO. Having taken legal advice, Mr Dunphy prepared a letter to JSAL and Mr Sturgess that he signed as chairman. The letter purported to give formal notice by the company directing that JSAL suspend the provision of services to allow Mr Sturgess to take a holiday from Greymouth's business for three months from the date of the letter until 9 May 2011. Mr Dunphy handed this letter to Mr Sturgess at the board meeting on Friday 4 February 2011. For the reasons given earlier in this judgment, I have found that the purported suspension was invalid.
>
> [75] After handing the letter to Mr Sturgess, Mr Dunphy asked him to advise whether he was going to take the holiday as directed in the notice. There was then the following exchange:
>
> > MD — John, I need to know whether you are going to take a holiday?
> >
> > …
> >
> > JS — I'll do what I like to do. Right, we have to agree on stuff Mark. If this is then the resolution that you are passing, like to say that I have to go from the company for three months, then put the resolution to the board right and we will then decide on that.

…

JS — Put the resolution forward Mr Chairman please?

MD — Sorry, what resolution are you…

JS — The resolution that this be passed to me, the resolution that this be passed to me. That you have full ability to pass this resolution to your partner, right, in business and let's see whether Peter votes on it or not, and whether I vote on it.

[76] Later in the meeting Mr Sturgess said:

JS — … We can't agree on a resolution, right, I have proposed a resolution, right?

PM — You proposed a resolution?

JS — Yeah, I propose a resolution around this one.

MD — Right, what are you proposing?

JS — That this is something that the company supports to be delivered to John Sturgess.

PM — Well my own attitude is that Mark has taken legal advice on this which I have seen and that that notice is in correct format.

JS — So you support it?

PM — Yeah, I told you that.

JS — Mark, you support it?

MD — Yes, I do John.

JS — I don't support it, okay so we are now, we are now in this period of I believe 90 days.

MD — No, no that's not…

JS — According to the Shareholders Agreement gentlemen, right where we either sort this one out or not or the company winds up.

[77] The meeting ended shortly after this because Mr Masfen had to leave. Mr Masfen encouraged Mr Sturgess to consider taking the leave. Mr Sturgess said that he would do so and take legal advice. Mr Dunphy then re-stated that he needed to know whether Mr Sturgess would take the leave which provoked the following exchange:

JS — We have a resolution Mark.

MD — No, we don't have a resolution.

> JS — We have yet to decide whether you have the ability to issue something like this to someone who is covered under the Shareholders Agreement.
>
> MD — Listen, I am quite convinced that I've got the ability to do that John, I've done it.
>
> JS — Okay.
>
> MD — And you know how it is when you are giving instructions to someone who reports to you, you need to know whether they're going to do what you say or not and that's fundamental in our type of company so I need to know now whether you are going to follow that instruction and take 90 days leave.
>
> JS — As I've told you Mark I will take legal advice and as far as you gentlemen are concerned, I've tabled a resolution to there, we are now also in the 90 day period.
>
> MD — Well John I'm going to take that as a no.
>
> JS — Okay, you take it anyway you like, yeah.
>
> MD — And on that basis I'm going to declare the meeting closed.

[78] Mr Sturgess immediately consulted Simpson Grierson who wrote to Messrs Dunphy and Masfen on Sunday 6 February 2011 challenging the validity of the notice and demanding that the letter be withdrawn. They took the view, based on Mr Sturgess' instructions, that the resolution he had proposed remained outstanding and still needed to be formally voted on. They stated:

> Mr Sturgess understands that the board meeting of last Friday will continue on Monday morning and will meet at 9.30 am at Mr Masfen's office for this purpose. We understand that there are a large number of agenda items outstanding. It is important that these agenda items are dealt with. One such item is the board resolution proposed by Mr Sturgess that the board consider, and if thought appropriate, vote on whether the 4 February letter from Mr Dunphy be approved (ratified) by the board.

[79] The resolution was not put at the next meeting that was held on 16 February 2011. The minutes of that meeting make no reference to the issue.

[80] The usual practice was for formal board submission documents to be prepared in support of proposed resolutions. Mr Sturgess did not at any stage follow this procedure in relation to the suspension notice. There is no evidence that he proposed a resolution that the company ratify or approve the notice following the 4 February 2011 meeting.

The deadlock provision

[58] Clause 6.1 of the shareholder agreement provides:

> If a resolution submitted to the Board by a Director is not passed, then if the resolution is not resolved within 90 Working Days of the date the resolution was submitted to the Board, any Shareholder may by notice to the other Shareholders, require that all the Shares in the Company be sold to a third party. In the event that the parties are unable to find a purchaser for the shares, then unless one (or more) of the Shareholders agrees to purchase the Shares held by the other Shareholders, the Company (and any Subsidiary) should be liquidated unless the parties agree otherwise.

[59] It will be seen that a shareholder may compel a sale of all of the shares in the company if a resolution is not "resolved" within 90 working days of the date it was submitted to the Board. That period expired, so far as the resolution said to have been put on 4 February 2011 is concerned, on 14 June 2011. Not until 9 July 2012 did Mr Sturgess interests seek to invoke cl 6.

The High Court's conclusions

[60] The Judge did not accept that the proposed resolution of 4 February 2011 triggered rights under cl 6.1 of the shareholder agreement.[13] He found, as noted above, that Mr Sturgess did not at any stage follow the usual practice of submitting formal documents in support of the proposed resolution, nor did he pursue the resolution following the 4 February meeting.[14] Rather, the matter was left on the basis that he would take legal advice and consider his position, so it was not necessary for the board to consider the resolution further. Mr Sturgess never pursued the matter. In short, there was no deadlock.

Assessment

[61] Mr Geiringer criticised the Judge for shrinking from strict commercial consequences that the parties had prescribed for themselves in the event of deadlock. The Judge should not have used s 174 to "manufacture" a different end to the parties' relationship. So far as the deadlock provisions themselves are concerned, the Judge read in unnecessary procedural requirements, some of which the Board did adopt but only after the event of default. Delay in invoking the deadlock provisions should be attributed not to Mr Sturgess but to the "belligerence" of his co-directors.

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13 First High Court judgment, above n 2, at [82].
14 At [80].

[62] We reject the essential premise of this ground of appeal, which is that the deadlock provisions must prevail over s 174 in this case. It is settled law that s 174 "characteristically operates so as to limit the exercise of legal powers; in other words to stop, or grant a remedy in respect of, what would otherwise be lawful".[15] Relevantly, the Court might order under s 174(2)(a) that the Group 2 shareholders sell their shares to the Groups 1 and 3 shareholders even if the opposite result would have followed, but for the Court's intervention, under the shareholder agreement. We do accept, for reasons given later,[16] that the Court may choose to hold parties to their agreements, finding that complying conduct is not oppressive or does not warrant relief. But in this case relief was found warranted for reasons making it unjust for Mr Sturgess to rely on the deadlock provision. As will be seen, we agree with the Judge's findings about his misconduct, which predated the alleged deadlock and, by leading Mr Dunphy to suspend the management services contract, may be said to have caused it.

[63] Mr Sturgess sought specific performance. Gilbert J did not consider relief, but having regard to his findings about the event of default, which was also invoked for the first time on 9 July 2012, it is inevitable that he would have exercised his remedial discretion against Mr Sturgess. We would not be prepared to grant specific performance either. The deadlock issue arose because Mr Sturgess breached his obligations to Greymouth and the other shareholders. Further, the subsequent delay was long – exceptionally so in a live commercial context – and unjustified. We observe that in the interim Greymouth continued to invest, committing to more than $65 million in operational expenditure.

[64] These conclusions dispose of this ground of appeal. We add finally that we are not persuaded that the Judge erred by finding that Mr Sturgess did not call on the Board to make a decision on his resolution. Mr Sturgess himself deposed in an affidavit sworn on 11 November 2011 that there had been no situation of deadlock. It was open to the Judge to conclude, as he did, that Mr Sturgess agreed, having put the resolution informally, to reflect on his position and never subsequently put it on the agenda.

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15 *Jacobsen Venue Management New Zealand Ltd v Worldwide NZ LLC* [2008] NZCA 105 at [50].

16 See [157]–[175] below.

QUESTIONS OF BEHAVIOUR

[65] We turn to the grounds of appeal relating to Mr Sturgess' behaviour. We will deal first with the Midhurst and Radnor issues, which concern findings of negligence or breach of contract made against Mr Sturgess and JSAL in the derivative action brought by the Dunphy and Masfen interests in the 5309 proceeding. As part of that exercise, we will consider findings about Midhurst and Radnor which are relevant to whether Mr Sturgess also behaved oppressively for purposes of s 174. We will then deal with other allegations which also concern oppression, before deciding whether relief was warranted under s 174.

[66] Before dealing with Midhurst and Radnor, however, we must first address an issue about the extent of Mr Sturgess's authority as COO within the Greymouth Group.

Was Mr Sturgess responsible for managing all of Greymouth's operations?

[67] The 5309 plaintiffs took the view that Mr Sturgess was COO of all relevant companies within the group, including some which were not strictly subsidiaries but were ultimately in common ownership. Mr Sturgess denied it, saying that his responsibilities and those of JSAL were confined to Greymouth and seven subsidiaries, and did not extend to 20 special purpose companies established following a restructuring of the group's operations in 2005. This issue affected the s 174 claims, and it was also relevant to the Radnor and Midhurst allegations, since permits were held, or operations conducted, by companies for which Mr Sturgess denied responsibility.

The High Court conclusions

[68] Mr Sturgess and JSAL relied on cl 1.1 of the management services contract, which provided that JSAL was appointed to provide management services to the company and/or any of its subsidiary companies. Shares in the special purpose companies were held by Greymouth in a bare trust for Greymouth's shareholders in the same proportions as their shareholdings in Greymouth, so they were not strictly subsidiaries. This structure was adopted to permit the sale of particular operations or

interests held by the special purpose companies, without it being necessary to channel the sale proceeds through Greymouth and pay them out as dividends.

[69] The Judge found, however, that new management structures were not established for the special purpose companies and in practice their operations were managed in the same way as all other companies in the group, with no distinction being drawn between subsidiaries and the special purpose companies.[17] In practice, he found, Mr Sturgess was COO for all group companies, including the special purpose companies. He acknowledged that the shareholder agreement and management services contract do not reflect this, but he found that all parties proceeded on the understanding that the management arrangements for the special purpose companies were exactly the same as those for other companies in the group.[18] On the facts, he found, Mr Sturgess did indeed take responsibility for special purpose companies. The Judge found that an estoppel by convention arose on the basis of the parties shared understanding that the management services contract extended to the special purpose companies as if they were subsidiaries.[19]

Assessment

[70] On appeal, Mr Geiringer argued that because the JSAL management services contract covers only a few companies and it was never varied to include the others, many of the claims must fail. Further, the Judge's conclusions were not open on the pleadings, for they were available only in a claim for rectification. Nor were the requirements of estoppel by convention made out.

[71] For s 174 purposes, as will be seen, it is immaterial whether Mr Sturgess was appointed as COO of all group companies; it is enough that he conducted the affairs of those companies and did so in an oppressive manner. However, his obligations as COO under Greymouth's governing documents may inform that question, and he further maintains that he was not COO of the special purpose companies involved in the two permits, Midhurst and Radnor, in respect of which inquiries into damages were ordered.

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17 First High Court judgment, above n 2, at [127].
18 At [130].
19 At [139].

[72] We need not dwell on the Judge's factual findings, because Mr Geiringer did not challenge them directly (although he did contest findings about what Mr Sturgess did in the Radnor and Midhurst instances). His submissions on the present issue did not challenge the Judge's general finding that Mr Sturgess acted as COO of all group companies. That finding is unimpeachable. The special purpose companies had no other management, and there are instances of Mr Sturgess discussing them at Board level in terms indicating that he was responsible for them. The Judge noted Mr Sturgess's own statement, in his proposed brief of evidence, that the Board had increased his remuneration to reflect additional workloads which were associated, as a matter of fact, with the special purpose companies. There was some controversy about this in argument before us, as a result of which memoranda were filed after the hearing to demonstrate that Mr Sturgess had claimed expenses in respect of some of the special purpose companies.

[73] The argument that the Judge's conclusions could be reached only in an action for rectification is misconceived. The other parties claimed that the parties not only reached but then performed an agreement that Mr Sturgess would act as COO of all group companies. The special purpose companies were subsidiaries in substance, the contract did not preclude extension to other companies, and the omission from the JSAL management services contract was explained. The omission was relevant, but only as evidence. The contract contains a whole agreement clause, but such provisions are not conclusive.[20] The Judge found for compelling reasons that the parties did agree that Mr Sturgess would act as COO. The evidence shows that they did not distinguish in any relevant way among the group companies. The Judge drew the irresistible inference that Mr Sturgess assumed for the special purpose companies all of the responsibilities contained in the management services contract.[21]

[74] Given these findings the 5309 plaintiffs did not need to invoke estoppel, which plea presumes that Mr Sturgess would be entitled, but for detrimental reliance by the others, to rely upon contractual arrangements under which he was not COO of the special purpose companies. Accordingly, we say no more about it.

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[20] *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2010) 9 NZBLC 102,862 at [15].
[21] At [138].

Midhurst

[75] Greymouth holds two exploration permits in Taranaki which are known as the Midhurst permits. As the Judge recorded, the terms of these permits required the company to pursue two targets, known as the York and Midhurst leads, by acquiring, processing and interpreting 2D or 3D seismic data before 23 May 2010. The allegation was that Mr Sturgess conducted a 2D, rather than a 3D seismic survey contrary to professional advice and without board approval, and then tried to have the 2D data synthesised into 3D images despite professional advice that it would not produce results.

The High Court findings

[76] The Judge explained that 3D data takes longer and costs more to acquire than 2D, but because it permits a three dimensional image it provides a more sophisticated and accurate understanding of the subsurface geology. The choice between 2D and 3D is always important. It involves balancing the cost, the potential quality of the results, the target area characteristics, and the survey objectives.

[77] The Judge found that Geoff Bulte, a senior geophysicist with Greymouth, recommended a 3D programme for Midhurst because Greymouth was examining multiple prospects at a range of depths; further, a 3D survey would complement two existing 3D surveys adjoining the intended survey area. He found that Mr Sturgess initially accepted this recommendation, but then changed his mind. The Judge appears to have accepted that Mr Sturgess was concerned about the cost of drilling additional shotholes required for a 3D survey, particularly given difficult drilling conditions in the area. He found that Mr Sturgess did not discuss this decision with Mr Dunphy, nor tell him that it was contrary to Mr Bulte's advice. He accepted, though, that by 5 January 2010 Mr Dunphy was aware that a 2D survey was required for at least part of the area. At a board meeting on 23 February 2010 Mr Bulte gave an exploration update which noted the 2D seismic programme at Midhurst and did not express any misgivings about the survey, which was by then well advanced.

[78] In early March 2010, after about half of the shotholes had been drilled, Mr Sturgess asked Mr Bulte to turn the programme into a 3D one. Mr Bulte pointed

out that because differing requirements of a 3D survey most of the shotholes already drilled would be wasted. Mr Sturgess responded that he had seen an Internet report by a Russian company describing the use of pseudo-3D data processing techniques using 2D seismic data.

[79] Mr Bulte did not consider this methodology relevant to Midhurst, but Mr Sturgess insisted on it, contrary to Mr Bulte's advice. The Judge appears to have accepted that Mr Sturgess was interested in trialling methods of shooting in 2D mode but analysing the data in pseudo 3D manner, in an attempt to find ways to meet significant commitments that Greymouth had made to acquire 3D seismic data in Chile.

[80] It seems clear that the Midhurst data could not produce a 3D-quality output. Indeed, the experts involved considered that the 2D data was unsuitable for processing into a 3D volume. Mr Sturgess was told that his expectations of the data were unrealistic. That assessment proved correct.

[81] Although the Judge found that the 2D data did not produce anything of value, he was not persuaded that a full 3D survey was the only reasonable option and that Mr Sturgess was negligent in proceeding with a 2D survey. However, he did find that Mr Sturgess was negligent in proceeding with the pseudo 3D endeavour with no supporting expert advice that the unconventional technique would be worthwhile.[22] The additional costs incurred in that exercise were recoverable. They were not quantified in the judgment, the Judge indicating that he would order an inquiry into damages if necessary.

[82] The Judge also found that Mr Sturgess ought to have discussed the survey with Mr Dunphy before abandoning the planned 3D survey in favour of 2D, and ought to have allowed Mr Dunphy to consider the matter in the light of Mr Bulte's adverse advice. He found that Mr Sturgess's failure to do so breached his reporting obligations as chief executive officer and director, and also breached the shareholder agreement.[23]

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22 At [164].
23 At [161].

Assessment

[83] Under this ground of appeal Mr Geiringer argued that the Judge's factual findings cannot be sustained on the evidence. He emphasised that the choice between 2D and 3D lay on a cost-benefit continuum and (as the Judge found) it was not necessarily wrong to choose 2D. He emphasised that at the 23 February 2010 Board meeting Mr Bulte said nothing critical about the 2D survey, and that in March 2010 the Board received a report on Midhurst which recorded that the 2D survey would generate "a lot more data than originally planned" when used in combination with a methodology designed for 3D data. He submitted that the Board knew of the proposed methodology before each phase of it was implemented. Not until it was apparent that the 2D survey had failed to produce useful data did Mr Sturgess proceed (in September 2010) with pseudo-3D, and that decision was reasonable; for just $100,000 it might allow the company to secure something from the $2.6 million sunk on 2D. He contended too that the Judge's finding that Mr Sturgess continued in the face of expert advice was mistaken; all the experts had said was that the methodology would not produce the results of a full 3D survey, and contemporaneous emails show that Mr Sturgess was receptive to advice. An inference that the Board would have proceeded even if fully informed ought also to have been drawn.

[84] However, the primary complaint was that Mr Sturgess did not consult the Board about Mr Bulte's recommendation that a full 3D survey be done given that Greymouth was looking at multiple prospects and depths, or his decision to abandon 3D in favour of 2D, or the costs and benefits of each. It is no answer to say that Mr Bulte did not criticise 2D at the February Board meeting; the important points are that Mr Bulte had recommended 3D but by then Mr Sturgess had already made the 2D decision and the work was under way. That committed the company to the costs of a survey which later proved to be wasted, which in turn appears to have led him to throw good money after bad by pursuing conversion of the data into pseudo 3D form.

[85] Nor did Mr Sturgess pass on expert reservations about the pseudo 3D methodology; rather, he decided to proceed in that manner without apprising the

Board of the adverse advice he had received. With respect to the submission that Mr Sturgess was receptive to advice, we accept that he told one advisor in an email of 30 April that the attempt to "make 3D out of Midhurst" should not be made if there was no value in it. Although the experts' advice was negative the attempt subsequently proceeded. The evidence of Mr Brady, Greymouth's General Manager (Exploration and Subsurface), was that Mr Sturgess insisted in the face of all advice that pseudo 3D could be done and became quite combative when told that it would not work. For these reasons we do not accept that the Judge's findings were not open to him. It was also open to the Judge to conclude that had the Board been adequately informed the company would not have proceeded with the pseudo-3D analysis, and further that the work achieved nothing of value.

[86] This ground of appeal fails.

Radnor

[87] The allegation regarding the Radnor permit is that Mr Sturgess negligently, and without board approval, decided to fracture stimulate the Radnor-1B well contrary to expert advice. It was said that the operation failed, resulting in substantial wasted costs to Greymouth, and Mr Sturgess is said to have responded to subsequent questions by trying to distance himself from the operation.

The High Court findings

[88] The Judge explained that the Radnor permit, which is in Taranaki, is held by five wholly owned Greymouth companies and another company, Bridge Petroleum Ltd, which is 92 per cent owned by Greymouth. In October 2009 Greymouth began to drill a sidetrack well from the existing Radnor-1A wellbore at a depth of 4,033 metres, with the intention of testing multiple reservoirs in the Mangahewa formation for hydrocarbons. Drilling was completed on 22 October 2009 to a total depth of 5,021 metres.

[89] Fracture stimulation or "fracking" stimulates the flow of oil or gas to a well by increasing permeability of the producing formation. Fracturing is achieved by pumping fluid down the well and through the perforations in the casing under

extremely high pressure. A petroleum engineer, Ricardo Guerra Urquijo, recommended to Mr Sturgess that a "mini frac" be undertaken in a particular zone at Radnor-1B because initial results were unpromising and a mini frac would be an inexpensive way of assessing potential productivity. A mini frac is an operation of short duration in which a small amount of water is pumped until fracture has been initiated, at which point pressure in the well is allowed to fall off naturally. The information acquired can then be used to assess whether a full fracture operation is justified and, if so, to assist in its design.

[90] On 20 May 2010 Mr Sturgess told Mr Dunphy that a mini frac was planned at Radnor for the following week. He had at that time been considering a full frac, but did not mention it. He subsequently authorised a mini frac, the results of which were not promising. Mr Sturgess immediately authorised a full frac, which did not succeed. There was unchallenged evidence that the well was inappropriately designed for fracking and Greymouth should not have invested in the operation without carefully considering the likely results.

[91] Mr Sturgess denied responsibility for the full frac. He said it was designed and undertaken by contractors. The Judge found that Mr Sturgess directed the operation and authorised the associated expenditure of $1 million; further, he did so at a time when he knew, or ought to have known, that the prospects of a full frac succeeding were low.

[92] The Judge accordingly concluded that Mr Sturgess's decision to proceed with the full frac was negligent.[24] He and JSAL were found liable for the costs of the operation, less the costs that would have been incurred in the recommended mini frac. The quantum remains to be fixed.

[93] The Judge also found that Mr Sturgess authorised the operation and attendant expenditure without consulting Mr Dunphy, who did not know that a major frac was planned, let alone carried out, until some months later.[25] He ought to have consulted Mr Dunphy before committing to the full frac, and should have reported its results

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[24] At [225].
[25] At [226].

promptly when they became available at the beginning of June 2010. When he did respond to Mr Dunphy's inquiries in August 2010, his advice was misleading and inadequate. He attempted to distance himself by saying that the decisions had been made by contractors working under the instructions of an in-house lawyer at Greymouth who was also a director of Bridge Petroleum, and that Mr Guerra Urquijo had conducted the operation without approval. The Judge found that none of these allegations was correct.[26]

Assessment

[94] Again, the Judge's conclusions were challenged on the facts. The principal contention on appeal was that Mr Sturgess did not authorise the full frac; the decision was made by others at a time when Mr Sturgess was incommunicado because he was travelling internationally. Mr Geiringer also argued that not until later did the Board insist that it must authorise fracking operations; we take this to be a submission that if Mr Sturgess did authorise it then he acted within his authority. It was also contended that the mini frac was not unpromising and that the full frac was a success, and that in any event no loss was proved, for the Board might well have gone ahead with the full frac anyway.

[95] We begin with the question whether Mr Sturgess authorised the full frac. The entire operation took place on the weekend of 29 and 30 May 2010. The mini frac happened on the 29th, and the full frac on the 30th. Mr Sturgess's contention that the evidence shows he did not authorise it rests on the proposition that the two fracs were distinct operations, the first intended to assess whether the well was promising enough to warrant the second.

[96] The respondents accept that a mini frac can be conducted for that purpose, and further that Mr Guerra Urquijo had recommended a mini frac of that kind at a cost of US$20,000. He recommended it because he thought the well unpromising. However, Mr Guerra Urquijo's evidence is that the actual mini frac was not done for that purpose, but rather to optimise placement in the well. It was a larger scale operation than Mr Guerra had recommended and it cost significantly more,

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[26] At [228].

US$60,000. It was done because Mr Sturgess had already commissioned the full frac. The Judge plainly accepted this evidence. He found that the mini frac recommended by Mr Guerra would have been conducted in any event, so declared that the costs of that operation (not the actual mini frac cost of $60,000) would be deducted from the damages.

[97] It is true that there is no evidence of any communication between Mr Sturgess and Greymouth staff between the two fracs. (There was a phone call so he was not entirely incommunicado, but there is no evidence of its content and it came from a rig on a different site.) However, for the reasons just given it does not follow that the Judge has misinterpreted the evidence.

[98] Mr Geiringer also pointed to an email of 29 May from Mr Sturgess to the rig manager, in which he said "…approved to $1 million [the cost of the full frac] … usual thing to prepare/supply an AFE [approved field expenditure] cost estimate". An AFE is an internal process for authorising expenditure. The Judge interpreted this not as a warning that authorisation had not been given but as authority to proceed with an indication that an AFE should be prepared as a matter of form. The email chain suggests that the Judge was correct to interpret the evidence in that way. We observe too that the email is inconsistent with Mr Sturgess's claim that he did not know the full frac was to proceed.

[99] Mr Geiringer did not argue before us that the Board had authorised the operation; he accepted there is no evidence that Mr Dunphy knew of it in advance. We did understand him to pursue the argument that the Board did not insist on authorising fracking operations until later. However, as Mr O'Brien observed, the evidence does not support that contention. There is evidence that Mr Dunphy stated later that it "is" Board policy that fracking requires Board approval, but that does not show the policy was new, and earlier Board minutes include references to fracs, which tends to show that the practice predated Radnor.

[100] The submission that Mr Sturgess's conduct caused no loss is difficult to understand. Mr Geiringer emphasised that there is no direct evidence that the Board would not have proceeded. But Mr Guerra Urquijo had recommended his mini frac

because the operation was thought unpromising, and the mini frac results confirmed it. The Judge properly drew the inference that had the Board been informed of these matters it would have decided against the full frac.

Other allegations of misconduct

[101] The other allegations appealed focused on Mr Sturgess's obligation to report to Mr Dunphy, as Executive Chairman, and the Board.

[102] Mr Sturgess denied any obligation to report to Mr Dunphy, saying he need only report to the Board and did so. But Gilbert J found that it is normal practice for a chief operating officer to report to an executive chairman, and observed that Mr Sturgess had acknowledged not only that a team approach to decision-making was fundamental to the success of the Greymouth Group, but also that it was necessary and prudent that the directors be properly satisfied about relevant issues before committing to operations, some of which are high risk and most of which involve much expenditure and the potential for further exposure for the company.

[103] By way of reinforcement, the Judge noted, Mr Sturgess was required to obtain board approval for all management decisions within the ambit of cl 7.1 of the shareholder agreement, which as noted earlier, vests management decisions in the Board. Clause 7 provides:

> GOVERNANCE
>
> 7.1 Board Decisions: Except as delegated pursuant to clause 7.2, all matters and decisions relating to management of the Company are decided by the Board, including, without limitation:
>
> (a) annual general and administrative and capital spending budgets;
>
> (b) annual executive compensation (cash and stock) and employee agreements;
>
> (c) material deviations from the annual budgets;
>
> (d) material changes in operating strategy or geographic orientation of the Company, regardless of project size;

(e) creation of, or investments in, Subsidiaries (except to the extent contemplated in the annual budget referred to in paragraph (i));

(f) capital expenditure;

(g) any recompletion or development drilling expenditure;

(h) any acquisition of land, seismic data or exploratory drilling expenditure;

(i) subject to clause 7.2, the disposal of an asset, or a series of related assets;

(j) the grant of any guarantee or indemnity or a series of related guaranties or indemnities;

(k) the entry by the Company into credit facilities and/or the amendment of credit facilities;

(l) the entry into any commodity hedge transaction;

(m) distributions to Shareholders;

(n) any transaction between the Company and the Shareholder, a Related Party of a Shareholder or (save as expressly contemplated in section 5 of this agreement) any Director;

(o) the variation of any contract in a manner which, had that variation been incorporated in the contract at the outset, would have required approval in accordance with this clause 7.1.

7.2 Delegation: The Board, may from time to time delegate any matters and decisions relating to management of the Company to the Chairman and/or to the Chief Operating Officer.

There were no delegations in the JSAL management services contract, and no evidence that any had been granted in practice.

[104] Mr Sturgess pointed out that the JSAL management services contract, like that for Mr Dunphy, stated that the named individual would be referred to as executive chairman. This the Judge characterised as an obvious error; the operative provisions of the agreement correctly referred to Mr Sturgess acting as director and chief operating officer, while those in Mr Dunphy's agreement correctly referred to him as director and executive chairman. Further, the Judge found, Mr Sturgess

regularly reported to Mr Dunphy until 2010, and Mr Dunphy generally kept Mr Masfen informed of any significant developments or issues.[27]

[105] In this Court, Mr Geiringer maintained that Mr Sturgess owed no obligation to report to Mr Dunphy. He submitted that the Judge was wrong to infer from the company's practice that such obligation existed. Mr Sturgess reported rather to the Board, and he fulfilled that obligation.

[106] We reject this argument for the reasons given by the Judge. We add that under cl 5 of the management services contract JSAL was obliged to perform such services as the Board reasonably required, and to provide regular communication on the services as required by the Board. As Mr Farmer QC submitted, the relationship between the directors was such that management, Messrs Dunphy and Sturgess, would agree a position and the Board would support that, and this model only worked so long as Mr Sturgess, as chief operating officer, was first reporting to Mr Dunphy.

[107] We turn to the four findings of breach of reporting obligations which are challenged on appeal. They are known as Clarencia, Waimanu, Brotula and Turangi.

[108] We preface the discussion by placing it in context. These allegations are no longer said to sound in damages. They matter only because they contribute to the decision whether relief is warranted under s 174. As to that, we have agreed with the Judge that Mr Sturgess committed other and more significant wrongs, so the findings are now of marginal significance. They do not tell us anything about the form of relief, for Mr Sturgess now accepts that his relationship with the others is beyond repair and agrees that he will not again serve as a director or manager.

[109] Further, and to some extent for the same reasons, we do not attach significance to Mr Geiringer's complaint that some of the Judge's findings were not pursued clearly enough in the pleadings. Nor do we accept his submission that had Mr Sturgess realised the findings were at large he might have gone into the witness box. The allegations were signalled generally in the pleadings, and explicitly in the

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[27] At [120].

evidence. Mr Geiringer fairly acknowledged that Mr Sturgess understood the case against him when he chose not to give evidence.

Clarencia

[110] Clarencia-1A was a re-entry operation into an existing well in an onshore permit area situated on Tierra del Fuego. The permit is held in a joint venture, but Greymouth undertook the re-entry operation on a sole risk basis. The complaint was that without reporting to Mr Dunphy Mr Sturgess completed the well in a manner that left cement over the zones of interest. The cement was at a depth of 2,944 metres, and it had been placed there through the contractor's error. Had the Board been aware of the error at the time, it might have been remedied by drilling out the cement before the rig was removed from the site on 8 March 2010. Instead the cement was subsequently drilled out during a workover operation in 2012.

[111] The evidence was that Mr Sturgess advised Mr Dunphy that it was proposed to perforate the well liner casing at intervals from 2,951 to 2,956 metres to enable testing for hydrocarbons. Mr Sturgess subsequently learned that cement had been incorrectly set in the bottom section of the well, starting at 2,944 metres, meaning that it would have to be drilled out if the company were to perforate the well at the proposed interval. Mr Sturgess chose not to drill the cement out, but rather had the well perforated at a higher level. He did not discuss the decision with Mr Dunphy or tell him that the bottom section of the well had been cemented from 2,944 metres. The Judge found that the operation was of considerable importance to Greymouth and the decision to complete the well ought to have been discussed with Mr Dunphy.[28]

[112] On appeal, Mr Geiringer contended that the Judge's findings were unsustainable on the evidence. Relying on a drilling report of 1 March 2010, he contended that, contrary to the Judge's findings, the well was drilled out on 1 March to at least 2,967 metres. However, the evidence as a whole does not support that contention. It indicates rather that cement remained at 2,944 metres, so precluding exploration below that depth until, in 2012, a well was brought in to drill the cement

[28] At [174].

out; further, that Mr Sturgess knew the depth since he directed on 3 March that perforations be made at just above 2,944 metres. What matters for present purposes is that Mr Sturgess did not discuss the decision to complete the well in that manner with Mr Dunphy.

[113] For these reasons we are not persuaded that the Judge was wrong.

Waimanu

[114] The Judge recorded that the Waimanu-1 well is an exploration well situated within the perimeter of the New Plymouth Airport. Greymouth began to drill in 2009 and completed the well on 2 March 2010 at a depth of 5,662 metres, which is very deep for an onshore well. It represented a significant investment for Greymouth.

[115] The bottom 1,000-metre section of the well was cased with 4.5 inch steel liner pipe which needed to be cemented in place. That operation could have happened on 9 March 2010, and the leading personnel on site recommended to Mr Sturgess that it go ahead at that time. The evidence at trial was that a cement operation would likely have succeeded had it been attempted at that time. However, Mr Sturgess chose not to do it. He directed rather that the well be completed for testing. Before testing was undertaken the steel liner in the bottom 1000 metre section of the well collapsed.

[116] It has not been necessary for us to review the Judge's factual findings in detail. He did not accept that the failure was the result of negligence on Mr Sturgess's part; he found that the collapse may have happened for other reasons, notably that the liner pipe was substandard. However, the Judge found that Mr Sturgess ought to have reported fully to Mr Dunphy on the operational difficulties that occurred at the well and resulted in the collapse of the bottom section. Critical decisions had to be made at that time, but Mr Sturgess did not identify or discuss any options with Mr Dunphy or pass on the view of senior personnel on site that a cement operation ought to have been undertaken. Nor did he elaborate on the reasons for the failure that he reported to the Board on 31 March 2010.

[117] On appeal, Mr Geiringer contended that the Judge's findings were not the subject of any pleading. However, the 5309 plaintiffs alleged that he and JSAL "repeatedly failed or refused to report appropriately, honestly and accurately…on drilling activities, issues and decisions, and to obtain authorisation…for significant drilling and well intervention decisions, including as follows…". The pleading then offered the following particular: "failing or refusing to report adequately on the reasons for the collapse of the Waimanu-1 well." As noted earlier, the evidence clearly extended to pre-collapse behaviour, and counsel evidently appreciated that at trial, where it seems that no complaint was made about the pleading.

[118] In the circumstances, we do not accept that the Judge was precluded for pleading reasons from making the findings that are in issue now.

Brotula

[119] Brotula is a permit area in Chile in which Greymouth has made a very substantial investment to date and has committed to spend a great deal more. The cost of exploration is very high due to regulatory requirements and the hostile environment, and it is particularly important to ensure that all exploration wells are planned and implemented carefully, and that any promising zones are logged and tested appropriately.

[120] The Judge found that the Brotula TA-1 exploration well was planned to reach a depth of 4,215 metres and target, among other things, a formation known as G7.

[121] The 5309 plaintiffs alleged that Mr Sturgess negligently failed to electrically log the G7 zone, and negligently arranged for the well to be completed using substandard slotted liner pipe which prevented testing and logging operations. A claim for damages in relation to the well was eventually withdrawn because the well was subsequently abandoned for other reasons and Greymouth was able to claim on an insurance policy. The plaintiffs nonetheless continued to rely on Brotula in support of their application for relief, alleging not only that Mr Sturgess was negligent but also that he failed to report.

[122] The Judge was not satisfied that Mr Sturgess was negligent in failing to carrying out electric logging of the G7 zone; he was not persuaded that that was a practical option in the circumstances. He accepted that the well was completed using substandard liner pipe, but did not accept that Mr Sturgess negligently arranged that. He found, however, that the well was completed without first consulting Mr Dunphy; indeed, there was no real challenge to Mr Dunphy's evidence on the point. Mr Sturgess acted unilaterally, and did not tell Mr Dunphy what was happening. The Judge found that his reporting was inadequate.[29]

[123] Mr Geiringer contended that the Judge's findings are inexplicable, for he accepted that Mr Dunphy did give directions about how the well was to be completed, which demonstrates that he was consulted, and the evidence also shows that it was completed as Mr Dunphy directed. But that is to misinterpret what the Judge said. He found that Mr Dunphy requested testing but also that there was no real challenge to Mr Dunphy's evidence that he was not consulted about the completion. As Mr O'Brien submitted, the position taken on appeal also contradicts Mr Sturgess's stance at trial; there he argued that the well was suspended, not completed, so Board approval was not needed.

[124] For these reasons, we are not persuaded that the Judge was wrong.

Turangi

[125] The Judge recorded that the Turangi-2 well in Taranaki is one of Greymouth's primary producing wells. In mid-January 2011 it stopped producing because calcite had accumulated in the well, resulting in Greymouth being unable to meet contracted gas supplies to its major customer for an extended period. It was common ground that calcite accumulation in the well was expected and should have been managed through proper maintenance. The question was whether Mr Sturgess was responsible for the maintenance or whether it was the responsibility of an independent third party. As to that, the Judge found that Mr Sturgess was ultimately responsible for certain operations, which included testing the well and clearing an expected accumulation of calcite, but there was no evidence of industry practice

[29] At [320].

about the proper maintenance regime, nor that Mr Sturgess knew that the well was suffering from excessive build-up, which had happened only four months after the well had last been cleared. He was not persuaded that the failure of the well was caused by negligence on Mr Sturgess's part.[30]

[126] The Judge found, however, that Mr Sturgess inappropriately attempted to shift blame for the failure of the well after the event, claiming that a gas sales executive employed by Greymouth had been responsible.[31]

[127] On appeal, Mr Geiringer contended that the Judge's finding that Mr Sturgess attempted to shift blame was unfair. He emphasised that the Judge also found no evidence that Mr Sturgess knew of the need for maintenance, and submitted that Mr Sturgess can hardly be accused of trying to shift blame for something he knew nothing about.

[128] Mr O'Brien accepted that the Judge's reference to shifting blame can be misinterpreted, but contended that it is not a case of blaming Mr Sturgess for the failure of maintenance. Rather, the allegation of poor reporting concerns what Mr Sturgess did when he learned of the problem. The evidence showed that when asked why the well had failed he attempted to disavow all responsibility by inappropriately blaming the corporate gas sales team. The Judge took the matter no further than a finding that this conduct was neither constructive nor appropriate. We agree.

Findings of misconduct not appealed

[129] Mr Sturgess did not appeal all of the Judge's adverse findings. With respect to a number of specific complaints he simply denied that he was COO of the relevant company or was obliged to report to Mr Dunphy, but the Judge's findings went much further than that. The findings not appealed include: a failure to exercise reasonable care, skill and diligence in the preparation of a compulsory report for the Ministry of Economic Development for one operation (Kowhai);[32] negligent conduct and failing

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30 At [376].
31 At [378].
32 At [242].

to report in relation to two operations (Ohanga and Kaimiro);[33] evasive and misleading conduct and a failure to consult in authorising capital expenditure;[34] a disregard for fellow directors' views on related party dealings;[35] and a general readiness to ascribe responsibility to others when things went wrong.[36] These findings contributed to Gilbert J's view that Mr Sturgess's conduct was inexcusable and oppressive.[37]

Was the conduct of Mr Sturgess oppressive, unfairly discriminatory or unfairly prejudicial?

[130] Section 174(1) allows a shareholder (or other person on whom the constitution confers any of the rights and powers of a shareholder) to seek relief in the High Court on the ground that the affairs of a company have been, are being, or will likely be conducted in a manner that is "oppressive, unfairly discriminatory, or unfairly prejudicial" to that person in any capacity.

[131] The leading authority is still *Thomas v H W Thomas Ltd*, a 1984 judgment of this Court.[38] It was concerned with the substantially identical provision in the then Companies Act 1955. For the Court, Richardson J said:[39]

> The foundation of the jurisdiction under the recast provision is a complaint by a member of oppression, unfair discrimination or unfair prejudice to him in the conduct of the affairs of the company or in acts of the company. That is subs (1). Then subs (2) provides that on any such application the Court may grant the statutory relief where it considers it "just and equitable" to do so. If follows in my view that the considerations underlying the exercise of the just and equitable winding-up jurisdiction bear on the exercise of the jurisdiction under subs (2).
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> …
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> In employing the words "oppressive, unfairly discriminatory or unfairly prejudicial" Parliament has afforded petitioners a wider base on which to found a complaint. Taking the ordinary dictionary definition of the words from the Shorter Oxford English Dictionary: oppressive is "unjustly burdensome"; unfair is "not fair or equitable; unjust"; discriminate is 'to make or constitute a difference in or between; to differentiate"; and

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33 At [277]–[278], [286], [291], [335], [354] and [357].
34 At [386], [409], [412]–[413] and [417]–[418].
35 At [435].
36 At [444].
37 At [449]–[451].
38 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA).
39 At 693.

> prejudicial, "causing prejudice, detrimental, damaging (to rights, interests, etc)". I do not read the subsection as referring to three distinct alternatives which are to be considered separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under s 209. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company.

[132] Richardson J went on to explain that this approach harmonises the test under subsection (1) with the "just and equitable" standard for relief; it is the "unfairly detrimental" effect of the company's affairs upon the complaining member that justifies relief. He adopted the following passage from the speech of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*:[40]

> The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[133] Gilbert J found that, given the company's structure, it was possible for Mr Sturgess, as COO and representative of a minority group of shareholders, to conduct the affairs of the company oppressively, and further that his conduct was oppressive and prejudicial.

[134] On appeal Mr Geiringer initially submitted that: as a minority shareholder Mr Sturgess could not act in a manner amounting to oppressive, unfairly

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[40] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) at 379.

discriminatory, or unfairly prejudicial conduct vis-à-vis the majority; that as a mere independent contractor Mr Sturgess could not conduct the affairs of the company oppressively for purposes of s 174; that any errors of Mr Sturgess's were matters of business judgment; that errors of judgment cannot suffice; and, finally, that the section demands bad faith.

[135] In oral argument not all of these grounds were pursued. Mr Geiringer accepted that it is possible for a minority shareholder to behave in a manner that oppresses a majority. That is manifestly correct. The section provides that any shareholder may seek relief, so precluding what would amount to a presumption that a majority cannot invoke it.[41] In the ordinary way a majority shareholder controls the company's affairs itself through its command of the general meeting, but the legislation recognises that the locus of corporate power is a practical question of fact and law.[42]

[136] In this case, the Group 1 and 3 shareholders hold more than 75 per cent of the shares, but under Greymouth's constitution that does not empower them to pass ordinary or special resolutions, so their shareholding does not confer control of the company. Further, the company's governance is vested in the Board to an unusual extent and Mr Sturgess was a director, able under Greymouth's constitutional arrangements to veto Board decisions. Those arrangements permitted deadlock at shareholder and Board levels. Deadlock alone need not justify relief under s 174.[43] But Mr Sturgess was also JSAL's nominated COO under a management services contract that the Board could not terminate, and because he was a director the Board was substantially powerless to discipline any unauthorised conduct in his managerial capacity. (The agreement could be terminated for breach, but of course the Board would have to make that decision.) It is we think manifest that Mr Sturgess enjoyed the capacity, as a matter of fact and law, to behave in a manner that oppressed the majority shareholders.

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41 *Hogg v Shepherd* HC Auckland CIV-2002-404-1959, 3 September 2003.

42 Compare *Re Polyresins Pty Ltd* (1998) 28 ACSR 671 (QSC). See Christopher Hare "Shareholder remedies" in Peter Watts, Neil Campbell and Christopher Hare (eds) *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at 784.

43 *Hawkes v Cuddy (No 2)* [2009] EWCA Civ 291, [2009] 2 BCLC 427 at [108].

[137] Nor did we understand Mr Geiringer to argue seriously that, as a matter of construction, s 174 requires bad faith. The section requires actual or likely conduct that is "oppressive, unfairly discriminatory or unfairly prejudicial". That standard focuses on the conduct's effect upon the complaining shareholder and says nothing about the defendant's state of mind. No doubt bad faith often accompanies oppression or discrimination or prejudice and no doubt a court may find the defendant's state of mind relevant, but those premises do not in logic justify a conclusion that bad faith is a necessary condition of relief. As this Court has long emphasised, the legislature has created a broad and flexible remedy and care must be taken not to diminish it by reading additional requirements into the statutory language.[44]

[138] It follows that we also reject the submission that relief must be denied where the offending conduct may be characterised as an error of business judgment, made in what the defendant considered the best interests of the company. We acknowledge that in *Latimer* this Court stated that mere mismanagement and inefficiency will not sustain a remedy,[45] but it was merely emphasising the point that judges are wary of using s 174 to compensate shareholders for risks that are inherent in business. The Court approved of *Thomas*, in which this Court held after surveying the legislative history that Parliament created a broad and flexible remedy for conduct whose effect is unjustly detrimental upon a shareholder, whatever form that conduct may take, and further that the statutory standard should not be read restrictively;[46] unfairness requires a visible departure from the standards of fair dealing, assessed in light of the history and structure of the company and the expectations of its members.

[139] Mr Geiringer did maintain that only the directors and/or shareholders may conduct the affairs of the company oppressively, and that as a mere manager, and JSAL's agent at that, Mr Sturgess was in no position to do so. We reject this submission for the reasons given above, and emphasise that the remedy attaches where the "affairs" of the company have been "conducted" in a qualifying manner. These are terms of wide meaning, not confined to things that only directors and

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44 *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [113]; *Thomas*, above n 38, at 693.

45 *Latimer Holdings Ltd*, above n 44, at [70].

46 *Thomas*, above n 38, at 693–695.

shareholders may do. Further, Mr Sturgess was a director and it is artificial to separate his conduct as COO from that as director. He may not have vetoed any Board decisions, but he attended the Board in both capacities, and what he knew in his capacity as COO he also knew qua director. As COO he was able to deny Mr Dunphy and the Board information they needed for decisions that were theirs to make. It is settled law that sins of omission may justify relief under s 174.[47]

[140] Mr Geiringer also emphasised that the management services contract was never formally extended to the special purpose companies. The point being made here, as we understand it, was that if Mr Sturgess did act as COO he could be summarily removed. However, that would require a Board decision, which he could veto. We record that Mr Geiringer accepted that veto rights in the shareholder agreement and constitution extended to the special purpose companies.

[141] We have not been persuaded that the Judge erred in his critical findings about Mr Sturgess's conduct. That conduct breached the expectations of the three directors about the co-operative manner in which they would do business together, it breached the shareholder's agreement by excluding Mr Dunphy and the Board from involvement in significant management decisions which were the Board's to make, and in some instances it caused the company loss.

[142] Of these wrongs the breach of expectations is for present purposes the most significant. Greymouth is a tightly held company which can fairly be described as a joint venture or quasi-partnership among three men. Its governing documents assume that they would work closely together, with Messrs Dunphy and Sturgess both in executive capacities. The shareholder's agreement obliged the shareholders to use all their powers to further the company's objectives of carrying on business in oil and gas exploration and production, and ensuring that "all matters and decisions relating to management of the Company are decided by the Board …".[48] The agreements assume a high level of mutual commitment to those objectives, if it were otherwise, the parties would not have vested management in a Board any one of whose members might veto management decisions. Mr Sturgess breached both the

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47 Hare, above n 42, at 788.
48 Clauses 2.1, 3.1, 7.1.

letter and the spirit of the shareholder agreement. If it were necessary to do so, and it is not, we would hold that he acted in a manner that equity would regard as contrary to good faith.[49]

[143] For these reasons we are satisfied that Mr Sturgess's conduct was oppressive and unfairly prejudicial toward the Group 1 and 3 shareholders.

[144] We accept, as Mr Skelton submitted, that relief does not follow automatically from a finding of oppression; under s 174(2) the court has a discretion and relief will be granted only if the court finds it just and equitable to do so. But of course relief will often be just and equitable where oppression has been made out; wrong and remedy are closely linked. The "just and equitable" standard allows the court to "subject the exercise of legal rights to equitable considerations; that is, of a personal character arising between one individual and another….".[50]

[145] However, we did not understand Mr Geiringer to dispute that if the Judge's findings were upheld, relief against Mr Sturgess under s 174(2) was warranted in the exercise of the Court's discretion. We think it manifest that relief was and is warranted as against Mr Sturgess. The Judge has found that his conduct destroyed the others' trust and confidence in him, and as we said at the outset the co-operation that the agreements require of the three men is now beyond them. Indeed, there is no real dispute about that.

RELIEF

Winding up

[146] For the reasons just given, Mr Sturgess's attempt to have the company wound up under s 241 on just and equitable grounds is misguided.[51] As the Court noted in Thomas,[52] that remedy affords some protection for minority shareholders against the

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49 *O'Neill v Phillips* [1999] 1 WLR 1092 (HL) at 1099 per Lord Hoffmann. See Matthew Berkahn and Susan Watson "The Unfair Prejudice Remedy" in John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) 589 at 608.

50 *Westbourne Galleries Ltd*, above n 40, at 379.

51 We note that winding up is also an available remedy under s 174 but Mr Sturgess abandoned an application under that section.

52 *Thomas*, above n 34, at 690.

domination of a company's controllers. But this is not such a case. And as Richardson J went on to say, winding up is a blunt and drastic remedy. It might prove necessary under s 174, even in Greymouth's circumstances, were there no other way to allow the Group 2 shareholders to exit at fair value.[53] But for the reasons discussed below, it appears still that exit can be achieved in other ways. To order a winding up at this stage would be to force the major shareholders to face the breakup of a solvent and successful business or buy Group 2 out on Mr Sturgess's terms, so affording him a degree of leverage for which he has advanced no sufficient justification.

Relief under s 174(2)

[147] If the court considers it just and equitable to do so, it may make such order as it thinks fit. The section goes on to give examples, which include an order requiring the company or any other person to buy shares (a buyout order) and an order putting the company into liquidation. As those examples show, relief may allow or force shareholders to exit.

[148] Wrong and remedy are closely linked. As Richardson J put it in *Thomas*,[54] it is the unfairly detrimental effect of the conduct on the complaining member that brings the remedy into play. The remedy responds to that detriment, and the court acts for remedial, not punitive, purposes. The most common remedy is a buyout order,[55] presumably because the cases usually involve tightly held companies or quasi-partnerships in which the members can no longer do business together. When fixing the price the court will adopt a valuation methodology designed to achieve fair market value, which is normally defined as the price that an informed buyer would pay.[56] It assumes no discount for minority status.[57]

[149] The parties here agree that fair value is the appropriate measure. The shareholder agreement provides an appropriate methodology. As noted earlier (at

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53 Berkahn and Watson, above n 49, at 623.
54 At 694.
55 Hare, above n 42, at 819; *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] BCC 85 at [75].
56 *Lusk v Archive Security Ltd* (1991) 5 NZCLC ¶96-452 (HC) at 66,994.
57 *Fong v Wong* [2010] NZSC 152, (2010) 20 PRNZ 250 at [5]. Non-defaulting shareholders are defined to exclude related parties of the defaulter, so that, for example, as a defaulter Mr Sturgess could not offer his shares to Jet.

[49]), it provides that where shareholders want to sell, or a defaulting shareholder must sell, a prescribed sale process must be followed. The selling shareholder gives, or the defaulting shareholder is deemed to have given, a sale notice. Where sale is voluntary, the seller may specify the price that it wants, but a defaulter is deemed to have offered its shares to the non-defaulting shareholders at fair value. Clause 13.1 provides:

> Consequences: Subject to completion of the process referred to in clause 14 (to the extent applicable), if any Event of Default occurs in respect of a Shareholder (the "Defaulting Shareholder") the Non-Defaulting Shareholders may, while that Event of Default continues, by notice in writing to the Defaulting Shareholder require that the Defaulting Shareholder transfer all of its Shares to the Non-Defaulting Shareholders, whereupon the Defaulting Shareholder shall be deemed to have given a Sale Notice offering to transfer all of its Shares to the Non-Defaulting Shareholders at Fair Value, and clauses 8.3 to 8.5 (but not clause 8.6) shall, with the necessary modifications, apply.

[150] Fair Value is defined in cl 1.3. It means the fair market value determined by agreement or by an independent arbitrator, and states that the fair market value of an exiting shareholder's interest comprises its proportion of the fair market value of all of the shares in the company, with neither discount nor premium for control:

> Fair Value: If it is necessary for any purpose of this agreement to determine the fair market value of the Shares:
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> (a) all Shareholders shall, for a period of 10 Working Days after on Shareholder gives notice to the other Shareholders requiring the other Shareholders to do so, endeavour to agree on the fair market value of Shares;
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> (b) if the Shareholders do not agree on the fair market value of Shares within the period of 10 Working Days referred to in clause 1.3(a), the fair market value shall be determined by an independent valuer agreed upon by the Shareholders, or failing agreement within five Working Days after the end of that period, appointed on the application of any Shareholder by the president for the time being of the institute of Chartered Accountants of New Zealand or his or her nominee;
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> (c) the person appointed as valuer under clause 1.3(b) shall:
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> (i) act as an arbitrator in accordance with the provisions of the Arbitration Act 1996;
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> (ii) determine the fair market value of the Shares as soon as possible, which valuation shall be conclusive;

(d) in determining the fair market value of the Shares, the valuer shall determine the fair market value of all of the Shares in the Company, and shall then determine the fair market value of the Shares in question as the appropriate percentage of the value of all Shares, so that no regard shall be had to the control of the Company, or to any premium for control or discount for lack of control;

(e) the Shareholders shall promptly and openly make available to the valuer all information in their possession or under their control relating to the Company to enable the valuer to proceed with the valuation on an informed basis as to the financial position, affairs, performance, and prospects of the Company; and

(f) the fees and expenses of the valuer shall be paid by all Shareholders in proportion to their holdings of Shares, or in such other manner as the valuer may determine.

[151] It appears, and appellants' counsel did not suggest otherwise, that where a defaulter is deemed to have given a sale notice the non-defaulting shareholders may by notice accept the deemed offer under cl 8.3, which strictly deals with pre-emptive rights *within* shareholding groups but is deemed under cl 13.1 to apply to defaulting and non-defaulting shareholders:

> Acceptance of Sale Notice: The recipients of the Sale Notice under clause 8.2 ("Relevant Shareholders(s)") may not later than the date 10 Working Days after giving of the Sale Notice ("Acceptance Date"), give notice to the Seller that the Relevant Shareholder wishes (or Relevant Shareholders wish) to acquire the Sale Interest on the terms specified in the Sale Notice.

That being so, the non-defaulting shareholders are not obliged to buy at the Fair Value determined by the arbitrator.

[152] If the non-defaulting shareholders do not buy the shares at Fair Value under the deemed sale notice by giving notice under cl 8.3, the selling shareholder may offer its shares to anyone else, and in that case all shareholders must provide such assistance as is within its power and reasonable to ask. Clause 8.9 provides:

> Sale to third parties: If no notice is given to the Seller pursuant to, and within the time specified in, clause 8.3 or clause 8.6 (as applicable), the Seller may, subject to clauses 8.10, 8.13 and 9.1 within 60 Working Days of the date of the Sale Notice, transfer the Sale Interest to any other person for a price not less than, and on terms and conditions no more favourable than, specified in the Sale Notice. For the purpose of this clause 8.9, each Shareholder shall provide such assistance as is within its power and as may reasonably be required by the Seller for the purposes of enabling the Seller to solicit offers for the Sale Interest including:

(a) allowing prospective purchasers and their advisers to carry out reasonable due diligence enquiries;

(b) allowing the Seller, at the Seller's own cost, to complete any offering or sale document (including any information memorandum); and

(c) enabling completion of any such sale to take place.

[153] Clause 8.10 provides that if other shareholders elect not to buy at Fair Value and the defaulter "proposes to sell … at a price, or on terms and conditions more favourable than" those specified in the sale notice, the provisions of cl 8.1 to 8.10 apply again, meaning that the shares must first be offered again to the non-defaulting shareholders on the new terms:

> Clause to apply again: If the Seller proposes to sell, transfer, or otherwise dispose of the Sale Interest outside the period referred to in clause 8.9, or at a price, or on terms and conditions more favourable than, specified in the Sale Notice, clauses 8.1 to 8.10 shall again apply.

[154] Several points may be made about these provisions. First, they record the parties' agreement that Fair Value as determined by an arbitrator is the appropriate price at which a defaulter may be required to sell and a non-defaulter may exercise a right to buy.

[155] Second, they do not appear to insist that a defaulter must offer its shares to the non-defaulters at a lower price if no one can be found to purchase them at that Fair Value. In that case, the defaulter may remain a shareholder. Fair value, in other words, is fair for both the vendor who must sell and the purchaser who wants to buy.

[156] Third, they do not apply directly to a sale ordered by the Court under s 174. Under the agreement, a defaulter is forced to offer its shares at Fair Value only if it has committed an event of default as defined, and such default continues, and the non-defaulters have by notice required that the defaulter transfer its shares to them. Relief under s 174 does not depend on these things, nor did we understand the Dunphy and Masfen interests to suggest that they have given the necessary notices under cls 13.1 and 8.3.

Relief in this case

[157] At trial the Group 2 shareholders were ultimately willing to sell at fair value, but as noted earlier their stance changed on appeal. Mr Geiringer contended that sale is unnecessary, for Mr Sturgess will not again serve as manager or director. Should we reject that submission, he invited us to vary the remedy so that a third party may buy the shares free of pre-emptive rights or, in the alternative, the other shareholders or Greymouth must buy them at the fair value fixed by the arbitrator. Mr Skelton contended that no wrong was proved against Jet and the Judge offered no justification for ordering it to sell. He argued that the arbitration is unlikely to establish fair value, for the arbitrator may not attach sufficient value to the anticipated proving up and development of the company's Chilean assets. In the alternative, he too sought an order that Greymouth buy at fair market value. Although the arbitration was established by agreement, he invited us at the hearing to put a stop to it, urging us to accept that Mr Sturgess lacks the resources to pay counsel or necessary experts. We declined the invitation.

[158] Following the hearing we issued a minute dated 28 March 2014, indicating that the decision-making process would proceed in stages:

(a) A judgment would be issued dealing with all issues raised by the appeals other than orders 1 and 3 (which relate to the sale of the Sturgess interests' shares)

(b) The Court would then await the result of the arbitration. Should the parties still require the Court's assistance, they could address the Court on the outcome they seek in relation to orders 1 and 3.

(c) A final judgment would be issued if necessary.

[159] We ordered a stay of execution in respect of orders 1 and 3 made in the High Court. All other High Court orders remained unaffected and there was no impediment to the arbitration.

[160] By minute of 9 June 2014 we suggested that we might instead deal with all matters, including orders 1 and 3, without awaiting the arbitration, and invited counsel's submissions on that process. Counsel were not agreed; the Dunphy/Masfen interests adopted our suggestion, pointing out that leave would be reserved to apply, but the Sturgess interests opposed. Counsel also advised that an award was expected by 24 June 2014.

[161] We have chosen to adhere to the procedure we first proposed, dealing with everything except the form of relief with respect to orders 1 and 3. It follows that we must first decide whether the Judge was right to order sale of the Group 2 shares in the circumstances as they were at trial. The next question, which we will consider if necessary later, on receipt of further submissions on orders 1 and 3, is whether in light of subsequent events the Group 2 shareholders should still be forced to sell.

[162] Two questions now fall for decision:

(a) whether it was appropriate to grant a remedy that affected Jet, and not Mr Sturgess alone; and

(b) whether sale of Group 2 shares was the appropriate response to the oppression at the time of the High Court decision.

Was it appropriate to grant relief that extended to Jet?

[163] Mr Skelton contended that Gilbert J failed to distinguish Jet from Mr Sturgess, inappropriately granting relief against it although it had done no wrong and wishes to remain a passive shareholder. He emphasised that the 5309 plaintiffs had pleaded that it had breached its obligations under the shareholder agreement, alienated itself from the other shareholders and undermined the trust needed for ongoing association, yet the judgment contains no finding that it conducted the company's affairs oppressively.

[164] These submissions need to be set in context. As the respondents submit, the Judge was plainly conscious of Jet and took the approach that he did because no distinction was drawn between Jet and Mr Sturgess at trial. It was suggested in

closing that Jet had not failed to exercise the reasonable endeavours required of it under the shareholder agreement, but Mr Skelton conceded that Jet had not sought to remain a shareholder. Jet and Mr Sturgess filed joint pleadings which agreed that a trust and confidence between the directors had broken down irreconcilably, that the company was unable to operate efficiently, and that the company had become dysfunctional. Mr Skelton represented them both at trial, where they were routinely described as "the Sturgess interests".

[165] Further, as we explained at the outset Jet is a corporate trustee for Sturgess family trusts. The beneficiaries are Mr Sturgess, his wife Andrea Sturgess and their children. Mr and Mrs Sturgess are Jet's shareholders as to 50 per cent each, and until just before the hearing before us they were both directors. He resigned his office on 7 February 2014, for no apparent reason other than to give the impression that Jet is independent of him. As a matter of form Mr Sturgess was the Group 2 nominee on the Board, but as a matter of substance Jet was the vehicle through which he chose to structure his interest in Greymouth.

[166] These matters presumably explain why nothing significant was made of Jet's separate legal personality at trial, and why Gilbert J did not expressly address the allegations that Jet had breached the shareholder agreement.

[167] The respondents invited us to address them here, having filed a notice of intention to support the judgment on other grounds. Mr O'Brien argued that Jet must have known of Mr Sturgess's actions throughout and could have removed him as a director, but it did nothing; that being so, it breached its obligation to use all reasonable endeavours to ensure that he took all reasonable steps to pursue the intentions expressed in cls 3 and 7 of the shareholder agreement.

[168] It seems likely that Jet breached the shareholder agreement by doing nothing over a significant period to ensure that Mr Sturgess reported to the Board, so denying the Board the ability to make management decisions reserved to it under cl 7. For reasons given earlier, that conduct engaged him as director as well as manager. We are not persuaded that his negligence qua manager (as in the Radnor and Midhurst

examples) falls into the same category; he seems to have acted in what he saw as Greymouth's interests.

[169] However, we need not make any such finding. The order requiring Jet to sell did not require finding that it had conducted the company's affairs, let alone that it had done so oppressively. As Mr O'Brien submitted, Jet's close association with Mr Sturgess and the absence of any indication that it had sought to restrain his behaviour provided sufficient reason to treat it in the same way as Mr Sturgess. In our opinion the Judge was correct to draw no distinction between them for purposes of remedy.

Was the sale of Group 2 shares appropriate?

[170] As we mentioned in the introduction, Gilbert J assumed that Mr Sturgess would remain a director, and based his conclusions on his finding that the Board was dysfunctional and counsel's advice that the Group 2 shareholders were willing to sell at fair value. The question we must now answer is whether sale of Group 2 shares was the appropriate remedy when Mr Sturgess will no longer serve as a director or manager.

[171] The appellants[58] argued that the test is whether relief is necessary to respond to the oppression and the sale order fails that test for a number of reasons: the oppression happened at operational not shareholder level; the management services contract has been cancelled, and a new director has been appointed by the President of the Institute of Directors; there is no evidence of conflict on the Board since that appointment was made; shareholders have very limited powers under the constitution so there is limited potential for conflict; and Gilbert J ordered that the deadlock provision may not be used without leave. Mr Geiringer added that Mr Sturgess has lost his career and should not lose his shareholding as well.

[172] There is very limited authority for the proposition that a court should do as

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[58] Most of the arguments which we address here were advanced by Mr Skelton, whose submissions on relief Mr Geiringer generally adopted.

little as necessary to address the offending behaviour.[59] Mr Skelton cited *Jordan v Chemical Specialties Ltd*, in which Morris J held that the Court should be wary of intervening in management to any extent greater than strictly necessary.[60] Of course the court will consider whether the company's conduct can be so regulated in future as to prevent further oppression. Section 174(2) gives examples of orders of that kind. But to adopt a principle that the court should restrict itself to restraining the conduct would be to circumscribe the remedy.[61] The court assesses oppression by reference to shareholders' reasonable expectations and interests, which may dictate that they should not continue in business together. It will also be wary of assuming a supervisory role, which might involve it in matters of business judgement. As noted above, a buyout order is the most common remedy, and if that is not possible the court may opt for liquidation.

[173] Like Gilbert J, we are not persuaded that removing Mr Sturgess as manager and director is a satisfactory solution, although it does mitigate concern.[62] We observe the absence of conflict on the Board since he departed, but more important are the opportunities for conflict that would exist after the dust of litigation settled. As to that, the shareholder agreement positively obliges each shareholder to pursue the company's business by, among other things, using reasonable endeavours to ensure their nominee directors behave accordingly. It further provides that directors may act in the interests of the shareholders who nominated them even if those interests conflict with Greymouth's[63] and each director retains the capacity to veto Board decisions. These provisions continue to affect the Group 2 director; an independent third party nominated him, but he is not an independent director. So far as Group 2 interests are concerned, our attention was drawn to no meaningful difference between Mr Sturgess and Jet. Faced with these provisions, we cannot accept Mr Skelton's characterisation of the Group 2 shareholders as "passive".

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59 *Jordan v Chemical Specialities Ltd* (1999) 8 NZCLC ¶96-788 (HC); *Johnson v Sneyd* HC Wellington CIV-2004-435-84, 7 December 2005; *Re Enterprise Goldmines NL* (1991) 3 ACSR 531 (WASC).

60 At 261,848.

61 *Latimer Holdings Ltd*, above n 44, at [112]–[113].

62 First High Court judgment, above n 2, at [461].

63 Clause 2.2.

[174] Conflict among shareholders about the company's future direction seems likely, especially so long as the sale of Group 2 shares is a commercial possibility, as it manifestly is; indeed, this litigation can now be seen as positional bargaining over the terms of exit. We were given to understand that there is already disagreement among shareholders over dividend policy; counsel complained of being starved of funds for the arbitration. We observe too that although the agreement limits the direct governance powers of shareholders, those powers do extend to the creation of subsidiaries, any investment in subsidiaries, and the making of any distribution (excluding profits).

[175] For these reasons we are not persuaded that the Judge erred by granting relief which extended to the sale of Group 2 shares. As previously indicated, it remains to be decided whether the orders he made are still appropriate.

Process for addressing the orders for sale

[176] Orders 1 and 3 provide:

> 1. The first defendant (Jet Trustees Limited) and the second defendant (Mr John Gilbert Sturgess) (together and separately "the Sturgess interests") shall sell their shares ("the shares") in Greymouth Petroleum Holdings Limited (GPHL") and in or in respect of all other companies and related entities owned legally or beneficially by the shareholders of GPHL (together an separately "the Greymouth Group"), being in aggregate 13.856 per cent of the total of shares issued by those companies, at the fair market value ("the FMV") determined by the arbitration ("the arbitration") currently being undertaken by the parties to the 5309 proceeding and on such other terms or at such other price as might otherwise be agreed in accordance with clause 8 of the parties' Shareholder Agreement.
>
> …
>
> 3. If no sale of the shares has been effected prior to the commencement of the FMV arbitration hearing, the Sturgess interests must, within 10 working days following the determination of FMV, give a sale notice offering to transfer the shares to GPHL (for itself and as agent for all Greymouth Group companies and related entities) at FMV and clauses 8.5 to 8.10 and 8.12 of the Shareholder Agreement shall apply as appropriate with the necessary modifications.

[177] We make several points about these orders. First, the time is now past when the Group 2 shareholders might sell their shares freely before the arbitration. Rather, they must now offer them to Greymouth.

[178] Second, the offer must be made at the arbitrated fair market value.

[179] Third, Greymouth need not buy the Group 2 shares. Rather, the orders envisage that cls 8.5 to 8.10 of the shareholder agreement apply. As noted above, those provisions appear to envisage that the offeree shareholders need not buy at fair market value, and in that case the offeror shareholder need not sell. If it proposes to sell, it may offer the shares to the market at the same price. If it proposes to sell at a lower price or on more favourable terms, the pre-emptive rights again apply.

[180] As previously indicated, the question which remains for further argument and decision, if necessary, is whether these orders are still appropriate.

Decision

[181] The form of relief in relation to orders 1 and 3 is reserved for further argument. A short timetable will be fixed by minute accompanying this judgment. Subject to that, the appeals are dismissed. The cross-appeals are dismissed.

[182] Leave is reserved to apply.

Costs

[183] Costs are reserved.

Solicitors:
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