IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2016-425-000056
[2016] NZHC 2097

IN THE MATTER	of Peregrine Wines Limited
BETWEEN	GREGORY JAMES HAY AND KIM EDWARD HOLLOWS Plaintiffs
AND	PEREGRINE ESTATE LIMITED Defendant

Hearing: 24 August 2016

Appearances: N H Soper for Plaintiffs
T J Shiels QC and C S Gardner for Defendant

Judgment: 5 September 2016

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Introduction

[1] The plaintiffs (the trustees of the Greg Hay Family Trust) and the defendant (PEL) are the shareholders in Peregrine Wines Limited (PWL). The trustees own 25.14 per cent of the shares, PEL 74.86 per cent. The first-named trustee, Mr G J Hay, is a director. Mr L L McLachlan, the sole director of the defendant, is another director of Peregrine Wines Limited.

[2] In March 2013 Mr Hay approached Mr McLachlan advising that the trustees wished to sell their shareholding, and invited him to make an offer on behalf of PEL to buy them. Mr McLachlan, on behalf of PEL, offered to purchase the shares for $1,568,000.

[3] This was not acceptable to the trustees, so they decided to invoke clause 11 of the constitution which provided a procedure for the sale of shares by one shareholder to another. Mr McLachlan was not prepared to pay the Trust's nominated selling

price of $3,250,000, but confirmed that PEL would buy the shares at "fair value" to be fixed in accordance with clause 11.4. A valuer was duly appointed to assess fair value. In due course she indicated a valuation range of $2,580,000 to $2,650,000, and fixed fair value in the sum of $2,620,000.

[4] PEL declined to complete a purchase at this figure and engaged its own adviser to assess fair value. He produced "an assessment of value" of $1,275,000.[1]

[5] The trustees seek specific performance by way of summary judgment of PEL's contractual obligation to buy the shares at the fair value fixed under clause 11.4.

Summary judgment

[6] Under r 12.2 of the High Court Rules the Court may give judgment against a defendant on a summary basis if a plaintiff satisfies the Court that the defendant does not have a defence to a cause of action in the statement of claim on which a plaintiff relies. The onus of establishing this position rests on the plaintiff.[2] The classic exposition of this principle is in *Auckett v Falvey*:[3]

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

The constitution and the share valuation

[7] Clause 11 of the constitution provides:

> **11. RESTRICTION UPON TRANSFER OF SHARES**
>
> **Objects of clause**
>
> **11.1.** (1) Clauses 11.1 to 11.11 govern the sale of shares by and between shareholders of the company.

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1 This quote is from paragraph 43 of his written valuation dated 13 June 2016.
2 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
3 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986 at 2.

(2) Clauses 11.1 to 11.11 must be given a fair, large, and liberal interpretation so as to best attain the following objects –

(a) If any shareholder, manager, protection attorney, or trustee in bankruptcy, or personal representative of any shareholder, desires to sell or to transfer any of the shares which are held by him or her, then he or she must first offer them for sale to the existing shareholders in accordance with clauses 11.1 to 11.11; and

(b) Any shares offered in accordance with paragraph (a) must be sold –

(i) At the price fixed by the seller in accordance with clause 11.2(2)(a); or

(ii) At the "fair value" of the shares as fixed by the expert in accordance with clause 11.4; and

(c) Any offer to sell made as provided in this clause may be withdrawn by the seller if the "fair value" as fixed by the expert in accordance with clause 11.4 is not acceptable to the seller.

Notice of desire to sell

11.2. (1) Except where the transfer is made pursuant to clauses 11.10 or 11.11, every shareholder, manager, protection attorney, trustee in bankruptcy, or personal representative of a shareholder, who desires to sell or to transfer any shares of the shareholder ("the proposing transferor") must give notice in writing ("a transfer notice") to the company that he or she desires to transfer the shares.

(2) The transfer notice –

(a) Must specify the sum which he or she considers to be the value of the shares; and

(b) Must (subject as is hereinafter provided) constitute the company his or her agent for the sale of shares to any other shareholders of the company (or to any other person nominated by the board) at the sum so specified or (at the option of the purchaser) at the fair value to be fixed in accordance with clause 11.4.

Offer to shareholders

11.3. (1) The board must (immediately upon receipt of the transfer notice) send to each of the shareholders of the company (other than the proposing transferor) a notice which –

(a) Advises him or her of the number of shares for sale; and

(b) The asking price for the shares, being the sum specified in the Transfer Notice; and

(c) Names a day (being 28 days after the receipt by the company of the transfer notice) on which the right to acquire all or any of the shares if not already exercised is deemed to be declined.

Allocation

(2) After the receipt of replies from all shareholders or the expiry of the said period of 28 days (whichever is the earlier), the shares must be allocated to those shareholders who are willing to purchase the shares at the asking price and, if more than one, then in proportion to their existing shareholding in that class.

(3) Subject to clause 11.4(1) if no shareholder is willing to take all or any of the shares, then the shares which are not purchased by the shareholders must be allocated by the board to persons (selected by the board) who are willing to purchase them.

Fixing of "fair value"

11.4. (1) Notwithstanding clause 11.3(3), if no shareholder is willing to take all or any of the shares at the asking price specified by the proposing transferor but there is a shareholder who is prepared to purchase the shares or the balance of the shares at a lesser figure than the asking price, then the fair value must be fixed on the application of either party –

(a) By a person ("the expert") to be nominated by the President of the New Zealand Institute of Accountants; or

(b) If for any reason that president fails to make a nomination, then by a person ("the expert") to be nominated by the President of the Arbitrators' and Mediators' Institute of New Zealand Inc.

(2) The expert (when nominated and in certifying the sum which in the expert's opinion is the fair value of the shares) is an expert and not an arbitrator.

(3) Accordingly the Arbitration Act 1996 does not apply.

(4) The value fixed by the expert is the "fair value".

Part acceptance not effective

11.5. (1) The offer of the proposing transferor may consist of all or part of the shares in the company which are held by him or her.

(2) If the transfer notice includes several shares –

(a) The proposing transferor need not sell or transfer part only of the shares specified in the transfer notice; and

(b) The proposing transferor may revoke the said notice unless it is accepted in respect of all the shares which are offered by him or her.

Seller can withdraw

11.6. (1) If the fair value fixed by the expert in accordance with clause 11.4 is less than the sum specified by the proposing transferor in his or her transfer notice as the sum which he or she considers to be the value of the shares, then the proposing transferor may (at any time before the expiration of 14 days after the date on which the proposing transferor received notice of the fair value fixed by the expert) revoke the transfer notice which was given by him or her.

(2) If the proposing transferor fails to revoke the transfer notice within the specified time, then it remains in full force and effect and the proposing transferor is bound by it.

(3) Except as provided in this clause, the transfer notice is revocable only by resolution of the board.

(4) If the fair value fixed by the expert is higher than the asking price specified by the proposing transferor in his or her transfer notice, then the proposing transferee is bound to purchase the shares (or the balance of the shares) at the asking price specified by the proposing transferor.

Settlement

(5) Within 14 days after the board has allocated the shares (if at the price stated by the proposing transferor), or within 14 days after the expiry of the period within which the proposing transferor may revoke the transfer notice (if at the fair value fixed by the expert), whichever occurs later –

(a) The purchasers must tender the price of the shares to the proposing transferor; and

(b) The proposing transferor must tender in return to the purchaser the signed share transfer and the relative share certificate.

[8] I have omitted the provisions which apply if a proposing transferor does not transfer the shares in question, the seller's rights if there is no buyer, and provisions relating to bankruptcy of a shareholder, as none of these are relevant.

[9] It is common ground that PEL, in terms of clause 11, is a shareholder which is willing to take all of the shares on offer by the trustees, though not at the trustees' asking price, and that clauses 11.4, 11.5 and 11.6 are therefore applicable. Pursuant to clause 11.4 the president of the New Zealand Institute of Accountants nominated Ms Julie Millar of BDO in Christchurch as the expert to fix the fair value of the Trust's shares in accordance with that clause. She produced a valuation dated 18 December 2015, in which she concludes:

> The value of the 25.14 per cent stake held by [the Trust] is assessed to be in a range from $2.58m to $2.65m as at 30 June 2015, with a midpoint of $2.62m.

[10] For completeness I record that on 5 January 2009 the then shareholders of Peregrine Wines Limited (then called Peregrine Wines Central Otago Limited) executed a shareholders' agreement. The Trust owned shares at that time; Mr McLachlan and other entities owned shares also through a shareholder called Lamont Holdings Limited. There is brief reference to this document in the evidence, but I find it of relevance only to the extent that it provides in clause 4 that unless all the parties agree otherwise no party will sell or transfer shares to another party except on the terms contained in the constitution.

Section 149 Companies Act 1983

[11] This section applies to the transfer of shares in issue and provides, to the extent relevant:

149 Restrictions on share dealing by directors

(1) If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other financial products issued by the company or a related company, the director may acquire or dispose of those shares or financial products only if, -

(a) In the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or financial products; or

(b) In the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or financial products.

(2) For the purposes of subsection (1) of this section, the fair value of shares or financial products is to be determined on the basis of all information known to the director or publicly available at the time.

…

(4) Where a director acquires shares or financial products in contravention of subsection (1)(a), the director is liable to the person from whom the shares or financial products were acquired for the amount by which the fair value of the shares or financial products exceeds the amount paid by the director.

(5) Where a director disposes of shares or financial products in contravention of subsection (1)(b), the director is liable to the person to whom the shares or financial products were disposed of for the amount by which the consideration received by the director exceeds the fair value of the shares or financial products.

…

[12] This section was discussed at length by the Court of Appeal in *Thexton v Thexton*.[4] The facts, briefly, were that a father had agreed to sell his shares in a company to his son at an agreed price of $250,000. It was common ground that at the time, the fair value of the shares was $790,000. After the father died his widow instituted proceedings under s 149(4). The Court discussed the origins of the section in various reports directed to the abuse of insider trading. It then referred in detail to the section:

> [13] Section 149(1) proceeds in two steps. The first may be restated in the form of a question to be answered at the time the deal (acquisition or disposition) is agreed on:
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> > Has the director information in his or her capacity as a director … being information that would not otherwise be available to him or her, but

[4] *Thexton v Thexton* [2002] 1 NZLR 780 (CA).

> which is information material to an assessment of the value of shares … issued by the company?

If the answer is "Yes", then the second step, the consequence of that answer, is that the director may acquire or dispose of the shares only if the consideration given or received, as the case may be, is not less than or not more than the fair value of the shares.

[14] Three conclusions follow from that analysis of s 149(1). The first concerns the availability of information relevant to value. If such information is publicly available but the director also has it in his or her capacity as a director, the answer to the question posed is "No". That is because the information is available to the director otherwise than through his or her position with the company. But the mere fact that a director is willing to disclose confidential information to someone else cannot mean that the information is available to him or her, i.e. the director, otherwise than in his or her capacity as a director. If a director has confidential information it does not matter whether the director discloses that information to the other party. Nor does it matter whether the other party has or has access to that information, except where it is publicly available in which event it will not, of course, be confidential. In short, the statutory control is based on the possession by the director of the information, rather than on its disclosure by the director.

[15] The second conclusion is that information does not cease to be "material to an assessment of the value of shares" once disclosed by a director to a prospective buyer or seller of the shares. The relevant materiality is to an assessment of the value of the shares, which is not the same thing as the ultimate agreed price. Even if the information is disclosed, it is still material as affecting the price willing but not anxious buyers and sellers would consider fair. To put it another way, the price will change depending on whether or not they both have that information.

[16] The third conclusion which follows from the two stage analysis of s 149(1) is that, if the question at the first stage is answered "Yes", the consequence is that the director may only buy or sell at fair value (or above fair value if buying and below fair value if selling). Neither disclosure to the other party nor the agreement of the other party can avoid that consequence.

[17] We turn next to s 149(2). It is directed to the determination of fair value for the purposes of s 149(1). Clearly, both sections must be read together. Section 149(2) reinforces the interpretation of s 149(1) looked at on its own. Section 149(2) requires the fair value of shares "to be determined on the basis of all information known to the director or publicly available at the time". There is no qualification or exception where the director has disclosed all or any information to the prospective buyer or seller of the shares. In its terms the subsection implements the abstain or pay fair value premise underlying s 149(1).

[18] Section 149(4) and (5) similarly reflect the abstain or pay fair value premise. Where a director buys or sells shares in contravention of para (a) or para (b) of subs (1), the director is liable to the other party for the amount of the difference between the consideration given or received as the case may be and the fair value. In that objective assessment neither disclosure by the

> director to the other party nor the information available to the other party is a factor relevant to the quantification of the ensuing liability to pay.
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> [19] In our view there is nothing in the section to support the proposition that a director intending to deal in shares in the company has a duty to disclose to the prospective buyer or seller information material to value which the director has in his or her capacity as a director and that disclosure frees the director from liability and renders the agreed price unassailable. The section does not even contemplate the passing of information from the director to the other party as a consideration relevant to liability or to quantification of the resulting liability for breach. On the contrary, on an ordinary reading of the section at each step the provisions of the section adopt the abstain or pay fair value premise.

[13] The Court also said:[5]

> Also, if an independent valuer provided at the time with all information known to the director or publicly available which was material to an assessment of value certified that the price was fair, it would be difficult subsequently for the other party to impeach the resulting transaction.

[14] It is common ground between counsel that s 149 applies to the transaction between the trustees and PEL with the result that a transfer of the trustees' shares to PEL must be at fair value. Further, if it is at a price more than fair value, the excess is recoverable by PEL and that if it is at less than fair value the trustees may require payment of the difference.

The two valuations

[15] There are significant differences between the assessments of fair value undertaken by Ms Millar and by Mr Hagen. I need not canvass the differences. It is sufficient to record that they are so extensive that if the quantum of the assessment of fair value were to be in issue in this case there would be no prospect of summary judgment being entered. Mr Soper did not seek to submit otherwise and both counsel focussed their argument on whether PEL is bound by the Millar valuation or not.

The case for the trustees

[16] The case for the trustees falls into a series of three sequential propositions. The first is that both s 149 and the constitution of PWL require a transfer of shares

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5 At [21].

from the trustees to PEL to take place at fair value. The constitution of PWL provides a contractually binding method for establishing fair value which both the trustees and PEL were required to follow.[6]

[17] Secondly, both parties engaged in that process. As a result fair value was established, and is binding on both parties.[7]

[18] The third element of Mr Soper's argument is that the fair value established by the Constitution is the fair value required by s 149. As a result s 149(4) and (5) have no application, because the consideration established by the independent valuation for the proposed transfer is fixed by the valuation at the fair value of the shares. Accordingly PEL must complete its purchase.

The case for PEL

[19] The primary submission for PEL is that Ms Millar's assessment of fair value is not definitive for the purposes of s 149. Mr Shiels says that the parties to a transaction governed by s 149 cannot agree fair value as they have in this case.

[20] Secondly, he says that assessment of fair value is the province of the Court which will undertake an assessment after hearing evidence. This follows from the fact that remedies following a transaction at other than fair value are in the hands of the Court.[8] The Court cannot enter judgment in relation to a fair value established under the constitution (even if binding) and then leave it to PEL to seek a remedy under s 149(5).

[21] Thirdly, Mr Shiels says that the valuation is flawed and unenforceable, first because it is evident that the valuer did not decide a key element of the valuation (minority discount). Instead she adopted the opinion of Chapman Tripp, solicitors from which she sought an opinion as to whether a minority discount should be applied in assessing the fair value of the trustees' shareholding. Having received that opinion, she did not bring to bear an independent judgment as she was required to

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6 Constitution, clause 11.4(4) "the value fixed by the expert is the 'fair value'."
7 Constitution, clauses 11.6(2) (binding the seller) and 11.6(4) (binding the purchaser).
8 Companies Act 1993, s 149(4) and (5).

do. Mr Shiels also criticises Ms Millar's report on the basis that she has not met her contractual obligation to provide a valuation report detailing the information she received, assumptions she made, her valuation methodology, and the conclusion she reached. Her report contains manifest errors. Further, nothing in the engagement of Ms Millar provided that her assessment would be final and binding, a factor suggesting it was not intended that it should be.

Issues for determination

[22] The issues to be decided are:

(a) Did Ms Millar fix fair value for the purposes of the Constitution?

(b) If the resolution of the first issue is that she did, then as far as the Constitution is concerned, does the valuation bind the trustees and PEL?

(c) Does the valuation by Ms Millar under the constitution also fix fair value in terms of s 149?

First issue: Did Ms Millar fix fair value for the purposes of the Constitution?

[23] The directors of PWL, Mr McLachlan and Mr Hay, signed a letter of engagement after Ms Millar was nominated as valuer by the NZICA. In the letter it states: "The purpose of the valuation is to determine a fair value of the 25.14% stake in PWL held by Greg Hay Family Trust."

[24] The letter goes on to record a distinction between fair value and fair market value, a point of relevance for reasons which emerge in consideration of the third issue, and confirmation that the basis of the PWL valuation will be fair value in accordance with clause 11 of the constitution. Ms Millar observes that when considering fair market value the size of the stake being valued may involve application of a minority interest discount. This observation is not made in relation to fair value.

[25] The valuation by Ms Millar sets out the basis of her firm's instruction:

> BDO has been appointed by the New Zealand Institute of Chartered Accountants to provide an independent valuation of the shares of Peregrine Wines Limited ("PWL"). The purpose of the valuation is to determine a fair value for the 25.14 per cent in PWL held by the Greg Hay Family Trust ("TGHFT"), in connection with a proposed sale of the shares.

[26] Under the subheading "Basis of Valuation" the report refers in a number of sentences to fair value. These include:

> We have assessed the value of the equity of PWL, its subsidiaries and equity interests using a fair valuation approach in accordance with the Company's constitution. Under a fair value approach, the intrinsic value of the Company is assessed on the basis of what is fair between the parties. This requires consideration of what the buyer gains and what the seller gives up, with an equitable sharing of gains and losses to both parties.
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> In assessing fair value, we considered whether a discount for lack of control should be applied to TGHFT minority interest. …

[27] The report goes on to give reasons for not applying such a discount, the principal element of the criticism of the report levelled by and on behalf of PDL.

[28] In the report's conclusion,[9] which states the figure which the trustees maintain is the assessed fair value of their holding in PWL, the phrase "fair value" is not actually used. In my opinion, however, there is no doubt that the midpoint stated by Ms Millar is her assessment of fair value for the purposes of the constitution. She acknowledges the purpose of her valuation is to determine a fair value, notes a number of times in her report that it is fair value which is being assessed, and refers to fair value when assessing various elements of the valuation exercise which she took into consideration in arriving at her result. The lack of reference to the phrase "fair value" in the expression of the final result of the exercise is not, in my opinion, of any relevance.

[29] In light of the references above it is not, in my view, arguable that the figure arrived at is other than the fair value required under clause 11.

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[9] At [9] above.

Second issue: Does the valuation bind the trustees and PEL in terms of the constitution?

[30] Mr Shiels submits, first, that Ms Millar's report does not state that her valuation is final and binding. He relies on a passage in *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc*:[10]

> As explained by Ellis J, the conventional approach is that where an expert determination clause provides (as it does in this case) that any determination by the experts shall be "final and binding" those words without any qualification mean there are only very limited grounds on which the determination may be challenged. More particularly, the decisions state that the courts may intervene only where the expert has departed from his mandate in a material respect and failed to do what he was appointed to do. It is not enough to show the expert has made a mistake, was negligent or even patently wrong.[11]

[31] Contrary to the submission of Mr Shiels, however, this case does not say that a material factor in deciding whether a determination is final and binding is a statement within the determination itself to that effect. As can be seen from the passage cited the relevant document to examine is the document containing the clause under which the expert determination has been invoked – here, clause 11 of the constitution. As I have noted, clause 11 specifically provides that the determination of the expert appointed under that clause will be final. Given that the appointment was made by the New Zealand Institute of Accountants pursuant to the constitution and the report specifically states that its purpose is to determine a fair value, I am satisfied that even if there is a wider scope for challenge when a determination is not undertaken for the purpose of being final and binding, that is not the case here.

[32] As noted in the passage cited from *Waterfront Properties*, the Court may intervene only where an expert has departed from his or her mandate in a material respect and failed to do what the expert was appointed to do. It is insufficient to show that the expert has made a mistake, was negligent or is even patently wrong. The thrust of the evidence presented for PEL, by way of a report from Mr J C Hagen, chartered accountant, is that Ms Millar made a mistake, and that she was wrong in

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[10] *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc* [2015] NZCA 62, [2015] NZAR 492 at [29] (footnotes omitted).

[11] The footnote to the latter portion of this passage refers to *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 (CA).

her assessment of fair value. Even if correct, that would be insufficient to avoid the otherwise binding effect, for the purposes of the constitution, of her assessment. At trial it would be necessary to show that Ms Millar departed from her mandate in a material respect and failed to do what she was appointed to do. On the present application, it is necessary to decide whether PEL has demonstrated a tenable defence on that basis.

[33] On this issue, Mr Shiels relies on three principal propositions. First, he says there is a deficiency of reasons for Ms Millar's decision. Secondly, he says Ms Millar erred by not allowing a discount for the minority shareholding. Thirdly, he says Ms Millar departed from her mandate by delegating to Chapman Tripp an important aspect of her role. I refer to these in turn.

Deficiency of reasons?

[34] For his first proposition, Mr Shiels relies on *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*.[12] In this case the High Court of Australia examined the validity of the determination of an expert tasked with providing an expert determination of issues in a contractual dispute. In the present case, too, Ms Millar's role was as an expert and not an arbitrator.[13]

[35] The High Court of Australia observed in relation to an appointed expert:[14]

> … the history of the term suggests the way in which the function to which it refers will be discharged. As Chesterman J said in *Zeke Services Pty Ltd v Traffic Technologies Ltd*:
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> > The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar.

[36] The Court then recorded that in that case, the question whether the expert's determination accorded with the contract came down to an enquiry about whether the

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12 *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38, (2011) 244 CLR 305.

13 Constitution, clause 11.4(2).

14 *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*, above n 12, at [25].

expert had given reasons within the meaning of clause 4 of schedule 6 of the contract. There is no such requirement in clause 11 of the constitution of PWL. Nor does the appointment record any obligation to give reasons; rather, it describes the valuer's "deliverable" in the following terms:

> We will prepare a valuation report detailing the information we have been provided with, our assumptions, valuation methodology and conclusion. A summary of our understanding of the business will be produced and circulated to you to review for factual accuracy prior to us finalising the valuation report. We may require the Directors to sign a representation letter supporting the information provided to us.

[37] In contrast to the position in *Shoalhaven City Council*, therefore, there was no obligation on Ms Millar to give reasons either under the constitution, or by the terms of her appointment. The relevance of this is derived from Mr Shiels' reliance on the following passage from that judgment:

> [27] A deficiency or error in the reasons given by an expert may affect the validity of the determination in two ways:
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> 1. The deficiency or error may disclose that the expert has not made a determination in accordance with the contract and that the purported determination is therefore not binding.
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> 2. The deficiency or error may be such that the purported reasons are not reasons within the meaning of the contract and, if it be the case that the provision of reasons is a necessary condition of the binding operation of the determination, the deficiency or error will have the result that the determination is not binding.
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> …

[38] Mr Shiels submits that the assumptions, valuation methodology and conclusions expressed by Ms Millar should either be equated to reasons, or the same principle should apply to these portions of her report.

[39] I deal with the two points from *Shoalhaven City Council* in inverse order. The second of the two circumstances described does not apply in this case. There is no provision in the constitution requiring the giving of reasons, nor therefore is the provision of reasons a necessary condition for the binding operation of Ms Millar's determination.

[40] The first deficiency or error identified in *Shoalhaven City Council* is not merely a mistake. Not making a determination in accordance with the contract equates to departure from mandate, in terms of the passage I have cited from *Waterfront Properties*. Mr Shiels says Ms Millar has departed from her mandate in a material respect and failed to do what she was appointed to do. This is discussed further in relation to the opinion of Chapman Tripp. In the context of an application for summary judgment, it is necessary to determine whether a tenable defence has been shown to this effect.

Minority shareholding discount?

[41] The most trenchant criticism of Ms Millar's valuation stems from her failure to apply a minority shareholding discount. Mr Shiels referred in detail to Ms Millar's given reasons for not doing so. Four reasons are given. The first is that PWL is a closely held company. Mr Shiels says this is erroneous and no evidence supports it. The first of these points merely alleges error. I am unable to discern what Mr Shiels means by there not being any evidence to support this reason. It is plain that Ms Millar assessed all aspects of the company, from the detailed contents of her extensive report. Even if he is right, however, this too would be an error.

[42] The second reason given by Ms Millar is that there is no evidence that the Trust benefitted from a minority discount when acquiring shares in PWL. Mr Shiels says this reason is deficient. He criticises Mr Hay for not explaining, in his affidavit in reply, the terms of an agreement between Mr Hay as purchaser and a vendor of a number of shares in December 2011. Mr Shiels is correct when he says that whether a discount applied is a matter within the trustees' knowledge. At most however, if (and I say if because it is not clear on the evidence), Ms Millar did not have any knowledge of whether a minority discount was applied at the time the trustees acquired their shares, that is only one factor that Ms Millar took into account, and in my view the most this observation establishes is that she may have made an error. Ms Millar's third reason is that the shareholding owned by the trustees gives them a right to appoint a director to the board, which provides the trustees with influence and other rights and opportunities that would be transferred with any sale of the shares. Her fourth reason is that there are benefits to PEL in acquiring remaining

shares in PWL which outweigh benefits given up by the trustees. She says that these include taxation and governance benefits. Mr Shiels' criticisms of Ms Millar's third and fourth reasons also amount to no more than allegations of error. I refer to these reasons again in relation to Ms Millar's engagement of Chapman Tripp.

[43] His final submission, that the report fails the test of "detailing the information we have been provided with, our assumptions, valuation methodology and conclusion", in terms of the letter of engagement, does not show a departure from her mandate. At most, it relates to the contents of the report, not its conclusion. Given the nature of an expert's role,[15] this does not demonstrate a tenable defence.

[44] In any event, Mr McLachlan refers to Ms Millar and her staff having made extensive requests for information, and to it having been a mammoth task to provide all the information asked for. Many hours were spent on the telephone dealing with queries. It could not be expected that every single item of information would be recorded in the report, and in my opinion this was not required.

[45] In my view these aspects of Mr Shiels' argument only raise the prospect that Ms Millar was mistaken in her view, or possibly that she made an error in not enquiring further on this point. This does not amount, however, to departing from her mandate to assess fair value.

Did Ms Millar delegate part of her duty to Chapman Tripp?

[46] The third issue raised by Mr Shiels in relation to departure from mandate is derived from Ms Millar's engagement of Chapman Tripp, solicitors, to advise in relation to application of a minority discount. Her instruction to Chapman Tripp is not in evidence, but in the firm's report dated 17 December 2015 it records its instruction thus:

> You have requested our opinion as to whether a minority discount should be applied in assessing the 'fair value' of the 25.14% shareholding in Peregrine Wines Limited (*the Company*) by the trustees of the Greg Hay Family Trust (*Hay*).

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15 At [34] above.

[47] Mr Shiels says that Ms Millar departed from her mandate to assess the fair value of the Trust's shares for the purposes of transfer to PEL by seeking an opinion from Chapman Tripp in these terms. He says she sought advice on a key point on which her decision was required, obtained advice, and then reproduced it in her report.

[48] The advice from Chapman Tripp refers to the judgments in the Court of Appeal and the Supreme Court in *Fong v Wong*.[16] In *Fong v Wong* it had been agreed that a parcel of shares be valued at fair market value. This exercise was undertaken but one party objected to the valuation because of the minority shareholding discount which had been applied by the valuer. The High Court found that s 149 of the Companies Act may apply and that as fair market value had been determined, not fair value as required by s 149, it was arguable that the purchase of the shares provided for by the agreement which led to the valuation was a breach of s 149. The High Court found it arguable that specific performance could not be granted on an agreement which involved a breach of s 149. Asher J said:[17]

> However it is arguable that a director cannot seek specific performance of an agreement which involves a breach of s 149. A court would not in its discretion to order specific performance direct a party to do something that was unlawful.

[49] His Honour found that it was arguable that if fair value had been assessed, a minority discount may not have been applied, applying *M Yovich & Sons Ltd v Yovich*.[18]

[50] Chapman Tripp went on to discuss the subsequent judgments in *Fong v Wong* in the Court of Appeal and the Supreme Court. The firm noted that the evidence in *Fong v Wong* from Mr Hagen, who in the present case gives evidence for PEL, was to the effect that in assessing fair value, there is no bar to the application of a discount for minority shareholdings. Chapman Tripp reported that they were aware of some instances where valuers had applied a minority discount in assessing fair

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16 *Fong v Wong* [2010] NZSC 152, (2010) 20 PRNZ 250; *Fong v Wong* [2010] NZCA 301, [2011] NZCCLR 2.

17 *Fong v Wong* HC Auckland CIV-2008-404-5547, 4 December 2008 at [44].

18 *M Yovich & Sons Ltd v Yovich* (2001) 9 NZCLC 262,490 (CA).

value, and also an instance of where a minority discount had not been applied. The firm advised at paragraph 9:

> For a closely-held company we consider that it is generally expected that if a minority discount was to be applied in the valuation of shares on an exit, there would be an expectation that a minority discount also applied on the subscription or purchase of the shares by the minority on becoming a shareholder. We understand from you that there is no evidence to suggest that such a discount was applied upon Hay becoming a shareholder or later subscribing for further shares in the company. We understand in relation to one subscription by Hay it is likely PEL subscribed for shares at the same time at the same price.

[51] The firm went on to note that the question of whether a minority discount should apply in assessing fair value must always turn on the particular factual context, and an assessment of that which is gained by a buyer and lost by a seller, a point made by Mr Hagen in his evidence in *Fong v Wong* and a point on which there is no dispute in the present case.

[52] Against that background, and on the particular circumstances of the present case, Chapman Tripp gave its opinion thus:

> … it is our opinion that the preferred view is that no minority discount should apply as part of an assessment of the fair value of the Hay shares. We believe this is the appropriate position in this context for the following reasons.

[53] The firm then gave four reasons. Mr Shiels argues that these are essentially reproduced by Ms Millar as her reasons for not applying a minority interest discount.

[54] Ms Millar discusses the question of whether to apply a minority discount at page 9 of her report. She sets out reasons which may apply to a company and which may suggest that the value attributable to a minority shareholding should be at a discount. She records Australian and North American studies indicating the extent of likely minority discounts for small private companies. She then says:

> In determining whether a minority interest discount should be applied in assessing the fair value of the 25.14% stake held by TGHFT, we obtained an independent legal opinion from Chapman Tripp. Based on this legal opinion we have not applied a minority interest discount as part of an assessment of the fair value of TGHFT shares for the following key reasons …

[55] The four reasons given may be compared with the reasons given at paragraph 14 of the opinion from Chapman Tripp. The first reason given by Ms Millar is all but identical to the reason given by Chapman Tripp in paragraph 14.2. The second reason given by Ms Millar is all but identical to the majority of the first sentence of the reason given by Chapman Tripp in paragraph 14.1. The third reason given by Ms Millar is largely to the same effect, but differently worded, from the reason given by Chapman Tripp in paragraph 14.3. The fourth reason given by Ms Millar is virtually identical to the reason given by Chapman Tripp in paragraph 14.4. There is therefore some force in Mr Shiels' submission, but a different picture emerges when the context of the Chapman Tripp report is considered in more detail.

[56] One of the persons at BDO assisting Ms Millar in the preparation of her assessment was Mr Andrew Grace. He was in communication with Mr McLachlan in relation to the valuation. Mr McLachlan says in his affidavit that he regarded it as appropriate for PWL to be primarily responsible for handling the provision of information to Ms Millar. I have already described how he regarded this as a mammoth task. On 27 July 2015 he informed Mr Hay by email that he was handling the provision of all information for the valuation exercise to be completed. In the course of exchanges with Mr Grace, Mr McLachlan was engaged in advocating for the inclusion of a minority shareholding discount in the final Millar report. On 21 October 2015 Mr Grace wrote to Mr McLachlan, with a copy to Ms Millar, in relation to this issue:

> Hi Lindsay,
>
> Thanks for your email regarding clarification of the Fair Value basis that we have adopted for our valuation.
>
> Below outlines our considerations in determining the "fair value" of *Peregrine Wines Ltd ("PWL")*. With specific attention to whether applying a minority interest discount to reflect the lack of control is appropriate.
>
> Key to any assessment of share value is S149 of the Companies Act 1993. S149 requires transactions involving directors with material non-public information to be for 'fair value'. Although there is no specific guidance on the determination of 'fair value' the case law precedent of Wong & Fong Vs Fong and Chong is commonly used as a reference point, and what we have relied on for our view.
>
> As you have noted, it is not uncommon for 'fair market value' of a minority interest to be discounted to reflect the shareholders lack of control over the

affairs of the company. This lack of control makes the shares less valuable to an arm's length purchaser on the open market. However, this can result in minority shareholders being unfairly exploited if a discount is imposed. This may occur where:

- A company is a quasi-partnership; and,
- Where the minority interest has a special strategic value to the majority shareholder

The following three elements must exist for a quasi-partnership:

1. An association formed on the basis of a personal relationship involving mutual confidence.
2. An agreement or understanding that all or some of the shareholders shall participate in the conduct of the business.
3. Restriction on share transfers.

We consider this transaction would to [sic] constitute special strategic value to the majority shareholder.

We consider that both a quasi-partnership and special strategic value is likely to exist and accordingly a minority interest discount has not been applied.

Please feel free to contact me to discuss, if you are not comfortable with this position we may need to seek a legal opinion.

Regards

Andrew

[57] It is evident from this email that at this point a view had been formed that a minority shareholding discount would not apply. Mr Grace gives reasons for this, noting the application of s 149 of the Companies Act and noting that assessment of a fair market value may differ from assessment of a fair value for the reasons given. Mr Grace says that a view had been formed that the indicia for a quasi partnership are present, and that a special strategic value is likely to exist, and for these reasons a minority interest discount was not being applied.

[58] The first of these reasons is reflected in the first reason given in Ms Millar's final report for not applying a discount in the final valuation, which is a point also identified by Chapman Tripp. The second, relating to special strategic value, is also given in the final report. It is embodied in the third and fourth reasons given, which

I have set out above.[19] It follows, therefore, that prior to receiving the Chapman Tripp report three of the four reasons which were finally given for not applying a minority discount had been identified.

[59] Mr McLachlan wrote again on this topic three weeks after Mr Grace's email, on 12 November. He said:

> Andrew
>
> Re Valuation methodology
>
> As you are aware I have not been comfortable with either yours or Julie's differing explanations as to why you may not recognise, in your share valuation, the minority nature of the subject parcel of shares.
>
> My understanding is that, in each case, all circumstances need to be considered before determining whether a discount for minority interest should be applied and that the wording "fair value" is not in itself the determinate.
>
> Since our discussion I have aired the circumstances of the Peregrine share valuation with a QC who, after due consideration, has informally advised that such circumstances would require a minority discount be applied and not to do so would be wrong at law. I will now arrange for the informal advice to be documented and will forward as a submission for your consideration prior to the end of next week.
>
> Regards
> Lindsay

[60] The reference to the opinion from a Queen's Counsel is to Mr McLachlan's advice from Mr Shiels QC who represented his company on this application. Some of his advice is in a letter dated 30 July 2015 addressed to Downie Stewart, solicitors for PEL on this application. Mr Shiels records that he had been asked by that firm to advise PWL on a situation that had arisen in relation to the preemptive rights in the constitution. This opinion does not canvass the question of minority shareholding discount. Rather, it canvasses the terms of the constitution. Amongst other matters Mr Shiels advises that "unless the Transfer Notice has been withdrawn, the shareholders willing to buy become bound to buy (clause 11.6(5)) at the lesser of the asking price, or the fair value". It is plain from this that as early as July 2015 Mr McLachlan and his company were aware of the binding nature of the fair value assessment under the constitution.

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[19] At [42] above.

[61] Mr Shiels must have written another opinion dated 23 November 2015 because it is referred to by Chapman Tripp in its legal opinion. It has not been produced. Chapman Tripp disagrees with the opinion, noting that the conclusion reached by Mr Shiels appears to have been largely derived by distinguishing facts of the present case from those applying in *Fong v Wong*, and asserting that in the absence of those facts a minority discount must therefore be applied. Chapman Tripp expresses disagreement with this approach as an appropriate way of assessing whether a minority discount should be applied in the present case. It says that the question of whether a minority discount should apply in assessing fair value of shares must always turn on the particular factual context and an assessment of what is gained by the buyer and lost by the seller. This accords with the evidence of Mr Hagen in *Fong v Wong*, and in argument Mr Shiels expressly agreed with this proposition.

[62] The relevance of this evidence in the present context is that the conclusion of Ms Millar on this issue in her final report was not expressed solely in the context of having received a report from Chapman Tripp. Rather, she had had input from Mr McLachlan, and his counsel, and the reasons finally given had largely been enunciated by Mr Grace of her firm nearly two months prior to the final report being given, those reasons then being the subject of debate with Mr McLachlan and a second opinion from Mr Shiels. The only point not raised at that early stage but later appearing as a reason for not giving the discount in Ms Millar's report, is the reference to there not being any evidence that the trustees benefitted from a minority discount when either purchasing or subscribing for shares in the company. On the evidence before me that appears to have been a point first raised by Chapman Tripp.

[63] In submissions Mr Shiels likens the situation in this case to the facts in *Kollerich & Cie SA v State Trading Corporation of India*,[20] and in *Jones v Jones*.[21]

[64] I need refer only to the latter, as the principle is clear. A mandate given to an expert engaged by the parties was that he should employ an expert valuer of his choice to undertake a valuation of certain machinery. In fact, however, the engaged

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[20] *Kollerich & Cie SA v State Trading Corporation of India* (1980) 2 Lloyds Rep 32 (EWCA).
[21] *Jones v Jones* [1971] 1 WLR 840 (Ch).

expert undertook the valuation himself. It was held that this took him outside his mandate. Mr Shiels argues that in effect Chapman Tripp made the decision on minority discount, but that was an issue reposing solely in Ms Millar in her engagement as an expert, because it was an integral element of the assessment of fair value.

[65] On an application for summary judgment PEL need only show that there is a factual basis on which it may have a defence to the claim at trial, and it is for the trustees to show that PEL does not have such a defence.

[66] In my opinion the latter is the position, for the following reasons. First, Ms Millar was engaged to provide an assessment of fair value, and her report expressly states that is what she did.

[67] Secondly, she and her assistant, Mr Grace, were fully aware of the need to assess whether to apply a minority shareholding discount as part of that process, an issue which was evidently raised as early as October 2015.

[68] Thirdly, Mr McLachlan then took issue with this in correspondence, and ultimately sought and submitted to Ms Millar a legal opinion from a Queen's Counsel setting out the basis upon which a minority discount should be applied.

[69] Rather than merely following this opinion, which on the face of the documents before the Court differed from the view then held by BDO, it decided to take an independent opinion from a firm of solicitors, and that course was followed.

[70] Fourthly, the result was that Ms Millar maintained the view in the early draft report, and three of the four reasons she gives are those held earlier. Although much of the wording of her reasons is identical or substantially similar to the wording used by Chapman Tripp, the substance of the reasons accords with the substance of the reasons given in July 2015, save only for the single extra point which I have discussed above.

[71] That point does not materially take the matter any further. It merely cites a lack of evidence. Whilst criticism is levelled at Mr Hay for not providing details of the basis upon which the Trust bought its various parcels of shares, it was in fact Mr McLachlan who was providing the information that Ms Millar would require. On 27 July 2015 he advised Mr Hay by email:

> I am handling the provision of all information for the valuation exercise to be completed. I will undertake to supply all information requested and the valuer will release her report and all supporting information to both parties simultaneously under the control of her representation and engagement letters. I won't be providing information to other than the valuer in the interim.

[72] If he did not obtain and provide the information he now says Mr Hay should have provided, responsibility does not lie on Mr Hay from whom Mr McLachlan sought to take control of the exercise.

[73] I find the plaintiffs have established that the valuation binds the trustees and PEL for the purposes of the constitution.

Third issue: Does the valuation by Ms Millar under the constitution also fix fair value in terms of s 149?

[74] The requirement in s 149 of the Companies Act 1993, that in the given circumstances directors may only acquire shares at or above fair value, and dispose of them at or below fair value, have remained unaltered since the Companies Act came into force.

[75] The Supreme Court in *Fong v Wong* observed:[22]

> [8] … Statutory and contractual price fixing provisions in relation to shares in closely held companies often adopt one or the other of the expressions "fair market value" and "fair value". The valuation practices which have developed around these expressions are not free standing methodologies but rather represent the efforts of professional valuers to produce valuations which conform to the relevant statutory or contractual requirements. When the legislature chose to use the expression "fair value" in s 149, it plainly had valuation practice in mind and must have envisaged a value which was fair as between vendor and purchaser.

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22 *Fong v Wong*, above n 16.

[76] The constitution of PWL is a standard form document published by Avon Publishing Limited, in respect of which I note that copyright is claimed on four dates, the earliest of which is 1994. The provisions of clause 11 are as printed, without any alterations. Its use of the term "fair value" as the price at which shares are to change hands is entirely consistent with the antecedent Companies Act, and the observation of the Supreme Court in relation to both contractual and statutory price fixing provisions is plainly apposite to the constitution of PEL. In adopting its constitution PEL elected to provide for shares to be transferred at fair value, an expression which is not a "free standing methodolog[y]" but, rather is an expression used by valuers in relation to valuations produced for precisely this purpose.

[77] In 2009 the shareholders of PEL signed a shareholders' agreement in which, in respect of transfers of shares, they reinforced the requirement for shares not to be transferred, except on the terms contained in the company's constitution. They thereby reiterated their intention that shares were only to be transferred at fair value. Although the copy produced to the Court on this application is unsigned, it is common ground that the document was executed and provision made for it to be signed by both Mr Hay and Mr McLachlan's shareholding company, then called Lamont Holdings Limited.

[78] Mr Shiels submits that setting the fair value of shares for the purposes of s 149 is the sole province of the Court. First, he says that even if parties agree on a fair value, that may still not bind them if, on an objective assessment, it is found that they have agreed on a figure which is not in fact fair value. This was the position in *Thexton*, as I have noted. I agree with Mr Shiels on this point.

[79] Secondly, Mr Shiels refers to the High Court judgment in *Fong v Wong*. It will be recalled that in that case a valuer had assessed fair market value, and not fair value. Mr Shiels relies on the following passage:[23]

> However, the reasoning and result in *Thexton v Thexton* means that even an express agreement between the parties as to the mode of valuation or value must be put to one side. The situation was even more extreme in *Thexton v Thexton* where the value had actually been fixed by agreement between the parties at a certain price. That agreement was put to one side when s 149

[23] *Fong v Wong*, above n 17, at [31].

> was applied. It is clear that an express term as to value in an agreement must make way for the application of a fair value in terms of s 149.

[80] Mr Shiels says that this applies to the express agreement in the constitution with the result that only the Court can settle fair value.

[81] That is not an inference which in my opinion can be drawn from *Thexton v Thexton*, or the judgment of Asher J in *Fong v Wong*. The reference to the mode of valuation is in my opinion, reference to the agreement in *Fong v Wong* that the shares would pass at fair market value, not to the method by which it would be assessed, and the reference to agreement on value is a reference to the agreement in *Thexton* that the shares would transfer for a price which turned out to be well under an objectively and competently assessed fair value. The short and, quite frankly, simple point is that the Act requires the shares to transfer at fair value. It is not open to the parties to agree that they transfer at a value assessed on any other basis, or that they transfer at a price which later turns out not to be fair value, but I do not read anything in either *Thexton*, or *Fong v Wong* at any level, supporting the proposition that the parties cannot agree on a mechanism outside litigation for assessing fair value. The crucial factor is that the consideration for the transfer must be fair value, otherwise the disadvantaged party can sue to recover the difference.

[82] In the present case the parties have not agreed to assess the value on any basis other than fair value, and have not agreed on a figure at all, whether it be by reference to fair value or not. They have agreed in the constitution, and reiterated by the subsequent shareholders' agreement, that shares will be transferred at fair value, and no other figure. I do not discern any basis on which fair value should be said to bear one meaning for the purposes of the constitution, yet another for the purposes of s 149. Fair value is a well-recognised concept of valuation and the same phrase appears in both the constitution and s 149.

[83] I accept that if the shares are to be transferred at the price set by Ms Millar, that does not of itself prevent the trustees or PEL issuing proceedings in reliance on s 149(4) or s 149(5) respectively. Each, however, would appear to face the

likelihood of a plea that fair value, as required by s 149, had already been established. As the Court of Appeal in *Thexton* observed:[24]

> Fair value must be paid unless the director shows that all relevant information in his or her possession was publicly available. Also, if an independent valuer provided at the time with all information known to the director or publicly available which was material to an assessment of value certified that the price was fair, it would be difficult subsequently for the other party to impeach the resulting transaction.

[84] Mr Shiels submits that it cannot possibly be right for the Court to have the task of assessing fair value on a proceeding under s 149(4) or (5), but on an application such as the present to enforce an independent valuation of fair value which, on the evidence, may be wrong. He sought to draw support for this proposition from the judgment of Asher J in *Fong v Wong*, when his Honour referred to the unavailability of specific performance where an agreement breaches s 149.[25]

> However it is arguable that a director cannot seek specific performance of an agreement which involves a breach of s 149. A Court would not in its discretion to order specific performance direct parties do something that was unlawful …

[85] I respectfully agree with Asher J. The Court, however, is not being asked to do something which is unlawful. It is being asked to enforce an independent assessment of fair value, as required by s 149, undertaken in accordance with a process provided for in the company's constitution. Asher J was referring to the agreement in *Fong v Wong*, which was to assess fair market value, not fair value. That did not comply with s 149. The material difference between that position, and the present case, is evident.

[86] I find the trustees have established that the valuation fixed under the constitution also fixed the fair value in terms of s 149.

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24 At [21].
25 At [48] above.

Outcome

[87] The trustees are entitled to judgment enforcing transfer of the shares for payment of $2,620,000. As discussed with counsel, they will confer and submit a draft order for sealing if necessary.

[88] As also discussed, PEL will pay costs to the trustees on a 2B basis together with disbursements fixed if required by the Registrar.

_____

J G Matthews
Associate Judge

Solicitors:
Mike Garnham, Wellington
Counsel: N H Soper, Anderson Lloyd Lawyers, Dunedin
Downie Stewart Lawyers, Dunedin
Counsel: T Shiels QC, Dunedin