IN THE SUPREME COURT OF NEW ZEALAND SC 94/2017

BETWEEN **CHRISTOPHER DUNCAN BAKER**
KATHRYN ANN BAKER
Appellants

AND **WALLACE DOUGLAS HODDER**
ANN ADELE HODDER
First Respondents

KADD FARM LIMITED
Second Respondent

Hearing: 20 March 2018

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Arnold J

Appearances: J W Maassen and S F Clark for the Appellants
M E Parker, M R Cowan and J Eckford for the First Respondents
No appearance by or for the Second Respondent

CIVIL APPEAL

MR MAASSEN:

If the Court pleases, counsel's name is Maassen and I appear with Mr Clark for the appellants.

ELIAS CJ:

Thank you Mr Maassen, Mr Clark.

MR PARKER:

May it please Your Honours, Parker, I appear with Ms Maree Cowan immediately to my left and beyond her Ms Juliet Eckford, on behalf of the first respondents.

ELIAS CJ:

Thank you Mr Parker. Yes Mr Maassen.

MR MAASSEN:

Thank you Your Honour. If the Court pleases, I would like to address the jurisdictional question first because it is –

ELIAS CJ:

The mootness point you mean?

MR MAASSEN:

No, the point that the Court did not have jurisdiction to make the order it did.

ELIAS CJ:

I see, under section 174?

MR MAASSEN:

Correct, because that argument is foundational to other arguments including the moot question. So the difference between the appellants and the first respondent in this case on that point is whether the Court had jurisdiction to direct shareholders to sign a resolution, approving a major transaction. Now where a contract is for a major transaction, and is contingent on shareholder approval, then it reserves to shareholders the power to approve the contract. That, in my submission, follows from the clause creating the contingency and that is also follows from section 104 of the Companies Act 1993, and the approval procedure requires four things. A company resolution, that's

section 106, achieved by a vote a duly convened special meeting, that's section 121, at which the board allows debate, which is section 109, and is carried by a 75 per cent majority. The only qualification to that set of requirements is if a special resolution is signed by that requisite majority, thereby avoiding the need for a meeting. Now in this case the company constitution mirrors those statutory provisions. So if a meeting is held in accordance with the Act and the constitution, and a motion is put to the meeting, one of two things can happen. The motion fails, in which case the Court has no role in resurrecting the contract because the contingency has not been satisfied, or the motion is approved, in which case the contingency is satisfied. As a result if someone is seeking to use section 104 to approve a contract for a major transaction, the likely circumstances are this type of case. that is the board has not implemented section 129. The board has not attempted to satisfy the contingency in the contract, and the board has not complied with section 106, and the reason the board is doing that is because the board anticipates that if the motion is put then the motion may fail and the contract is at an end.

So the question is, should section 174, with its breadth of language, be interpreted as meaning that it can be used in this type of circumstance. Now section 174, in my submission, sits within Part 9 of the Companies Act, and that Part is concerned with enforcement, and the function of the provisions of Part 9 is concerned largely with enforcing the Act or the constitution, and in my submission section 174 should be viewed in this context. It should be viewed either as providing remedies where there is non-compliance with the Act or constitution, and of course section 175(1) lists 12 examples where Parliament has deemed non-compliance with the Act as –

ELIAS CJ:

Sorry, which section?

MR MAASSEN:

Section 175(1) lists in subsection (1) 12 matters where non-compliance with the Act automatically satisfies section 174, or alternatively there is compliance

with the Act and constitution, but nevertheless the Court finds that there is an unfair prejudice or unfair discrimination, and that is the circumstance that is referred to in *Sturgess v Dunphy* [2014] NZCA 266 and which is referred to in the –

ELIAS CJ:
Do we have *Sturgess v Dunphy* in the materials, I was looking for it last night.

MR MAASSEN:
I don't think I do, Your Honour, but there is a quote in paragraph 40 of the High Court decision where largely the Court of Appeal says 174 comes into play when even if there is compliance with the Act and constitution, the Court finds unfair prejudice and discrimination, but I say there are really two circumstances, either there isn't compliance with the Act and constitution, and 175 gives you examples, or there is. But my submission is that section 174 should not be seen as a section to facilitate breaches of the Act or the constitution. So it is one thing to conclude in a proceeding under section 174 that defendant has done something lawful, but unfairly prejudicial. It's quite another thing to say a defendant has acted unjustly in resisting non-compliance with the Act or the constitution, and this is such a case.

ELIAS CJ:
You're saying non-compliance with the Act can never be unfair or unjust, are you?

MR MAASSEN:
What I'm saying is, yes, I'm really saying that you can't come to section 174, having not complied with the Act and constitution, or at least in such a fundamentally way as not complying with section 129, which is deemed to be prejudicial now. I'm not trying to cast my net so widely that any minor non-compliance with the Act is disqualified, but I am certainly arguing that Parliament in section 175 has taken upon itself to list matters that in itself are deemed to non-comply. I do though, however, submit, and this is something where in my submission the High Court got wrong, when you are looking at

the conduct of the company, that factual background, it's not simply a case of disregarding non-compliances with the Act or the constitution by the party applying, that is fundamental to the question should the section apply and what remedy should be granted, and the lens through which the Judge has considered this matter is entirely a transaction focused, rationality focus, as opposed to looking at the circumstance, the factual background, that led to the matter being before the Court.

ELIAS CJ:
Well isn't your argument, is it necessary to get into the factual background for your argument, because as I understand it your argument is that because of section 109 – sorry, is it 109, the substantial transaction.

MR MAASSEN:
129.

ELIAS CJ:
129, because of 129 there is a right of a minority to block a substantial transaction, and that can't itself be unfair or unjust without subverting the scheme of the legislation.

MR MAASSEN:
That's correct. So I don't need to get into the facts at all, that's my primary jurisdictional point, and in my submission the argument that the section 174 cannot be read, despite the breadth of its language, as authorising a Court to subvert section 129, is section 175(1)(l), which deems non-compliance with that Act, sorry, with that provision as unfairly prejudicial, and if, it means that the shareholder need not do anything other than prove non-compliance with that section to be entitled to request relief and in my submission the Court logically can't then use section 174 to achieve that very thing, and in my submission there are two policy reasons I would also point as to why that position is correct, just as a matter of interpretation, and the first is that section 174 is not aimed at the Court having a role in deciding the merits of individual transactions, and inevitably if you are addressing in the Court the question,

"Should this transaction be approved" you're asking the Court to conduct a special meeting and decide the best course of action, and there is nothing in the statutory material that suggests that that is a proper function of the Court and in my submission in this case the Court in a way was, that rationale was, well there is no other offer on the table now, but of course that happened because the first respondents cancelled the agency with the other offer on the table, and the Judge didn't seem to take cognisance of that and yet it just shows you, in the rough and tumble of company affairs, what an invidious position the Court would be placed in to effectively conduct a special meeting.

Secondly, if, as I've hypothesised, the Court is having to make a determination in advance of a meeting, then in effect there is no right to vote because you are under this threat of the Court anticipating your intended course of action, and deciding whether that intended course of action is rational before the debate is held, and before the justifications are given, and in my submission it would be an odd provision if section 174 was conferring on the Court that sort of role. In my submission this proceeding was misconceived from the start and it was an action mounted to achieve what Parliament has deemed unfair prejudice, and even the original attempt to change the constitution without special resolution, was in breach of section 117 and 175. The only case that is relied upon by the first respondents is the *Hogg v Sheppard* HC Auckland CIV-2002-404-1959, 3 September 2003, decision, a decision of Justice Patterson, and Her Honour in the High Court referred to that in footnote 12 as being a case with similarities to this case, but in my submission this was never a similar case. In that case what happened is that a 30% shareholder went off and signed major transactions without the approval of the company by special resolution, and the Court found that that was a breach of the Act, and in my submission that is not at all inconsistent with the position that I'm advancing to you today.

So what you might find, I'm not going to go into the facts in detail, but I do want to signal two things. The first is that you may be interested to know that when the contract was signed on the 22nd of July, which was the $4 million offer, it was renewed numerous times which, of course, in itself may be

deemed prejudicial if you're not holding a meeting. But what's interesting is that for all of those conditional dates and extensions, there was never a clear 10 days required for a notice of special general meeting under the constitution. So the first contract was signed on the 22nd of July and it was extended, that had a conditional date of the 4th of August. It was extended three times from the 4th of August to the 10th. From the 10th to the 19th and the 19th to the 26th. So there was never any intention to conduct a meeting in accordance with the constitution, and interestingly you may have noted from the material that when the proposal was made on an email the 5th of August for a meeting, the lawyers for the first respondent said the condition of the meeting was the approving of the sale. That was the condition of the meeting.

ELIAS CJ:

Where do we find that notice?

MR MAASSEN:

That's in volume 3, tab 1, page 389. So this is an email between solicitors and the paragraph I'm referring to is the third paragraph, and it says, "Our clients are willing to attend a teleconference… on these terms." Item 3 is, "A shareholders resolution is passed approving of a special resolution to sell the farm in accordance with… Companies Act 1993 and constitution." So the outcome is set as a precondition of the meeting.

GLAZEBROOK J:

Although the proposed agenda does say "consider merits". What does that mean?

MR MAASSEN:

Well I'm not sure what it means but I think it's referring to the Hall contract which had come into play on the 5th of August.

GLAZEBROOK J:

The current contract and new offer. It does sound as though there's going to be a discussion though doesn't it? Envisaged there's a discussion even if the outcome is…

MR MAASSEN:

Yes, I think that what the distinction was being made by the author was, we want a resolution definitely that it sell, but we can set, we can discuss which of those is to be accepted.

ELIAS CJ:

They might be reading perhaps quite a bit into it because it is possible that it was, the condition was simply that there would be a shareholder resolution put to the meeting. I note it goes on to say a bit more but it is slightly contradictory. It may simply envisage that the meeting is to have a shareholder resolution put to it.

MR MAASSEN:

That may be one interpretation –

ELIAS CJ:

Yes, but you say it goes a lot further.

MR MAASSEN:

– but in my submission it says, is passed approving a special resolution, and the significance in the chronology is of course the next conditional date for the Stewart sale was the 6th of August. So the intention is to very briefly discuss two offers, but the agenda is, in my submission, to get that 6 August date approved, and so in my submission that's not in compliance with the Act and there are two other matters I wanted to stress in the factual context. The firestorm started on the 26th of May when the first respondents decided to make an offer, or counteroffer, of 4.3 million unilaterally, when the intention was that the parties would meet and discuss a counteroffer, and that offer went out with the two signatures of the first respondents, but without board

approval. Now the board, at that time, were the four parties, and the constitution reflects Schedule 3 of the Act, that you need a quorum of a majority and majority approval, and there's a distinction between clause 29 of the constitution which says, two directors can bind the company and the distinction between that and what the board can do as a board, and in my submission on the 26th of May when that counteroffer was made, it was made without board approval, as required by the Act and constitution and so when on the 27th –

ELIAS CJ:
Sorry, what provision of the Act are you relying on in that respect, for making the offer?

MR MAASSEN:
I am relying principally on the constitution but I'm also relying on Schedule 3 of the Act which this constitution reflects and the provision is in volume 3, tab 6, page 476.

ELIAS CJ:
What provision is it, because I'm just looking at the legislation?

MR MAASSEN:
I'm sorry.

GLAZEBROOK J:
Is it the quorum one you're looking at or…

MR MAASSEN:
Quorum is clause 4 of Schedule 3. But I'm also referring to clause 25.6 to 25.10 of the constitution.

ARNOLD J:
Where's the constitution again, remind me?

MR MAASSEN:

It's tab 6, volume 3.

GLAZEBROOK J:

Where's the bind, two directors may bind?

MR MAASSEN:

That's the 29 on page 477, "Method of contracting." A contract is enforceable if signed by two or more directors, but I make a distinction between what is a requirement for binding a company, from the requirements for the business of the management of the company, in terms of the constitution, and so my submission is that when Mr and Ms Hodder decided unilaterally to make that 4.3 offer, they were not acting in accordance with the constitution.

ELIAS CJ:

But what prevented them – I see, it was an offer you say?

MR MAASSEN:

Yes. That could have, that was purported to be able to be accepted.

ELIAS CJ:

Yes, although presumably against the background of section 129, it couldn't have been implemented, could it?

MR MAASSEN:

No it couldn't have been implemented.

ELIAS CJ:

So it couldn't have been – yes, sorry.

MR MAASSEN:

But the management, the board, have to comply with the Act and constitution. They can't, as a board, act –

ELIAS CJ:

But is it material, because it didn't go anywhere. It's part of the background.

MR MAASSEN:

Yes. Well, it's not material to the substantive question that I've just put to you, the jurisdictional question, but it's relevant to the flavour of multiple breaches of the Act and constitution throughout this period, or transaction, that we're talking about, and these were fundamental matters for the Court to examine under section 174, leaving aside the jurisdictional question. If the applicant under 174 is not complying with the constitution and Act, that's highly relevant to the question whether or not there is unfair prejudice, oppression or discrimination. So the only other point I wanted to make is you recall the 8th of June letter where multiple claims were fired at the board, at the Bakers, because they did not agree with the counteroffer, which I say was made contrary to the constitution. Now that letter made a call on the shares of the Bakers and that call could also only have been made by a majority of the board. So within the space of the 26th of May and the 8th of June, there have been two non-compliances with the constitution by the board and what I'm submitting to Your Honours is that those, in combination with the dates of extension which did not allow for a special meeting, shows that the first respondents were determined to seal a deal with the Stewarts, and in my submission section 129 is precisely there as a safeguard for minorities to say, no, you can't make these decisions on your own, and it's even more important, in my submission, where this is a family enterprise where the children have been asked to put in eight years of sweat equity, and the security of their involvement in the firm is the 30% shareholding so that they have a place at the table of decision making, and so what I'm submitting is not only legally correct, in my submission it is consistent with the expectations of the parties, and I don't know what happened between the 26th of May and the 8th of June, but from that point on this simply was a case where the first respondents were not interested in conducting this company in accordance with the constitution and Act, and its' regrettable but that, in my submission, is the proper inference from the facts.

ELIAS CJ:

Could you just pause. I'm sorry to take you back, it was something that you said about the scheme of the Act, and you said, you referred to Part 9 and the fact that 174 was contained in Part 9.

MR MAASSEN:

Yes.

ELIAS CJ:

I haven't read through the Act for some time, some years, but I was just skimming through to see whether in Part 9, which is concerned with enforcement, it's enforcement, whether enforcement is envisaged against shareholders, or whether it's only against the directors and the company by shareholders. I can't see any provision which suggests a shareholder oppression indication.

MR MAASSEN:

No, and with respect I agree there is no indication either way. The classical situation is that these provisions, and in particular section 174, is aimed at management, but it can also be a majority of shareholders behaving as a collective, although –

ELIAS CJ:

Well I see that there is authority cited by Justice Ellis to that effect, but it was only one case. I'm just wondering why – I mean it might be entirely correct to say that 174 can be used in the case of oppression by shareholders, but it's not very evident from the scheme of Part 9.

MR MAASSEN:

No, and certainly it's not evident when you're dealing with the minority. That that places this case somewhat –

ELIAS CJ:

Well I understand that but it was just the point that was made in the judgment that it is acknowledged, I think, or that there is authority that section 174 can be used against majority shareholders exercising their rights to vote if, in the circumstances, there are circumstances indicative of oppression. That's quite a big step, and I would like to have seen a bit more authority, but perhaps the respondents can point me at some.

MR MAASSEN:

Yes, I apologise for that. It is a big step and it takes you into a much more sensitive area that perhaps the Act wasn't intended to get into but I simply can't assist you on that point.

ELIAS CJ:

Well it potentially opens up the scope of disputes using section 174 very widely.

MR MAASSEN:

Correct, yes.

ELIAS CJ:

So I wouldn't, myself, want to just go along with the view that it can be used by majority shareholders who feel oppressed by section 129, without considering the authorities to that effect.

MR MAASSEN:

Yes, I'm sorry Your Honour.

ELIAS CJ:

No, that's fine.

MR MAASSEN:

I need to but I do make a point in relation to that section which is what does the words "in other capacities" mean.

ELIAS CJ:

Yes.

MR MAASSEN:

Because I have strong reservations whether your capacity as a creditor of the company was intended to be a type of other capacity of the type that section 174 was intended to capture. I assumed it was where you had some management role, or management contract, and it was intrinsic to the operation of the company, and the effect of that was to affect your position in relation to the company. But to say, in this case, as it was in this case, the impact of you losing tax losses on liquidation is oppression of another capacity, is really to open section 174 and to an extraordinarily broad power of the Court to intervene into the affairs of the company. Because that's in essence what Her Honour said, is I, because it was suggested well then maybe this company needs to go into liquidation, which in my submission was a false alternative because what could have happened was further negotiation with Mr Hall who has said he was open to that. That's exhibited as a letter from the agent.

ELIAS CJ:

An alternative would have been receivership, wouldn't it?

MR MAASSEN:

Correct.

ELIAS CJ:

With instructions to undertake the sale.

MR MAASSEN:

Correct. Or future conduct of the affairs of the company so that all the Bakers have to have input into in the Court was a best method of sale. So that they weren't criticised for not approving a sale. That's a separate question. That the Court was considering how to do a sale, and that is the remedy which I think falls more logically in section 174, because in this type of case the

shareholder is the defendant, not the company and its affairs, and that is a very unusual situation and novel use, in my submission, of section 174.

So I have real difficulty with the other capacity concept, but in relation to Part 9, which Your Honour started with, that's probably a good point to insert another point that I wanted to make and which probably doesn't come out as well as it should in the written submissions, and that is section 164, because section 164 says when the Court can make or grant interim remedies and the Court, the section says you can only grant restraining orders and only if the conduct that you complain about is not complete, and that's a very interesting provision and in my submission the Act here should be read as a code, and it's relevant to a submission I want to make about process because –

ELIAS CJ:
Sorry, which subsection are you referring to?

MR MAASSEN:
Section 164, subsection (4).

ELIAS CJ:
"That has been completed." Yes.

MR MAASSEN:
Yes. So in my submission there can't be any doubt that the High Court here acted effectively in an interim manner because the hearing was conducted within the date for the filing of the statement of defence. Now this Act does actually provide interim remedies, but it is quite circumscribed. They are only interim restraining orders and only if the conduct is complete and in my submission the reason the provision is framed that way is twofold. First, the policy reasons that sit behind it being undesirable to make mandatory interim orders, is precisely the reason it's confined to restraining orders. Secondly, if the conduct is complete then the proper process is the ordinary proceeding and in my submission that provision is a – this enforcement, like the Act, is a code, and seeking a mandatory interim order is not available, and that's

effectively what happened here. So I just wanted to alert you to that provision because in my submission it's quite relevant.

ELIAS CJ:
I'm not sure that I understand that it is an interim order.

MR MAASSEN:
Well it's not an interim order, it is a final order, but my proposition is that the Court made a final order in the context of what was effectively an injunctive-type hearing, because the Act provides 10 days to file a statement of defence and then directions, and then a hearing in the usual way, and in this case the hearing was held within the date for filing and what I'm suggesting is that if you want to abridge the usual procedure you're effectively asking for interim orders. If you're not going to follow the usual procedure prescribed by the rules, which gives 10 days for gathering pleadings and parties and then the exchange of evidence and then a hearing with the right to cross-examination, then what you are really asking for is interim orders, and that's, in effect, what happened here. It was an application for interim mandatory final orders. Now I'm not saying, I know that sounds odd because that's not what the Judge did, and I'm not sure I can put it any more elegantly, but what I'm suggesting is that the Act does not contemplate this sort –

ELIAS CJ:
Well in respect of injunctions but I'm not sure that it is analogous to injunctions, the order that was made, it's simply a final order under section 174 isn't it?

MR MAASSEN:
It is. It is.

ELIAS CJ:
So I'm not sure why – I don't quite understand your reference to section 164.

MR MAASSEN:

Yes, and I'm sorry I don't make myself clear, but one of the complaints is the speed at which this process was followed.

ELIAS CJ:

Yes, I understand that.

MR MAASSEN:

And my proposition is that –

ELIAS CJ:

But that speed might have been appropriate for interim orders, but it wasn't appropriate for a final order.

MR MAASSEN:

Correct, and I'm just simply making the observation that even with interim orders, the Act doesn't contemplate mandatory orders, only restraining orders.

O'REGAN J:

The case that Justice Ellis relied on, the decision of Justice Lang, that was actually in an interim context, wasn't it?

MR MAASSEN:

It was and it probably –

O'REGAN J:

So you're saying it shouldn't have been made in that case either?

MR MAASSEN:

It shouldn't have been made. It was the wrong thing to do for the reasons that I've explained. So there are three reasons that are not straight legal reasons that are given by the first respondents for why section 174 was appropriate in this case. The first was the company – sorry, that was, the decision whether or not to approve the transaction was rational, was the most rational choice. The second was the company was insolvent, and the third was that the

Bakers were acting with improper motive, and I just want to briefly address those matters if I may. The first is, was it rational, and in my submission it was entirely rational for the Bakers to say that it was not appropriate to sell Heron Creek at $1600 per hectare less than it was bought in 2008 after all of their improvements, and in that regard I would like to take you, if I may, to the actual expectation of the board when PGG was instructed, which is found in volume 3, tab 2, page 416. Now this document is referred to by Mr Hodder in his first affidavit.

ELIAS CJ:

Sorry, what was the page number again?

MR MAASSEN:

Page 416, tab 2 of volume 3. On page 417 you can see that the letter is addressed to the directors, which includes all of the four people, and then on page 419 there is the appraisal and I want to refer you under that section 1, fair appraisal, to the final three paragraphs. First of all it says, "We accept that you have a price expectation in the order of $27,000 per hectare." So the board expected that price. Mr Hodder was saying that was a ridiculous price to expect, but that is the price that they communicated to the agent as their price expectation and Kathryn Baker explains why that figure was selected, because it would clear debt and they could split the balance to reflect their contributions to the company. Then it goes on to say, "Should we generate sufficient interest… we could achieve… between $4,200,000 and $4,725,000," and the critical point here is "generate sufficient interest" because the first counteroffer on the 26th of May was only three weeks into the marketing campaign, and there the Hodders had had immediately made a counteroffer at 4.3, which as you can appreciate went out into the market as market information of the base price that the Hodders were prepared to accept, or that Kadd Farm was prepared to accept for that farm. Then it goes on to say, it's a highly productive farm and we predict good local buyer competition. The second point I would like to make is that –

GLAZEBROOK J:

Can I ask, what's the date of the marketing proposal? Oh I see, 4th of May, that's right.

MR MAASSEN:

4th of May, yes. So, bearing in mind that in 2015 there were two valuations of five million, and –

ELIAS CJ:

2015?

MR MAASSEN:

2015, I'm sorry, and also bear in mind that the Hodders produced a valuation to the Court, never seen before by the Bakers, for the purpose of that proceeding from Mr Sorenson who did a valuation in one day. His affidavit says, I was visited on the 6th of September and his valuation is dated the 6th of September, and Kathryn Baker, who is clearly an accomplished farmer, she has run Flock House, is saying, there are fundamental errors in that valuation in terms of the irrigatable land, the amount of water that can be spread, bear in mind that they are both the farmers on the site, and Her Honour is accepting on an interim basis a valuer who was instructed on one day and produced a valuation the same day. So in my submission it was rational what the Bakers were saying. It is entirely consistent with the position.

Now it may be that the argument of irrationality on the Bakers part was whatever outcome, whatever price you achieve, there will not be a surplus of shareholder equity after payment of debts to assist you, and in relation to that argument I make two points. The first is, the rights of shareholders are not affected, in terms of section 129, by residual economic interests. There's nothing in the Act that talks about that. The second point is, this case, this company was a family company and the *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 decision emphasises the importance of expectations outside of the straight economic and legal questions, and the Bakers say, their expectation was that they would be recognised at least by having debate and

discussion about the price realisation of Heron Creek. That was their expectation, and in my submission any family member who was being put in that situation, that is an entirely reasonable expectation to hold.

So in relation to the rationale argument I put those points. In relation to the –

ARNOLD J:
Just before we move on from this valuation, it recommends at 420, it notes that the farm's been on the market by negotiation and it recommends that it be offered at a price of $4.7 million-odd. Now did that happen or not?

MR MAASSEN:
Not to my knowledge.

ARNOLD J:
No, because there as an offer of $4 million and then they talked about a counteroffer of $4.8.

MR MAASSEN:
Yes.

ARNOLD J:
So for some reason this recommendation wasn't followed?

MR MAASSEN:
No, that's my understanding, although I don't know if there's evidence on that. Now in relation to liquidation in my submission liquidation wasn't the only other alternative, it was a negotiation with Hall, but even if liquidation was the only other alternative to this deadlock, in my submission that is an orderly bringing in of assets and realisation of assets, and the consequence of liquidation cannot be unfairly prejudicial or unfair discrimination or oppression. So saying that the machinery of the Act for liquidation is a consequence that's oppressive, unfairly prejudicial or unfair discrimination is incorrect.

Secondly, tax losses are not a reason, in my submission, to invoke section 174.

So now I want to deal with the final reason that is put –

O'REGAN J:
Was it a reason to invoke section 174. I thought it was just a reason for not making an order to liquidate the company under section 174. In other words not to choose that remedy.

MR MAASSEN:
Can you rephrase that, sorry, I just missed it?

O'REGAN J:
The tax loss issue was not a relevant consideration in determining whether the Court had jurisdiction to do anything under section 174.

MR MAASSEN:
No.

O'REGAN J:
It was just confining the options open to the Court by saying liquidation isn't as good a remedy as an order to require the signing of the section 129 resolution.

MR MAASSEN:
No, I accept that.

GLAZEBROOK J:
Just checking, your primary argument though on rationality is that it's irrelevant because it's a shareholder right and they can be as irrational as they like.

MR MAASSEN:
Correct. Now concerning notice –

GLAZEBROOK J:

They probably wouldn't be but they can be if they want to be, that's the primary argument, isn't it?

MR MAASSEN:

That's the primary argument and that comes back to my point about motives. I postulated to you at the start the most likely situation where you would be invoking section 174 to approve a transaction, namely the board hasn't held a meeting, and it's worried about the outcome of a meeting. Now in my submission if motive is relevant then what you are doing is placing the Court in the situation of discerning the motive of a party where there is no meeting, where is no vote, and in my submission that is a nonsensical inquiry and has no legally useful purpose. Why could it possibly be thought that a party, who hasn't voted, who hasn't had debate, is going to have their motives examined in Court as part of an inquiry as to whether section 174 should apply.

GLAZEBROOK J:

And do you say the counterfactual, if you like, I know the Chief Justice hates that term, but the counterfactual is that they have a meeting, they vote against it, as they're entitled to do, and the transaction is at an end in any event.

MR MAASSEN:

Correct.

GLAZEBROOK J:

So there's nothing to 174 is the submission?

MR MAASSEN:

Correct.

GLAZEBROOK J:

And so it would be off if you could, in effect, anticipate that before there is a meeting, which is what should happen, absent obviously there being a signed resolution.

MR MAASSEN:

Yes, and so the embarrassing situation here for these people is all of these other issues are brought out into the open on the 8th of June letter, which they then try to deal with. They try to deal with it. Their motives are being examined and they say, look, can't we just have a meeting and debate this, and why are we in Court. Why are we in Court having to explain ourselves, and so I have been very strong to resist this motive argument. I think it lacks any evidence, it's inappropriate, but it's simply not an inquiry that the Court should be engaged in because in any event section 174 is not about motive. It's about the consequences of decisions about the conduct of affairs of the company. If you look at the *Thomas* decisions, and you look at others, want of probity is not the test, it is the effect of the conduct.

ELIAS CJ:

Well I'm not sure that can be entirely right because if you are talking about what directors are doing it may be relevant if they've got a collateral purpose which is not congruent with the best interests of the company. But it's a bit odd if you're applying that to shareholders.

MR MAASSEN:

Yes. So what I would like to now address you on is the question, was the appeal moot. As a general point I'd like to first of all make the observation that the first respondents have been actively engaged in this appeal process, and the one before the Court of Appeal, which I would suggest to you is atypical behaviour of a litigant that really thought this case was moot. But I give you three reasons why, in my submission, the appeal was not moot. The first –

O'REGAN J:

Just before you do that, did the respondents take the mootness point in the Court of Appeal?

MR MAASSEN:

No.

O'REGAN J:

So it was initiated by the Court?

MR MAASSEN:

It was initiated by the Court on the day, and it referred me to *Gordon-Smith v R* [2008] NZSC 56, which I had not read, because I had not –

ELIAS CJ:

You don't practice in criminal law.

MR MAASSEN:

No, but I'm now familiar with it and I can assist you with it. So the first point is that the *Bovaird and The Board of Trustees of Lynfield College v J Suing by his Litigation Guardian* [2008] NZCA 325 decision which I have cited is authority that if costs are in issue, and there is an important point, then leave can be granted. Sorry, that the appeal should be heard. But even if the Court is a more senior Court where leave is required, then the Court can hear it if the interests of justice demand it, and in my submission in this case whether you simply apply the *Bovaird* approach or the *Elders Pastoral Ltd v The Bank of New Zealand* [1990] 3 NZLR 129 (PC) approach, the Court of Appeal should have heard this case for the following reasons. A very truncated High Court process. An allegation the High Court had acted without jurisdiction and made an extraordinary intervention into the affairs of a private company, and the right to vote, and the allegation the Court had, in effect, unwittingly facilitated conduct Parliament deemed unfairly prejudicial. Finally, the timing and framing of the order of the Court was known to render an appeal nugatory. Her Honour said at paragraph 67, I am mindful that by making this forthwith order I am rendering this appeal likely to be nugatory, but I am determined to bring this matter to an end. And so mootness did not arise because of some supervening event, or because of some voluntary decision of the parties. It arose because –

ARNOLD J:

Jut on that, couldn't you have sought a stay from the Court of Appeal?

MR MAASSEN:

Well I was not, so people tell me that that is possible within, I could get in my car when I was then living in Palmerston North and drive down and get a stay, but all I can say is, I interpreted that order as meaning what it said, forthwith, and I had a demand on my table for a shareholder resolution so that the condition could be satisfied, and I did not think I could delay matters and come down to Wellington and look for a Court of Appeal Court that might be willing to hear a stay. That's my position.

In addition to costs issue in my submission in this case costs could be awarded in the High Court in favour of the first respondent and also I say that compensation is available to the Bakers under section 174 including costs because of the deemed unfairly prejudicial conduct, and I rely on *R (Bushell) v Newcastle-Upon-Tyne Licensing Fixtures* [2006] UKHL 7, [2006] 1 WLR 496 for the proposition that where a successful appeal opens the door to the possibility of costs recovery, then leave should be granted. In that case it turned on the undertaking as to damages that had been given at the first instance. In this case, in my submission, it turns on whether in fact the High Court order was valid. But then my final point on why it's not moot, and probably my most important point, is that this has not been pursued as an academic question because what the Bakers allege is that they were unfairly prejudiced, and the Court determined the matter on the basis of the factual background between May 2016 and October 2016 and logically that factual background cannot give rise to two polar opposite conclusions. You cannot have a conclusion, those facts created unfairly prejudicial conduct that meant the appellants were required to subject themselves to the remedy that the Court gave, and also that the same conduct was unfairly prejudicial to the appellants such that the first respondents were responsible under section 174. Those two conclusions are polar opposites on the same factual background.

ELIAS CJ:

But are they on the same factual background because your complaint is to do with the conduct of the directors. The decision was simply in terms of the absence of sale wold be unfairly prejudicial and therefore the order was made

to facilitate the sale. So the other matters surely still remain. What you wouldn't be able to do is challenge any loss in the sale perhaps.

MR MAASSEN:

That's, the final statement is true. However, as I saw the case it was about the events. If you see the pleadings it was about the events between May 2016 and October and I see that as the conduct of the affairs of the company that were the subject of inquiry, because the Court related all of those facts as factual material upon which it made its assessment. And we're saying is those exactly the same facts should actually be interpreted as leading to the opposite conclusion, not the appellants were acting unfairly prejudicial, but that the first respondents were, and if that is a correct analysis –

ELIAS CJ:

Is there a correct analysis of what Justice Ellis decided? I mean she said all the facts were pretty confused, didn't she?

MR MAASSEN:

Yes.

ELIAS CJ:

And so although she recited some of them didn't she simply focus on whether it would be unfairly prejudicial not to facilitate the sale in circumstances where the company was insolvent et cetera. I mean it's a snapshot that she's looking at, isn't it, rather than the history.

MR MAASSEN:

Well that's a fair statement of say from 44 to 48 but the reasons that in my submission Her Honour got to the point of this extraordinary intervention, was her view of the history and the possibility that well it simply would be unfairly prejudicial not to do it now and so it's hard to bracket this, or put a parentheses around it, but the proposition I'm advancing to you is that all of these facts were part of the background that the Court had regard to in

making its order, and in my submission the opposite conclusion was to be drawn from the one the Court made, and if that is correct then it is logical and necessary to appeal the decision. There is a live issue. It's not moot. These appellants are saying the same set of facts leads to a polar opposite conclusion from the Court, and in order for the Court's decision not to be seen in any way as an impediment to the alternative analysis, the proper course is an appeal.

ELIAS CJ:

Well I just need to put to you that it seems to me that the entire reasoning of Justice Ellis is in the portion of the judgment from 36 on which doesn't rely on the other matters of complaint, or at least if it does I'd like you to show me where it does.

MR MAASSEN:

Yes, I think that's the primary reasoning but I do make the submission that the proceeding was framed in terms of the circumstances commencing in May 2016 onwards and if a proceeding is mounted that in itself seeks a remedy which is oppressive or unjust by directors or the board or shareholders, then that whole transaction, in my submission, is open for consideration by the Bakers.

ELIAS CJ:

Well that may be able to be proceeded with. What you can't do though is complain, and it may well be that this is really the real gravamen of the matter, you won't be able to complain about the sale, because of the form of the order taken.

MR MAASSEN:

Yes. So in my respectful submission also the Court of Appeal was wrong to say the jurisdictional question was best heard in the context of a claim by the Bakers, and the reason I make that submission is it was a straight legal question. It was inelegant and inefficient to require the Bakers to argue in the High Court the question of jurisdiction that could have been resolved by the

Court of Appeal, and in my submission the general importance of the issue meant the High Court decision required correction.

GLAZEBROOK J:
I must say I can't quite see how you could argue a jurisdictional issue in the Court of Appeal – in the High Court without having an appeal, personally.

MR MAASSEN:
I couldn't see it.

GLAZEBROOK J:
Because you can only do so where jurisdiction was taken.

MR MAASSEN:
Yes.

GLAZEBROOK J:
It's difficult to see how you can say it shouldn't have been in a proceeding other than an appeal myself but that's not for you to answer obviously.

MR MAASSEN:
No, but that's how I saw it, and so those are the reasons why I submit that the case is not moot, but even if it was moot that is not the end of the matter because in my submission this Court's decision in *Gordon-Smith* outlines three policy reasons why the Court does not hear moot appeals. First, there is no contest between the parties and it's an adverse serial system. Secondly, you don't want to use limited appeal resources, and thirdly, you don't want to give advisory opinions. In my submission –

ELIAS CJ:
All of those are taken from the Canadian Supreme Court decision in quite different context it seems to me, particularly the third reason, the advisory opinion point, because in that case it would have subverted the reference procedure available to the provinces and the federal Government in the

Canadian constitutional set up. We have rather a different approach. I mean I think that there is a question of mootness, obviously, and the Courts would be reluctant to entertain appeals that are going to tie up resources if there's not much point, but that really does seem to me to depend on whether there is a point that should be determined by the Court.

MR MAASSEN:

That's, in essence, my submission but if you look at those three criteria in *Gordon-Smith*, there was a contest. Both my learned friend and I were dressed, ready to go, and it was the Court of Appeal that then raised this question. Secondly, how is it a good use of resources to send us back to make a limited appeal on costs with leave to argue the same point, when we were there before the Court ready to argue the substantive points on the day, so the resources question doesn't make any sense in terms of the Court's decision. Thirdly, this wasn't an advisory opinion, it was a question embedded in a set of facts between parties in relation to the conduct of affairs of the company. There was no sense in which this was simply a purely academic exercise. So none of the policy reasons in *Gordon-Smith* applied, but in addition *Gordon-Smith* goes further and says, even if these policy reasons apply, we can still entertain an appeal if it is an important matter that should be considered, and in my submission I've explained to you why I thought this case was an important question in terms of the Companies Act, the jurisdiction and the decision of the Court. So even if you come to the point it's moot, that's not the end of the matter, and it seems to me the Court of Appeal did not address the countervailing considerations of justice that Justice McGrath had referred to in *Gordon-Smith* as being reasons to carry on, and they simply had taken the view it was an advisory opinion.

So I'm almost at the end but I simply wanted to make a couple of simple points about the Court's reasoning and the fairness of the High Court process. I think I've made the point already but Her Honour in paragraphs 46 and 50 of the High Court decision refers to the fact that if the Bakers are prejudiced, then they can make a claim against the first respondents, which suggests that

in her mind she was not making a final determination in terms of the rights to do what she did.

WILLIAM YOUNG J:
I was looking at that before. Where's the reference earlier in the judgment that she alludes to?

MR MAASSEN:
You mean the –

WILLIAM YOUNG J:
She says, "As I have said there are separate remedies available to them under the Act if it transpires that they have been wrongly prejudiced."

GLAZEBROOK J:
Where's that sorry?

WILLIAM YOUNG J:
Sorry that's paragraph 68.

GLAZEBROOK J:
I was at 46.

MR MAASSEN:
46 and 50 is what I thought she also said. So a number of times, and my submission the job was to get the outcome right, the fairness and equity and the justice of the decision, right in terms of your application of section 174, not to say if I'm wrong, or there is something gone wrong, then you have remedies. So in my submission I don't understand, with respect, Her Honour's reasoning there.

GLAZEBROOK J:
Well you might even say that backs up your interpretation of section 174 in the first place. In that it's not designed for something that looks at something other than a person's behaviour and that it doesn't sanction breaches of

the Act effectively, or be used to sanction breaches of the Act, or at least fundamental breaches of the Act such as the breach of 129.

MR MAASSEN:

Correct. So now I want to briefly mention the fairness of the High Court process. I've mentioned to you section 164 and that very carefully circumscribed set of circumstances of interim intervention. I wanted to refer you, if I may, to volume 1 of the case and take you to the notice of proceeding, which is I think at tab 11, and at page 58 the document says, "this application will be heard on the 31st of October 2016 and unless you file within 10 working days a statement of defence, orders may be made against you". Now I'm not aware of any jurisprudence on the importance of an originating document in New Zealand, but in my submission a person served with these originating documents, signed by the registrar, is entitled to be able to rely on these documents as giving accurate information as to how they are to respond and engage in the process, and in my submission it is fundamentally unfair to have interlocutory processes occurring inside that 10 working days when you've had an opportunity to understand the claim against you and to engage in the process, and so the abridgements of these provisions and this document in my submission was fundamentally unfair and I've explained in my submissions why these originating documents are so important and provide fair notice.

So if you want to do something other than what is prescribed by the High Court Rules and these documents, you must apply for interim orders, if you are entitled to them. You must file undertakings as to damages. You must do those things. You cannot say, I'm going to abridge everything and not comply with these documents and thereby fundamentally get by means of those orders interim orders because that's, in effect, what they are.

Finally, my submission is that the forthwith order was inappropriate. The High Court Rules under Rule 11.12 says, a judgment has immediate effect from the date it is delivered, the time it is delivered, it has immediate effect, and in my submission if a Court says "forthwith" it means what it says, that at

least should be taken to mean what it says, and the consequence of a forthwith order is that you effectively render an appeal incapable of being pursued. Now there might be very limited circumstances where that is appropriate, but in my submission with this truncated process, and the fact that the order made was actually not even debated in Court, it was actually something that Her Honour found privately as a result of her own enquiries, and reading the Lang decision, justice demanded that she say, look, this is not about a constitutional liquidation, I am considering directing you to sign a shareholder resolution.

WILLIAM YOUNG J:
So what was the position of the applicants at the end of the hearing, what was their closing request for relief?

MR MAASSEN:
I can't recall that it was anything other than a realisation the constitutional, the argument to change the constitution was not a goer. My recollection is that the argument was to rely on *Hogg* for a transfer of shares sufficient to get a 75% majority because Her Honour mentions *Hogg* –

WILLIAM YOUNG J:
So this is paragraph 53 of her judgment?

MR MAASSEN:
Just a moment. 54. So, actually that's 53, it is 53, and you see the footnote there's a reference to *Hogg* where Justice Patterson – sorry, no, 55, first sentence, footnote 12, refers to the *Hogg v Sheppard* decision, and that was a decision of Justice Patterson where he transferred 100 shares from one shareholder to another for a breach of section 129, and so my recollection is the primary remedy that was then being advanced at the close of the hearing was a transfer of shares, because that is specifically listed as a potential, I think, remedy in section 174.

O'REGAN J:

But they still would have had to have a meeting then, because they wouldn't have been able to get a signed resolution of all shareholders.

MR MAASSEN:

Yes, and so the position that Mr and Ms Baker came to the Court with, as you can see from Kathryn Baker's affidavit, is "I want a meeting. Why am I in court. I want to debate this with my parents", and she says that and in my submission that is what, is a perfectly reasonable, entirely consistent with the constitution, entirely consistent with the expectations of the parties.

WILLIAM YOUNG J:

It's implicit, I guess, in the minute the Judge issued that the hearing would be conducted without oral evidence.

MR MAASSEN:

Correct.

WILLIAM YOUNG J:

Was there any discussion about whether the witnesses should be cross-examined on their affidavits?

MR MAASSEN:

There was no discussion about that, but I simply didn't have the time to issue notices to cross-examine because, for example, Mr Coleman filed an affidavit on the 4th, the hearing was on the 5th, as I recall it, so I had very limited time to digest any of this information, but I don't recall every saying to Her Honour – oh, I did say there should be discovery in cross-examination in these type of proceedings, and Her Honour said, "Can you do this in this type of case."

WILLIAM YOUNG J:

Well of course you can.

MR MAASSEN:

Exactly, but that was the question I was asked. Can you have it in this type of case, in other words Her Honour seemed to think that an originating application was simply an affidavit based like a summary judgment, but in fact an originating application is an ordinary proceeding in all respects except that it starts with affidavit evidence. So I do recall that exchange, and I was –

WILLIAM YOUNG J:

So did you physically say you did seek discovery, say you wanted discovery?

MR MAASSEN:

I said, "I don't have time," when she asked me why are you prejudiced, I said I don't have time for discovery, I want to see the company file relating to this transaction, I can't cross-examine these witnesses, and she said, "Can you do that in this case." This type of case, and –

ELIAS CJ:

I can't remember, did you ask for an adjournment?

MR MAASSEN:

Yes, I asked for the fixture to be vacated. I asked for –

ELIAS CJ:

Where is that dealt with, that application?

MR MAASSEN:

I think it's under the heading, "Interlocutory application." So those applications were heard together with the substantive proceeding and…

WILLIAM YOUNG J:

She doesn't mention discovery. I mean you did have a list of other complaints which perhaps obscured the focus of the real complaint that there was a rush to judgment, and the substantive issues which might be thought to arise as to mode of evidence and discovery.

MR MAASSEN:

That may well be right, it was all a bit of a blur, but she does describe a lot of my complaints about the process as being technical.

WILLIAM YOUNG J:

I rather agree with her actually.

MR MAASSEN:

But I certainly, well –

WILLIAM YOUNG J:

I mean you might be better to have, instead of taking all these technical points said I apply for orders that A, all witnesses be produced for cross-examination.

ARNOLD J:

The more important points are dealt with at 59. Important documents not before the Court and other evidence the defendants might have filed.

MR MAASSEN:

To be fair to me perhaps Kathryn Baker does summarise in her affidavit why she says she's prejudiced, and she mentions cross-examination, and she mentions the documents, so the Judge asked for information about prejudice and Ms Baker did deal with that issue. So it was squarely before Her Honour.

WILLIAM YOUNG J:

Of course she didn't know what orders she was going to make until the judgment came out, but was it ever suggested that the case should be dealt with effectively as though what was appropriate was an interlocutory order and there should be undertakings as to damages?

MR MAASSEN:

Well I'm not sure I knew where the case was going because it came out from the minute – the answer is probably no, but a minute came out saying "oh this

constitutional relief can't be granted", and that was the primary remedy, so midstream there was that issue, then Her Honour said, I might be minded to make an order for liquidation, so it was a bit fluid, I'd have to say, but I don't recall it ever saying that. It's a bit like being on a trolley, if you go too fast the wheels will start falling off, and this is exactly what happened here, in my submission, but what Her Honour did say in the judgment, and I think it's a correct and fair statement, that she describes the alarm of the Bakers at the way this proceeding was being conducted, and I think that is a fair –

GLAZEBROOK J:
Where is that?

MR MAASSEN:
Sorry, page 30, paragraph 68, the final two sentences. It says, "So while I understand am sympathetic to their dismay at recent events, and the potential effect of those events on their family, it does not seem to me that encouraging this dispute to be prolonged by way of an appeal will serve anybody's interests." So there was no doubt from the evidence and the way in which this case was argued that there was continuous concern by me as counsel that the Court was being asked to make decisions at pace, and the reason for that, of course –

ELIAS CJ:
That reference does not appear to be directed at that concern.

MR MAASSEN:
No, no. The stay application, was more directed at that, but I might have to just quickly check the pleadings. Yes, so in the pleadings volume 1, tab 14, at page 75, subparagraph (vi) it's really pitched on the basis of insufficient notice of the proceeding at that point is the complaint that is being made. Now the interlocutory application for the abridgement of hearing did not cite any authority for abridging a notice of proceeding. All it did was cite Justice Hansen's decision in *Commerce Commission v Cards NZ Limited* which was a heavily contested interlocutory hearing on venue. There's no

authorities that said you can abridge a notice of proceeding and the time for filing a statement of defence and have a hearing.

WILLIAM YOUNG J:
But you can.

MR MAASSEN:
But you can but –

WILLIAM YOUNG J:
But everyone knows that because there's a general power to abridge time.

MR MAASSEN:
Yes, that's general power to abridge time, but the circumstances of that, the matters that are to be considered, and whether it should be interlocutory, there's no authority for that proposition. So if Your Honours please, I think we're close to the morning adjournment, those are my oral submissions.

O'REGAN J:
So what are you asking us to do now?

MR MAASSEN:
I'm asking you to allow the appeal and refer the matters of costs back to the High Court on the basis that the Bakers were the successful party.

WILLIAM YOUNG J:
So you're effectively asking us to deal with it substantively, which was one of the forms of release specified in the application for leave to appeal?

MR MAASSEN:
Yes. I'm asking you to address –

WILLIAM YOUNG J:
Say it wasn't moot, and the appeal should be allowed, and costs should be readdressed.

GLAZEBROOK J:

Well from what you said on the jurisdiction you're saying you actually want us to say there was no jurisdiction. Well one, it isn't moot, and second there was no jurisdiction, aren't you?

MR MAASSEN:

Correct.

O'REGAN J:

So effectively you're asking us to do what the Court of Appeal would have been able to do if you'd argued it there and been successful?

MR MAASSEN:

Correct. Because the proceeding was mounted in a fundamentally misconceived way it's appropriate to refer it back to the High Court on that basis.

GLAZEBROOK J:

Just refer what, because if we say there was no jurisdiction then it's moot in the sense that it's sort of a bit too bad in respect of the property presumably?

MR MAASSEN:

Yes, well I can't do anything about that, and it's certainly inappropriate to do that, but the…

ELIAS CJ:

But the order is set aside and you can consider if there is any other consequential relief that you might seek in properly constituted proceedings, presumably, or will you just call it a day?

MR MAASSEN:

Correct, and hopefully that will be, but in my submission, yes, that's how it should be dealt with is my submission.

ELIAS CJ:

Thank you. We'll take the morning adjournment now.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.46 AM

ELIAS CJ:

Yes, thank you Mr Parker.

MR PARKER:

May it please Your Honours. I was proposing to deal with the points mootness first and then jurisdiction. Would you like me to change that order. You've had it put to you by my learned friend in a different way?

ELIAS CJ:

No, I think we can keep it all in our heads, thank you.

MR PARKER:

I'm grateful. As far as mootness is concerned we say this is moot. Your Honour Justice O'Regan asked the question as to whether we'd raised it with the Court of Appeal. We hadn't certainly directly but we did very briefly say in our submissions what's the point. But there's a bit more to deciding whether this is a moot appeal or not than just posing that rather facile question. First of all we would say based upon the authorities, *Gordon-Smith* of course is the one that most immediately guides us, but Your Honour has already referred to the *Borowski v Canada* (Attorney-General) [1989] 1 SCR 342 case, which set out some tests which were approved in the *Gordon-Smith* decision, and there are other cases from other jurisdictions such as *Sun Life* form the Privy Council, where there has to be an actual controversy, a substratum still existing, and we simply say that because of the order that was made, and not appealed as it could have been, or stayed, the subject matter, namely the major asset, in fact the only real asset of Kadd Farm Limited, has been sold and therefore what you are left with is no matter requiring –

O'REGAN J:

Can I just interrupt you. You said there's no appeal. I mean isn't that just completely circular. This is an appeal. There was an appeal. I mean it's –

MR PARKER:

Sorry, I put that poorly. What I mean to say is there could have been an appeal to stay that order. I'm sorry, Your Honour is quite right.

O'REGAN J:

Well could there? Hearing on the 5th, judgment on the 6th, contract expiring on the 7th, nothing in the judgment that allowed a 24 hour period to allow for an application to the Court of Appeal.

MR PARKER:

That doesn't –

O'REGAN J:

You weren't offering it. Why are you criticising Mr Maassen for not applying?

MR PARKER:

I criticise it because it was feasible to apply for a stay on very quick order. That could have been done in the usual way by instruction of an agent, documents prepared overnight, as we all do from time to time. So we simply do not accept on behalf of our clients that that could not have been done. My friend makes something –

O'REGAN J:

Did you resist a stay in the High Court?

MR PARKER:

This would have been to stay the order of the High Court –

O'REGAN J:

No, no, but the High Court Judge said she wasn't going to stay, so you resisted that?

MR PARKER:

That was something the Judge put in the judgment of her own volition. I don't believe it was the subject of any –

O'REGAN J:

So that was another aspect of the judgment that Mr Maassen didn't have any notice of. He didn't know the remedy that was coming and he didn't know there was going to be refusal of a stay.

MR PARKER:

Well, yes, I'll come back to those two points but –

WILLIAM YOUNG J:

I think he must have asked for a stay, I'm looking at paragraph 66.

MR PARKER:

Your Honour may well be right. Excuse me one second.

ELIAS CJ:

Of the judgment?

WILLIAM YOUNG J:

Of the judgment.

MR PARKER:

Yes, Your Honour is right, thank you. Simply we say that that step could have been taken to apply for a stay. I think I was just about to address the point in passing about a forthwith order. I don't believe that that has a higher status than any other order that requires something to be done, it is indicating do it without delay. Well as it happened the judgment came out at the end of the 5th. There was no forthwith provision of the signed resolution until mid-morning.

O'REGAN J:

The judgment came out on the 6th, didn't it?

MR PARKER:

It came out on the 6th, which is the Thursday at the end of, towards the end –

O'REGAN J:

And the contract was going to drop dead on the 7th?

MR PARKER:

The 7th was the last day to confirm it.

ELIAS CJ:

And the order was complied with by mid-morning.

MR PARKER:

By mid-morning, yes.

ELIAS CJ:

It seems pretty forthwith to me but then I'm not a conveyancer.

MR PARKER:

I don't want to make over much of this. I'm simply saying in passing that there could have been an application to the Court of Appeal to stay the order pending the appeal.

WILLIAM YOUNG J:

Well it could have been done by email and asked for a telephone conference.

MR PARKER:

I believe so. Be that as it may if we continue –

O'REGAN J:

Can I just ascertain, if Mr Maassen did ask for a delay to allow for an application to be made to the Court of Appeal, presumably you opposed it did you? Did you oppose that? The Judge says although –

MR PARKER:

Yes, I know, I'm just trying to recall Your Honour. I anticipate I would have done but I can't recall exactly but it would be wrong for me to suggest that I wouldn't have done. I don't believe it was any significant argument as far as I can recall on the day. Shall I continue Ma'am?

ELIAS CJ:

Sorry, you mentioned a decision of the Privy Council which I didn't take a note of but doesn't seem to be in the authorities, is that right?

MR PARKER:

It's not in the bundle. It's, in passing I saw reference to it in the case of *Finnigan v New Zealand Rugby Football Union,* which I'm sure the Court will be familiar with, but if necessary I will obtain it.

ELIAS CJ:

No, no, I just wondered. Can you just tell me the name again?

MR PARKER:

It's *Sun Life*, I've given myself a shorthand of that which I will expand, and it's per a comment of Lord Chancellor Simon.

WILLIAM YOUNG J:

Sun Life was one of the leading cases on mootness, isn't it?

MR PARKER:

Yes. So if we accept, as we suggest to the Court is the case, that there is no substratum left here because of the sale of the property, what is left that should persuade, or have persuaded the Court of Appeal to continue to hear it. The *Borowski* case and the other cases which have gone on to consider what might appear to be moot in the sense of the substratum disappearing, all have an element of public law, or something analogous to public law, concerning them, and that's what's motivated the Court in each case to look at the matter. *Gordon-Smith* of course related to jury vetting by the prosecution

and that was decided, that is a matter of significant public interest, it was going to –

GLAZEBROOK J:
What about commercial interest, does that not count?

MR PARKER:
I'm not saying it doesn't count, but I think there's got to be that, well first of all the cases indicate there's got to be this public law element, or something analogous to it.

GLAZEBROOK J:
Well whether you can use a statute for a purpose, and whether there's jurisdiction to make an order, would seem to me relatively fundamental a question. When you're looking at a Companies Act that actually regulates every company in New Zealand and elsewhere in some cases.

MR PARKER:
Ma'am, I can see that argument but in my submission this case is particularly fact dependent, and in cases that have dealt with mootness, if there is a suggestion that a matter is indeed going to be particularly fact dependent, then the Court will say –

GLAZEBROOK J:
Well the argument that it's not fact dependent is being made, i.e. there is just not jurisdiction whatever the facts to say that you take away a minority shareholder's right to have a meeting and decide whether or not to vote in favour of a major transaction.

MR PARKER:
Ma'am, I have yet to address those points, but –

GLAZEBROOK J:

Well if it's right it's not fact dependent is it, because it really doesn't matter how irrational they were being, whatever motive they had or anything of the sort.

MR PARKER:

I respectfully disagree and I hope I will develop my argument to you to show you why that's the case. If something is fact dependent, as I suggest this matter is, there's no great principle to be drawn out of it that has that overarching element that Your Honour was referring to by way of benefit to the structure and use of the Companies Act and companies abiding by it. So when I delve into jurisdiction hopefully I will be dissuading you that –

ELIAS CJ:

Well I suggest that perhaps that's really where the case turns, so you might want to press onto that, but we have read your written submissions on mootness, perhaps you can just touch on the things that you particularly want to emphasise there before moving to whether this order was available.

MR PARKER:

Ma'am, I don't think I need to spend overly long on the mootness, the tests are there. I suggest to you the, as I've said already, substratum's gone, the sale has happened, the question is whether there is some lesson to be drawn from the circumstances which require a statement about the exercise of the jurisdiction that warrant the matter not being declared moot and being fully heard.

So if I move on to jurisdiction and Justice Ellis' order, with which you're now fully familiar. The reference to the case of *Hogg*, which my learned friend referred to, was not cited by me because of any other purpose than that it showed a minority can be deemed to be oppressing a majority of the shareholders. Under section 174 it's been shown that, it indicates by its terminology that the application can be brought by a shareholder but the conduct can affect them, according to that section, in that capacity or any

other capacity. I can't find case law on that particular aspect. I did see that there was commentary in Morrisons which echoed the effect of that with some approval, but there was no case citation supporting that comment in the learned author's commentary.

ELIAS CJ:

What about the point that's made about the scheme of Part 9, was it 9, I can't remember these numbers, Part 9 and whether it's not about oppression through management and the company activities, rather than through exercise of shareholder rights.

MR PARKER:

Ma'am, I don't see that there is a distinction there because certainly in a lot of the companies like this, Kadd Farm, it is a small company where effectively two of the shareholders were directors until very late in the piece, are managing the company, and their decisions effectively are managing the company. Where we got to with this is a company that was in dire financial straits, that had been indicated for at least two years, the evidence indicates, and at that two year point before, so 2014, all the shareholders had agreed that sale would occur. I think that's quite important to emphasise. There was no disagreement between the shareholders that a sale should occur. It's at what level it should occur that seemed to be the problem and of course the, to use your word, the gravamen of my clients' case is, that the resistance to signing the special resolution was borne out of their desire to have that conditional on all their debts being wiped, that they owed to the company –

O'REGAN J:

They're entitled to have any motive they like as shareholders aren't they?

MR PARKER:

They can have any motive they like but it still has to be fair.

O'REGAN J:

No it doesn't. Why do shareholders have to be fair? I mean unless there's a shareholder's agreement that creates some sort of fiduciary obligations to each other, why do they have to be fair?

MR PARKER:

Well the authorities tend to suggest that that is the underlying rationale for section 174, which is –

O'REGAN J:

But section 129 gives you a veto right, and all they were doing was exercising it, and it says if you vote against you're allowed to be bought out, it gives you rights that result from the veto. So why is the exercise of a right the Act expressly gives you oppressive?

MR PARKER:

It's capable –

WILLIAM YOUNG J:

I suppose there are other rights that are given expressly by the Act such as approval of dividends and that sort of thing, non-approval of which is oppressive, but it is quite a big thing to say that something that is there to protect people can just be sidestepped.

O'REGAN J:

I mean would you say, for example, a refusal to vote for a resolution to change the constitution could be oppressive, because that's a similar sort of power, isn't it? That's the whole purpose of having 30% of the company, so you can block these things.

MR PARKER:

Well in my submission it's capable of being, I don't think there can be a rule to say, no it can't ever be oppressive to be unfair.

O'REGAN J:
So you would say to someone who insists on having 25.1% in a company, that you've got blocking rights subject to being overruled by a High Court Judge.

MR PARKER:
If you act unfairly.

O'REGAN J:
Unfairly, but where does it say in the Companies Act a shareholder has to act fairly?

MR PARKER:
Well in my submission there is a responsibility that attaches to –

O'REGAN J:
Well where, what's your authority?

MR PARKER:
My authority for that is *Re Empire Building Limited* [1973] 1 NZLR 214 (CA) and Turner P, President of the Court of Appeal then, let me see if it can just turn to that for your assistance. It's in our bundle of authorities and tab 5 and page 72 of that bundle, and in particular I'm starting at the paragraph beginning at line 26.

O'REGAN J:
At line 20 he says, "The articles provided for the way in which the funds of the company would be distributed… cannot in my opinion be oppressive for shareholders to refuse to amend them." You just said to me you thought a refusal to amend the constitution could be oppressive.

MR PARKER:
Well it could be because –

O'REGAN J:

This is the exact opposite.

GLAZEBROOK J:

He was talking about where you've got a discretion as well, and you can't exercise a discretion unfairly, which might be slightly different, because…

ELIAS CJ:

Well also look at the opening couple of sentences.

ARNOLD J:

Yes.

ELIAS CJ:

Which really makes the point that's been put to you by Justice O'Regan, that in the absence of some undertaking, or shareholder agreement, there's nothing to complain about.

MR PARKER:

That doesn't seem to be what President Turner said in that passage I've referred you to. I don't know whether I can attack it in a different way, which is this, my learned friend has, in his submissions and his address to you today, suggested that there is a pre-imminence to section 129 that makes it sacrosanct. Can I first deal with the suggestion that there must be a meeting before there can be a resolution. I do not see that in the scheme of the Act. A special resolution is an alternative to having a meeting. But if we look at section 129 and –

GLAZEBROOK J:

If somebody refuses to sign that then the only way you can do it is through a meeting, isn't it?

O'REGAN J:

And if you sign it you lost your minority buyout rights, so why would you do that?

MR PARKER:

Well you might do it in the interests of the company, which was the point I was coming onto, which is this company was in dire financial straits. There was a way to resolve those difficulties –

O'REGAN J:

Well except that the shareholders didn't agree with you. They thought it wasn't the best way forward for the company. They thought the higher offer would have been better. They were entitled to hold that view.

MR PARKER:

Well with respect, Your Honour, that's not correct because there is a letter from the Bakers which indicated that they were not prepared to sell even at $4.3 million without – well, they first of all said that it would undo their entitlement to be paid out for cost, disputed costs, which they said they were owed, and that was the theme that was developed in a number of communications, firstly between the solicitors, recognised in the affidavits of both my clients and Ms Baker, and it submitted that when one looks at that there was no, there was an agreement to sell, but it was never – so that, to some –

O'REGAN J:

So there was an agreement to sell, you accept that?

MR PARKER:

Sorry?

O'REGAN J:

You accept there was an agreement to sell?

MR PARKER:

No there was an – the shareholders definitely agreed to sell.

O'REGAN J:

So why didn't they hold a meeting. Why didn't they just convene a meeting. Why didn't they ask for extensions of time that allowed enough time to have a shareholders' meeting and debate the issue? Isn't that what you would do as responsible directors of a company which has to honour the section 129 right?

MR PARKER:

But, Your Honour, there is no doubt from the evidence there was communication between the parties, not just through their solicitors, and the Hodders got to the point where all the communications were indicating that there will be no signing of a special resolution to sell the major asset of the company unless there was settlement of personal debts, some of which were owed to the company, some which were not, but the majority of them were, and there was no reason for those to be given away by the company. It wouldn't be –

ELIAS CJ:

It was in the order of about $124,000 was it?

MR PARKER:

No.

ELIAS CJ:

No, it was more, I'm sorry.

MR PARKER:

No, it was quite a lot more. It was over a million. I accept it's disputed by my learned friend and his clients. I need to be clear about that, but it was of a much greater order and related to, just so that Your Honours are clear, there was a lease of Heron Creek farm, the adjoining farm Iramutu, which was leased to Mr Baker's company. There was a loan of $400,000 to Mr and Ms –

no, sorry, to Mr Baker's company, and Mr and Ms Baker. That was increased by $100,000 by the Hodders to assist Mr Baker paying his income tax, and there was one other element, sorry it's gone out of my mind for a moment, but those by themselves were substantial debts, and they were saying, we won't sign this special resolution unless those things are settled in our favour, or there's a payment received by us was one of the things that they said. They based that, to put it fairly, on they said they had put –

ELIAS CJ:

Their improvements.

MR PARKER:

Their improvements of $700,000 which they thought would translate, or the whole gist of what I've understood from my learned friend, would increase the value of the property but actually things don't quite work that way, plus those inputs were never agreed to by the Hodders. They weren't even aware of them, there was no company discussion between shareholders –

ELIAS CJ:

Yes, but all of this indicates that there's quite a complex background and nobody has yet grappled with the rights and wrongs of that, and hopefully no one will ever have to, but how does it, why does that – yes the Bakers may have expected or hoped to get something, salvage something from this, because they weren't going to salvage anything on the basis that the property sold at $4 million. Why aren't they allowed to vote their shares with that motive?

MR PARKER:

Because it's not in the interests of the company.

ELIAS CJ:

Well the company was –

ARNOLD J:

I mean there was this countervailing offer of $4.3. I understand there were some conditions around that which led the parents to say, well, we don't think that should be pursued. But I mean isn't, in those circumstances, why is it not legitimate for the daughter and son-in-law to say, well, hold on, we want that pursued.

MR PARKER:

Well they didn't really say that. They were saying we will agree to a sale –

ARNOLD J:

Well they wanted a counteroffer of $4.8 million which was rejected by the parents, but I mean all this indicates is that there were, as the Chief Justice has put to you, a number of things swirling around here, and clearly there were strong views on both sides, and a meeting seems an obvious way of attempting to resolve them.

MR PARKER:

Sir, with respect, there weren't all these offers swirling around. If I can talk firstly to the $4.3 million offer. It was subject to a due diligence clause. There's evidence in affidavit from Mr Hodder which indicates that that was a buyer who was attempting to buy a multiplicity of properties in the area. The due diligence clause made the matter uncertain, whereas they had a second sale within the range that Mr Sorenson had indicated. In fact Mr Sorenson's valuation was under the four million. Can I just touch upon –

ARNOLD J:

Well just stopping there. You may be right, I have no idea, but the point is that is a matter for discussion between the shareholders to resolve. It isn't a matter for unilateral decision by some of them is it?

MR PARKER:

Well with respect these things were being discussed. It didn't have to be in a meeting. The meeting seemed to be geared only to the Bakers continually

putting, no we're not going to sign until our debts are dealt to, and they were, and I really don't like using the expression, but they were holding things up for their own personal benefit. In my submission to Your Honours that can't be a proper use of their discretion.

ARNOLD J:
All right, I understand that. I don't want to, we can't get into the facts here.

MR PARKER:
No, it's delving a bit too deep.

O'REGAN J:
But section 129 isn't really a discretion, it's a veto right.

MR PARKER:
Well…

O'REGAN J:
In the division of powers between directors and shareholders, section 129 says once you get into changing the whole substratum of the company's business, you've got to get all the shareholders lined up, or at least 75% lined up, and if you don't you can't do it. Then if the outcome is that the only option is liquidation, well then you put up a resolution to liquidate.

MR PARKER:
That, with respect Your Honour, elevates section 129 to a level that I don't think is warranted by the Act.

ELIAS CJ:
Section 129 was conceived of as a pretty pivotal section in the scheme of the Act.

MR PARKER:
I understand that Your Honour but can I just put these points to you about the Companies Act. There are protections for people who enter into a contract

with the company where section 129 has not been complied with, and they are protected in those transactions. That is different from other provisions in the Companies Act, for instance the issue of certain shares, where when that takes place and it's done improperly, or in breach of the Act, that transaction is illegal. It says it in those terms, and there are other similar provisions which require –

GLAZEBROOK J:
So what you referring to there, sorry, what section?

MR PARKER:
Section 40, contracts to issue shares.

GLAZEBROOK J:
But that's slightly different because isn't the whole idea about the Companies Act and the change in the Companies Act was that people didn't have to worry about the internal management of the company if you were a third party. So it's perfectly consistent that you don't worry about the internal management of a company on a section 129 basis isn't it, because before you had to look up and say, have the directors do this, have they resolved, have they done everything, is it within the powers of the company and wasn't the whole basis of the reform to say you don't worry about that stuff, if you're a third party?

MR PARKER:
Yes, certainly if you're a third party but that doesn't seem to tie in with section 40's protection which is the wrongful issue of shares is deemed illegal, and it's a –

O'REGAN J:
But there's no third party is there, there's just the shareholder and the company. So you don't need protection.

MR PARKER:

Well there maybe the issue of shares to a third party.

O'REGAN J:

No there's not. If the company issues shares to a shareholder illegally the Court just cancels them. Who's the third party?

MR PARKER:

Well couldn't it be a third party taking shares in the company?

O'REGAN J:

Well they'd become a shareholder if they do that.

MR PARKER:

Yes of course, indeed they do.

O'REGAN J:

Exactly, so why do they need protection?

MR PARKER:

But not until that point is reached. The other point I was going to make ancillary to this was there is, for instance, the provision in the Act that requires unanimous agreement to certain types of action, which is section 107. There's no such protection for a major transaction that would elevate section 129 to that sort of protection. If I'm getting it wrong –

O'REGAN J:

But there is, if you vote against it you're entitled to be bought out, and by refusing to have a meeting you deprive them of that possibility.

MR PARKER:

Well there's no requirement to have a meeting. It's either a meeting or a special resolution.

O'REGAN J:

Yes, but a special resolution, unless you've got a special provision, has to be signed by everyone.

MR PARKER:

Yes indeed but it doesn't require –

O'REGAN J:

So that by definition means if it's going to be signed by everyone, then no one gets any buyout rights. At a meeting one of them could have voted for it and one against, possibly. You might have had a, you know, or if they had voted against it and it had still gone ahead in a case where they had less than 25% they've be entitled to be bought out. So there's a balance, isn't there, and it's very clear that as a shareholder you're not required to stay in a company where the business has been fundamentally altered from what you signed up for, and that's what happens when the major asset gets sold.

MR PARKER:

Yes, which had been agreed to. But to come back – sorry, can I just step back slightly, Your Honour, which is to the suggestion there must be a meeting for there to be a special resolution signed. That's not so.

O'REGAN J:

I know that, I know that.

MR PARKER:

But Your Honour seems to be indicating to me that that is the process.

O'REGAN J:

No, I'm saying if you don't have a meeting you have to get everyone to sign.

MR PARKER:

If there's a meeting.

O'REGAN J:

Yes, and then you – if everyone signs – no. If there's not a meeting everyone has to sign, don't they?

MR PARKER:

Yes, indeed.

O'REGAN J:

Yes.

MR PARKER:

Yes indeed.

O'REGAN J:

So we're all agreed on that, I don't know why we're debating it.

MR PARKER:

I'm sorry Sir, I may have misunderstood something you said, so I do apologise.

GLAZEBROOK J:

But if they're not going to sign, then you have to have a meeting if you want the transaction to go ahead.

MR PARKER:

With respect I don't see that. I don't see that in the Act because –

GLAZEBROOK J:

So you go to Court and say it's not fair, these people won't sign, when you could easily have a meeting to discuss it and see whether you get a 75% majority.

MR PARKER:

Ma'am, there's a decision to be made at that point by the majority which is, well we'll have to accept that and just soldier on with this company or if the

reason for not signing is not one fair, and I'm using that terminology because the authorities do, if it's not fair, and it's not in the interests of the company and also it has an oppressive effect upon the person who's brought the application under section 174, the Court has a very broad power to make the order that Justice Ellis made, and which had been made similarly in the *Fairway Holdings Ltd v Furno Ltd* [2014] NZHC 858 case.

GLAZEBROOK J:

Well you perhaps need to work out, I mean we need to unpick that. You need to tell us what's fair, where the not in the interests of the company comes in because shareholders don't have any duty to act in the interests of the company and what's an oppressive effect on whom. So perhaps you do need to go through the cases you say.

ARNOLD J:

There's another point. I mean the argument you're advancing that seems to me in the situation like this where you've got a 70/30 split, which is presumably deliberate against the background of section 129 and so on, where there is a disagreement of that sort, it creates an incentive for the majority shareholder to come to the Court and ask for a remedy rather than committing fully to a process of trying to reach agreement with the minority shareholder, and that does, it seems to me, run completely counter to the underlying philosophy of section 129.

MR PARKER:

The way the shareholding was constructed may very well have been to, as you indicate, not be consistent with 129, as one might anticipate in a family business where the first stop is agreement.

ARNOLD J:

Yes.

MR PARKER:

And discussion, I fully accept that, and I think that's probably the way most companies operate in, in our country. However, what I am suggesting to you, and I'm sounding like a broken record I know, is that there must be an ability if there are explicit powers or discretions given to parties under the Companies Act where that is not being exercised in, whether it's fair or proper or a correct way, and it's detrimental, and I do say to the company but I accept what Your Honour Justice Glazebrook has said about the duty of, or non-duty of shareholders, but to the applicant for the remedy under section 174. Given the breadth of section 174, the non-exclusive list of potential remedies I think is subsection (2), it must be the case that the Act itself recognises that as President Turner said, there are times when powers properly given under the constitution and/or Act, although both reflect each other, can come to the Court and say, this is oppressive. It's oppressive to me as a shareholder. It's oppressive to me as Mr and Ms Hodder for all the resources we put into this company and the company is in this dire position, to ensure that something which would otherwise be a proper process, sale of the major asset in a company that's failing, it should come to our aid h ere.

ARNOLD J:

So how can you get over the point that your friend emphasised about section 175(1)(l) which just says, "Failure to comply with any of the following sections of this Act is conduct which is unfairly prejudicial."

MR PARKER:

Well the order ensured compliance with it. So the Judge's approached it in a way to not contravene that. I don't think that, of itself, is a bar. I don't see anything in 174 that contradicts her ability to make an order as she sees fit, to echo the words of the section, and that's what she did, and it was a regulated decision, if I can put it in that way. It was in accordance with principle. It wasn't capricious in any way. I know my friend has made something of the fact that ultimately what was made and ordered was not what was asked for but I think that's again underlined the width of the power that's given to the

Judge under section 174. It is indeed very wide indeed to enable, to fashion a remedy, and that's why it's a non-exclusive list.

O'REGAN J:
Is there any authority, other than the decision of Justice Lang, about using section 174? I mean acknowledging that in this case it was an interim order, quite clearly, not a final order, but is there any other authority?

MR PARKER:
Other than that where that remedy has been ordered, no I couldn't find –

O'REGAN J:
Or where section 174 has been used where a shareholder declines to sign a section 129 resolution or to vote in favour of it at a meeting.

MR PARKER:
No, I couldn't find another one. That seemed the one that was on point.

O'REGAN J:
But in that case it was effectively a compromise remedy wasn't it?

MR PARKER:
No I don't believe it was, and can I just address one point Your Honour made saying it was interim. In my submission that order was final. What was interim was that he recognised, and it's in one of the last paragraphs in that decision, he recognised that there were these other remedies available to the parties who, against whom the order was being made, to bring – to that extent there appeared to be other processes within that proceeding where that might be investigated. To that extent it was interim but the order itself was not, and that does lead me on to the point of, sorry Ma'am?

ELIAS CJ:
Sorry, if you're going on to another point, perhaps finish, but I want you to come back to section 175.

MR PARKER:

Sorry Your Honour.

O'REGAN J:

That's fine, you've answered my question thanks.

MR PARKER:

Thank you. Yes Ma'am.

ELIAS CJ:

Well 175 interpreted, as you say it does, to exclude anything, exclude what's happened here because a Judge has given the direction, it's really to treat section 174 as giving the Judge a power of dispensation from section 129, which seems contrary to both the structure of 175(2) and also to the basis of 174, which isn't about the sale, it's about the majority feeling oppressed by the minority relying on their rights under section 129. It just, it can't be the case that section 174 against that scheme permits the Court to dispense with the application of section 129.

MR PARKER:

What I would say about 175(l) is that the prejudicial or oppressive conduct is comprised in disregarding section 129. I don't believe that that precludes the Court under 174 facilitating a transaction under 129. There's a difference between the two. One is where somebody has, by their oppressive conduct, or constituting the oppressive conduct, ignored section 129. That's not the case here. What has happened is that the Court has ultimately said, a refusal to engage in section 129 by the shareholders was oppressive and it's right in these circumstances to make an order facilitating –

GLAZEBROOK J:

But they wanted to engage in 129, they wanted to have a vote and a meeting.

MR PARKER:

With respect they didn't. They wanted to only agree to provide their vote on conditions of personal benefit. That is a different thing in its nature.

ELIAS CJ:

But if there had been a vote, and if the directors had ploughed ahead, their conduct would have been deemed by the legislation to be oppressive under section 129.

MR PARKER:

Indeed, but they didn't.

ELIAS CJ:

Well they didn't because the Judge intervened and the question is the propriety of that against this background, which seems to enable a substantial shareholder to block a substantial transaction.

MR PARKER:

The majority shareholders didn't go ahead and reach a –

ELIAS CJ:

Well they didn't because they went to Court.

MR PARKER:

Correct, I agree with Your Honour, and that was a proper thing to do. To bring the matter before the Court, air it, and see if there was – and ask for a solution to the deadlock which was perfectly appropriate.

ELIAS CJ:

They went to the Court and got the Judge to do what they couldn't have done under section 175(1)(l).

MR PARKER:

They wouldn't have done that under section 175(1)(l). I don't think they can be castigated on the basis they did the right thing and came to the Court.

GLAZEBROOK J:

It's not castigating your clients, it's just trying to tease out the structure of the Act and whether the order was proper or not. So obviously your clients were not trying to disregard the law or in any way trying to circumvent anything. So it's really a structure of the Act question not a question of the propriety of your clients actions.

MR PARKER:

Forgive my wording. That was probably a little enthusiastic.

ELIAS CJ:

I think Justice Glazebrook was assisting me because it was probably my question that suggested that, but I am interested in the structure of the Act dimension, not in terms of motives or other propriety.

MR PARKER:

Yes Your Honour, I agree this question of motive as it's been characterised here today is a difficult one to draw, from which to draw principles that can be relied upon, but I suppose before I leave this I would simply say that 175(1)(l) is not a bar to the order that Justice Ellis gave. Does Your Honour want me to continue any further on that point?

There are a raft of communications which I have footnoted at some length and I apologise for that. I won't take you through every element of that but it's footnote 48 in my submissions and it sets out the circumstances of the communications saying we will not agree to sign the special resolution unless there's a settlement of our debt or the whole set of relationships between us. I will assume that Your Honours would not like me to go through that. it would be quite lengthy but that is a footnote which I draw your attention to.

GLAZEBROOK J:

One of the slight difficulties with this is that if that's relevant, and I don't at the moment see that it is, they haven't been cross-examined on and no findings

have been made, as far as I can tell, at least – well, no findings could properly be made in the absence of cross-examination I would say.

MR PARKER:

There was ability to ask for that. It was never requested. It was never a significant issue.

GLAZEBROOK J:

Well that wasn't what your friend said.

MR PARKER:

I don't recall, I'm not disputing what he says, and his recollection may be better than mine, but it certainly wasn't the subject of an application, and there was ample opportunity for that to occur. As you can see there was an application by –

GLAZEBROOK J:

Well it's difficult to see where the ample application because – well just in terms of the timing, there might have been time for the application to be made, but that was one of the arguments about prejudice in terms of not making the orders.

MR PARKER:

Well if the application had been made that may have weighed with Her Honour as far as the application to adjourn the matter and not be heard on the – initially it was going to be on the 4th, and then was put back to the 5th. That's not much of an adjournment, I accept, but it may have weighed with her for a greater adjournment, but it simply wasn't an application that was made. Can I just move on to this point, which is not totally unassociated, which is it does appear in looking at the approach of the appellants, both here and in submissions made to the Court of Appeal, which they really didn't have, or didn't give themselves the opportunity to address, what claims were available to them. It's as though there's a suggestion that the order made by Justice Ellis cut off their ability to make complaints about the sort of behaviour my

learned friend has tried to traverse this morning, and in fact it was said in terms that Justice Ellis' order made the ability for the Bakers to bring such an application or claims closed, door closed I think is the words used. In my submission, and it was also said in the submissions that Justice Ellis said something along the lines of, but explicitly that if I'm wrong there are these other claims available. At no point did she say if I am wrong there are other claims available; she pointed out in four different paragraphs in her judgment that there were other remedies available, as did the Court of Appeal, and I just want to very quickly traverse what might be available to them insofar as it's relevant I'll be brief.

They could, of course, based upon a number of the points my friend has put to you today, make an application themselves under 174 for oppression. I'm not saying I accept any of this but it is available to them, and it seems that what he was suggesting was a course of behaviour over quite a long time.

GLAZEBROOK J:
And so it couldn't possibly be oppression in relation to having to sign the resolution, so what would the oppression have been, and then would the effect, or the order that you could seek or the remedy you could seek be?

MR PARKER:
Well I'm really adopting what he says, which is that the Hodders were oppressive in not meeting, not agreeing to sales at the sort of price the Bakers wanted, or seeking offers at the sort of level they wanted over a number of months. Just as an ancillary point, we saw that PGG document earlier, which I think Justice Arnold referred to. Whilst that was dated May, the property itself had been for sale since March, that is in the evidence. There could have been a claim as a second type of claim against the Hodders for breach of their duties as directors, and that was touched upon I think in submission and maybe in the judgment. The –

ELIAS CJ:
But not in the sale because the sale wasn't affected by them as directors.

MR PARKER:

Well they were the only directors –

ELIAS CJ:

I know, but the sale was pursuant to a resolution of the directors in which the Bakers were directed to participate.

MR PARKER:

Yes, yes.

ELIAS CJ:

So the sale doesn't seem to be still something that could be the subject of further application to the Court.

MR PARKER:

Not by itself but as I understood, I'm really trying to comprehend what's been raised by my learned friend, because in his submissions before this Court he said that his clients should be entitled to cost/indemnity costs based upon an allegation of abuse of process by my clients. That's never been articulated in any way other than in submission but there is obviously an underlying view in his clients that there is such behaviour in their position as directors that might lead on to the sort of claim that could be made against directors under those sections in the Companies Act relating to breach of duties.

ELIAS CJ:

There's not going to be anything left in this company is there?

MR PARKER:

No. Not at all and it doesn't warrant us being here. In many ways it seems, drilling down in the submissions of the appellants that we're really arguing about a $40,000 cost, and I don't say that's inconsiderable, but –

ELIAS CJ:

We may be arguing, I don't know, but we may be arguing about whether the sale should have gone ahead, and whether there's loss to the company or to the share – arising out of that, and the non-observance of section 129.

MR PARKER:

Yes, I mean I've gathered that from the questions that the Bench has been putting to me as we've gone through.

O'REGAN J:

And the High Court judgment completely kills off such a claim doesn't it, because the High Court Judge has actually facilitated it by an order of the Court.

MR PARKER:

Well I don't think it completely gets rid of the ability to make claims about other things that the Bakers say the Hodders did.

O'REGAN J:

Yes, but the front and centre of this case is the sale.

MR PARKER:

Yes.

O'REGAN J:

If you take the sale out of the play what else is there to sue about. So I mean I just don't see how you can possibly stand there and say the High Court decision has no account on Mr Maassen's clients' ability to sue your clients. It's a complete bar to it, it seems to me.

MR PARKER:

Well with respect that's not necessarily the case. One of the things that they complain of is that when proceeds were received there was the paying off of

the secure creditor, the BNZ, and then repayment to the Hodders' company back to their trust of their trust of the $3.1 million plus interest.

ELIAS CJ:

Well that's an additional matter of complaint in the disposition, that's not before the Court, and so that's not prevented presumably. That's about the disposition, yes.

MR PARKER:

I agree with Your Honour respectfully, that is certainly available and I would have thought, and there does seem to be that power under section 301 of the Companies Act for there to be repayment of monies where it's been paid out incorrectly. It's the section that took over from the old voidable transactions.

ELIAS CJ:

But that's not before the Court?

MR PARKER:

No, no, it's not before the Court. All I'm saying is that's not been cut off by the order of Justice Ellis.

ELIAS CJ:

The thing they have come to Court about, and resisted all the way through, was the sale.

MR PARKER:

Yes. They resisted –

ELIAS CJ:

And that is foreclosed by the orders that have been made.

MR PARKER:

Yes. I agree with Your Honour. We're not, we're at one on that, and that we would say is why this matter is moot. There's nothing particularly to be

gained, or anything of that wider level that would warrant there being a delving into the substantive issues behind the decision of Justice Ellis.

O'REGAN J:

But doesn't that mean that her comment in her judgment that this doesn't preclude you taking other action in relation to the sale is wrong.

MR PARKER:

I didn't understand her to be saying it was in relation to the sale. What I heard from my learned friend here is that there are matters that he believes were wrong and actionable that are not related directly to the sale, but in the dealings leading up to what became the sale, and that can affect the Hodders in their office as directors, suggesting that they weren't acting as they should under their duties in the Companies Act, and those are still live matters.

GLAZEBROOK J:

But aren't they a bit subsumed in the sale because the things complained of is that they kept renewing the time period in relation to the sale. Things like they should have looked at the Hall offer rather than the sale. But it all comes back to the sale, doesn't it? Which is I think the point that your friend was making. Obviously what happens to the proceeds afterwards is totally different, but anything leading up, which is what she was saying, "To the extent the defendants are unhappy about how that state of affairs has come to pass," and how that state of affairs has come to pass is that there wasn't a meeting. There wasn't an opportunity to meet. The other offer was not pursued. The $4.8 million they wanted a counteroffer to be was not put et cetera.

MR PARKER:

Yes, but –

GLAZEBROOK J:

But it all comes down and it's all subsumed by the fact that of that sale in the end isn't it?

MR PARKER:

With respect I don't believe so. Yes, there's a sale, but this other behaviour of which they complained, it's not related to that particular sale. It's at another level of behaviour about managing the affairs of the company, and it's not strictly tied to that particular sale.

GLAZEBROOK J:

Well what are any damages going to be then?

MR PARKER:

The damages which they would seek to pursue appear to be what they have said at its highest, a contribution of $700,000 in kind and improvements, and that seems to be what they are aggrieved about, that there was never any recognition of that. There seemed to be an unrealistic view that they would be paid something out of that. When one looks at the debt situation of the company, which exceeded –

GLAZEBROOK J:

But all you're really saying is that the sale has taken away that possibility, which was never real in the first place, so there isn't any other remedy.

MR PARKER:

With respect that's not right because whilst it's an argument against their claim, if it's right that there was a sale at undervalue, which I don't believe there was but I'll put that to one side, and they were deprived of being entitled to have a share of a much greater sale price, then they have suffered a very real loss, perhaps. I mean I'm not accepting that argument, but that's one argument that they could pursue. They say they've lost the benefit of $700,000 and that's what they repeatedly say and had, they say, been deprived of some share by virtue of actions of the Hodders in the lead up process over quite a number of months and I would suggest the disposal of the proceeds is part of that narration. But it's not cut off by the fact of the sale.

Can I just deal with a small point in passing, and it was the PGG Wrightson marketing document, you'll recall that was drawn to your attention by my learned friend. It's in case on appeal volume 3, page 419 of the case. It's not a large point but your attention was drawn to the three paragraphs before the heading "2. Selling fee." But the paragraph above that which begins, "Recent comparable sales data therefore suggests that the current fair market value range for this property would be in the order of $23,000-$24,000 per hectare of $4.025 to $4.2 million plus GST." Now to read those last three paragraphs without reading that preceding one, which was giving an indication of what the proper marketable price might be, as against the expectation, is quite significant in my view, and I won't belabour that.

I have some small points that I just would like to tidy up unless there are substantial arguments about jurisdiction that you still wish me to address?

GLAZEBROOK J:
Have you just said anything that you can or want to say on what's unfair?

MR PARKER:
Yes, I believe I have. I would simply be seeing that it is a substantial basis for an order being made under section 147.

GLAZEBROOK J:
And what's unfair about this. That the company was insolvent, that the price was a reasonable price, and they have an ulterior motive, is that, are those the…

MR PARKER:
Yes, that's the nub of it Ma'am.

O'REGAN J:
But the unfairness was really in their capacity as creditors rather than shareholders, wasn't it? Is that what they were relying on, the fact that the debt, they had the most to gain from the sale?

MR PARKER:

They were debtors to the company, yes, they wanted those debts just simply wiped off.

O'REGAN J:

But the section is about prejudice to shareholders isn't it?

MR PARKER:

The prejudice is to the shareholder in that or other capacity and that's what the section says, and therefore it can be…

GLAZEBROOK J:

Yes, so what, I was just going to ask you this before we moved on, so in what capacity was it unfair to your clients?

MR PARKER:

It was unfair to them firstly because they were supporting the company by contributions to pay the secured creditor the BNZ to keep the company afloat pending an orderly wind down and pending a sale at a reasonable level that would first of all get rid of the secured creditor, and secondly not unreasonably get the very significant investment of 3.1 million plus interest in other supported payments to their trust, which was effectively themselves, rather than if matters continued that would be, that position would be degraded plus if the company had to be declared insolvent, or there was an application by a creditor to make the company, to liquidate the company, there might be a sale which might not be so favourable as one that was conducted in an orderly way as indeed was the case here.

GLAZEBROOK J:

Where did the tax losses fit in there, do you rely on those?

MR PARKER:

I don't make a big point about that. The tax losses, I mean it's important but it wasn't the motivating factor. The tax losses were raised because on the late

afternoon before the hearing before Justice Ellis she issued her minute doubting the precise remedy that we were asking for, and pointing that out to us and what did we want to do with that, and at the same time said, what I am thinking about is liquidating the company, and it was in that context that a memorandum went back very briefly and swiftly to her saying, yes, we would certainly agree with Your Honour about the jurisdictional point, and secondly that our clients would prefer not to lose those tax losses but that's the only time that came up. I don't believe it was, became any significant part of the hearing before Her Honour.

O'REGAN J:

Were the Hodders themselves creditors, or was it their company and their Trust?

MR PARKER:

It was their Trust funnelling money through a company called Belvue Downs.

O'REGAN J:

So they actually weren't creditors at the time? Except in the – they were shareholders in a company, or they were beneficiaries and trustees of a trust that was a shareholder in a company that was a creditor.

MR PARKER:

Not directly. But of course, but I mean…

O'REGAN J:

Does that matter?

MR PARKER:

I don't think it does. I don't think it does.

ARNOLD J:

The structure that, you know, just following this line, the structure it seems to me operates asymmetrically because as you rightly point out section 174 talks

about shareholders in that capacity, or in any other capacity, and as you said the Hodders were effectively creditors through these structures but you've also argued that the motivation of the Bakers has to be considered but weren't, I mean they saw themselves as creditors and your clients may not accept that but that's how they viewed it, and they were concerned about their position as creditors. Now do you say that, I thought you said that was illegitimate, they had to think simply about the company.

MR PARKER:
What I would say firstly in answer to your question is this. As far as my clients and their company and Trust are concerned it is undisputed and documented that they were creditors of the company.

ARNOLD J:
Yes, I accept that.

MR PARKER:
That is not the case for the Bakers. There is nothing to support what they say about their improvements. It is wholly disputed because Mr Baker and his company ran –

ARNOLD J:
But that to me simply gets us back to what we were talking about earlier and really highlights the problem with the process that's occurred in this case. clearly your clients do completely reject the Bakers' perspective on this, but in fact the Court was in no position to determine that, the material wasn't there, it wasn't, well they'd gone through it all, and it does tend to suggest that this process has misfired.

MR PARKER:
It is not – sorry, it's beyond doubt that the Bakers were seeking a personal benefit in refusing to sign the special resolution. That's undisputed and that can be looked at – sorry Ma'am?

GLAZEBROOK J:
Do we know that?

MR PARKER:
Yes, there's evidence, and I've referred you to my –

GLAZEBROOK J:
I mean you have and I said what are we supposed to do with that when there's been no cross-examination whatsoever on it. There's no admission of agreed facts or anything.

WILLIAM YOUNG J:
I think there's an admission that they didn't want to, wouldn't sign a resolution unless all debts were forgiven.

GLAZEBROOK J:
Well one can understand that because they don't want to, they think the property's worth more. They might have been totally wrong and unrealistic.

WILLIAM YOUNG J:
So it's in that respect you're saying there was a personal interest, they would sign the document if their debts were relieved.

MR PARKER:
Forgiven.

WILLIAM YOUNG J:
Forgiven.

MR PARKER:
And Ma'am to take your point, the evidence was on affidavit. There was affidavit from my clients, on behalf of my clients sorry, from Mr and Ms Baker in response, and then there was a further affidavit of Mr Hodder. That has standing. If there was a decision taken, or if it was omitted, to seek cross-examination, that doesn't alter the standing of that evidence. It still

stands and is compelling. So in answer to your rhetorical question "what do we do with that" it's evidence that's before the Court and was before Her Honour, on which she was entitled to rely.

GLAZEBROOK J:
Where did she rely on that or make a finding on it?

MR PARKER:
In the judgment when she came to her decision on the – sorry, I'll just go to the right…

WILLIAM YOUNG J:
It's implicit probably in 47.

MR PARKER:
Sorry, is that paragraph –

WILLIAM YOUNG J:
It's probably implicit in paragraph 47. "Although the Bakers are understandably perturbed by the turn matters took on 8 June, there is no legal foundation for the proposition that their separate indebtedness to the Hodder entities should somehow be put into the mix."

MR PARKER:
Yes.

WILLIAM YOUNG J:
"So putting the impact on family relationships to one side the Hodders' refusal to countenance any kind of trade-off cannot be said to be unreasonable."

MR PARKER:
All I was saying with my footnote was there is ample evidence of this refusal, and that's reflected in the judgment, thank you Your Honour.

WILLIAM YOUNG J:

Can I ask you another question. Is it the case that the only secured debt, only debt secured over the farm land, was the BNZ debt?

MR PARKER:

Yes it was.

WILLIAM YOUNG J:

So the Judge was wrong in her –

MR PARKER:

The Judge was wrong on that and that arose from an affidavit of a Mr Landrigan who was an accountant from BDO. I readily acknowledge that, and I think I did in my submissions to Your Honours, you may not have seen it.

ELIAS CJ:

Mr Parker, what in addition do you want to address us on?

MR PARKER:

Very minor matters just to put, a sort of record putting straight type matters, would those be things you'd like to hear after lunch or would you prefer me to –

ELIAS CJ:

How long do you expect to be on them?

MR PARKER:

If I was five to 10 minutes I'd be surprised.

ELIAS CJ:

Yes.

MR PARKER:

I'm grateful for that. There was an address to you, of course, by my friend about unfair process. I've addressed that in my submissions. In particular there was, in both the submissions to this Court and to the Court of Appeal, a complaint about the teleconference not being attended by the Bakers. I refer you to my submissions. I refer you to an affidavit of Ms Basarge, it's an unusual name, it's B-A-S-A-R-G-E, which gives a sequence of what occurred. the proceedings were served on Ms Baker on a Wednesday. They were served on Mr Baker on a Thurdsay. The proceedings were a notice of proceeding, a statement of claim, an application for an expedited hearing, and the affidavit of Mr Hodder. Unfortunately our agents did not serve the notice of teleconference. There was an effort made by my office to send to Cooper Rapley, even though we didn't know they were instructed, by courtesy an email with all those documents that afternoon. It was misaddressed with the lack of a full stop I'm afraid. In any event –

ELIAS CJ:

We have read all of this.

MR PARKER:

In that case I won't labour it. I simply want to –

ELIAS CJ:

I don't think, there's no way we're going to be making any determination of this. Or attribution of blame.

MR PARKER:

I'll leave that straight away. There was criticism of Mr Sorenson, the valuer, on the basis that he spent only one day at the property. His affidavit indicates that he had done valuations, plural, of the property in the past. There is nothing in that other than that his was the contemporaneous valuation available at the time and leading up to the sale.

There was criticism of our client on the basis that an affidavit of Mr Coleman, who was the solicitor for the Hodders, and still is on commercial matters, on the afternoon of the day before the hearing. In fact, the affidavit, both in unsworn and sworn form, was served on the 29th, not on the 4th, but there was a further copy sent because the Bakers required KDL to be served with all of the documents, and there were other documents that were provided that day. One was Ms Basarge's affirmation which had correction to the jura but not to the substance. Our submissions were served that day. I don't think we received my learned friend's until the day of the hearing, but that's something that we have to cope with from time to time.

I don't think there's any further points I wish to raise with Your Honours unless there are any questions that I can answer.

ELIAS CJ:
Thank you Mr Parker. Mr Maassen did you want to be heard in reply?

MR MAASSEN:
Just five minutes, if I may, is that convenient?

ELIAS CJ:
Yes, that's convenient, thank you.

MR MAASSEN:
In relation to Your Honours question about the scheme of Part 9, if you look at the authorities bundle for the appellants and go to tab 47 there is the *Thomas* decision which is of course the leading authority in relation to the Act, the prior Act, and at page 342, lines 15 to 30. So authority bundle for the appellants, tab 47, page 342, there's a discussion by the Court of the Cohen Committee, which was responsible for the drafting of legislation in the UK relevant to the question of interpretation of the predecessor to section 174, which was 209 of the Companies Act, and the language that the Court refers to there about it being unfettered and impossible to lay down a general guide, has become almost a hallowed phrase in the context of a discussion against 174, leading

to a timidity to consider the scheme in a way that would narrow, for example, 174 to conduct by the management, because it's essentially describing the section as a highly remedial section that gives the Court this very general and unmitigated power, and in some ways my learned friend is relying on that to, what I would suggest, is an extreme degree by not reading section 174 with its sister provision section 175, and it is that sort of approach, in my submission, that leads the Courts in the High Court to have this confidence that really they sit in a way able to judge many of the things that are issues between shareholders and directors, and measured against that very general standard of oppression and so forth.

So when my friend was being questioned about, so what is unfair, what is unjust, you exactly get back to the circular argument that it's the Court that is to decide and the logical consequence of that, if there are no boundaries, is the Court sitting as if it is the shareholders of the company, and that is the problem with an indefinite –

WILLIAM YOUNG J:
Well it doesn't normally because the jurisdiction tends to be premised on the assumption that where you have a closely held company there's an underlying set of understandings and expectations, and that the rules that are formalised in relation to the way the company operates, are predicated on the continuation of that relationship, so that when it breaks down the operation of those rules literally may be unfair, and that's what section 209, which usually applies, I think that's section 174. So I don't think it's being suggested that the Court just sits as a sort of an alternate board of directors, or an alternative general meeting of members.

MR MAASSEN:
Well it seemed to me that that's where almost Her Honour got to having quoted this very general provision, these types of general quotes, saw herself as being able to bring to an end, irrespective of rights and liabilities and obligations, the matter by exercising that 174 discretion.

Now finally I just wanted to mention that it is contested by the Bakers about how much is owed and were they entitled to put their proposals, and I would like you, if you are going to get into that, which I suspect you won't, to compare and contrast Kathryn Baker's very detailed affidavit about what –

ELIAS CJ:
We've got no findings on this in either of the Courts below.

MR MAASSEN:
No.

ELIAS CJ:
It would not be appropriate for us to embark on that.

MR MAASSEN:
In that case I'm not going to address Your Honour.

WILLIAM YOUNG J:
Can I ask you one question please? Would it be possible, in proceedings under section 174, for the Bakers to complain that the way in which offers had been solicited was unfair and oppressive to them because it presented the Court with what seemed to be a deadline, and unduly constrained the options that would otherwise have been available if the behaviour, on this hypothesis oppressive, hadn't occurred.

MR MAASSEN:
The answer to that question, if I may just grab my reference. I'd like to answer that question by referring to a document and I'll just find out where it is. So I'm referring to an email. Volume 5, tab 36.

WILLIAM YOUNG J:
I'm not really asking about whether it would be a good argument, what I'm really asking you is whether that argument would be precluded by the finding of Justice Ellis. For myself I'm not sure that it would be.

MR MAASSEN:

I'm not certain about that. I don't think it probably would be but I do –

WILLIAM YOUNG J:

But isn't that all that you, that if you are challenging the sale, isn't that all you'd be arguing, well we'd have to accept what happened but it happened because the affairs of the company had been conducted in a particular way where an offer was sought only – a concluded contract subject conditional was entered into only with the Stewarts. The Hall option wasn't pursued. The whole matter was presented as a matter of crisis, and as a result the property was sold at what we say was an undervalue. Wouldn't that be an argument that's available?

MR MAASSEN:

Well it might be an argument but the more substantive point is that the property has been sold for $4 million –

WILLIAM YOUNG J:

I understand that. But I'm saying, what I'm just trying to see is what it all means in terms of any future dispute. Would you not be able to run an argument along those lines, notwithstanding what the Judge said and did?

ELIAS CJ:

This is directed at the mootness dimension.

MR MAASSEN:

Well if the Court –

ELIAS CJ:

It might not be an oppression argument, it might be a negligence argument.

WILLIAM YOUNG J:

Well it could be negligence, it could be oppression, because they were excluded as directors which is normally an indicia of oppression when there's a breakdown in family relationships, or shareholder relationships.

MR MAASSEN:

Yes. I accept that but I also, with respect, say that the sale is the complaint.

WILLIAM YOUNG J:

I understand that but can't you still complain about the sale by saying that the way the company's affairs were run, resulted in the sale occurring when a different set of governing steps would have resulted in another outcome.

MR MAASSEN:

It is possible but I would like to bring it back to the practicality and reality. If I am turning up in Court and I have a High Court judgment that has directed the sale and said that is the only rational conclusion, then I am going to hit very heavy weather and a logical and sensible place is to turn up in an appeal Court and say, this was all completely wrong. So I'm not disagreeing, but the practical reality is, faced with this decision a logical step was to appeal it, and in my submission even so far as to say a necessary step, and I can only say in relation to the stay argument that sitting in my office, reading that judgment, and being asked to sign, my clients with me, I took the judgment at its face value and it said "forthwith" and that's how I interpreted it, and to say that I should have emailed the Court of Appeal I simply did not consider that to be a credible course of action. So if the Court pleases, those are my submissions.

ELIAS CJ:

Thank you counsel for your assistance. We will reserve our decision in this matter.

HEARING CONCLUDES