**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 94/2017**
**[2018] NZSC 78**

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| BETWEEN | CHRISTOPHER DUNCAN BAKER AND KATHRYN ANN BAKER<br>Appellants |
| AND | WALLACE DOUGLAS HODDER AND ANN ADELE HODDER<br>First Respondents |
| | KADD FARM LIMITED<br>Second Respondent |

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| Hearing: | 20 March 2018 |
| Court: | Elias CJ, William Young, Glazebrook, O'Regan and Arnold JJ |
| Counsel: | J W Maassen and S F Clark for Appellants<br>M E Parker, M R Cowan and J Eckford for First Respondents |
| Judgment: | 22 August 2018 |

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The order made under s 174 of the Companies Act 1993 against the appellants is quashed.**

**C The respondents must pay the appellants costs of $15,000 plus usual disbursements.**

**D We quash the costs orders made in the High Court and Court of Appeal. Costs should be re-determined in those Courts in light of this judgment.**

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**REASONS**
(Given by O'Regan J)

## Shareholder dispute

[1] The appellants, Duncan and Kathryn Baker, and the first respondents, Wallace and Ann Hodder, were shareholders in the second respondent, Kadd Farm Ltd (the company). It was a family company: Kathryn Baker is the Hodders' daughter. The Hodders held 70 per cent of the shares and the Bakers 30 per cent of the shares in the company. All were directors of the company.

[2] The company owned a farm known as Heron Creek. There was disagreement between the Hodders and the Bakers about the sale of Heron Creek.

[3] The proposed sale was a major transaction for the company. Because of that, a special resolution of the shareholders of the company was required under s 129 of the Companies Act 1993. That section prohibits a company from entering into a major transaction unless the transaction is approved by a special resolution or is contingent on such approval. In the present case, a special resolution could be passed only if either or both of the Bakers voted in favour of it. The Bakers agreed to sign a written resolution approving the sale, but only on conditions that were unacceptable to the Hodders. They did not sign a written resolution approving the sale when requested to do so. The Hodders commenced proceedings against the Bakers in the High Court under s 174 of the Companies Act. Under that section, a shareholder may apply for relief where the affairs of a company are being conducted in a way that is oppressive, unfairly discriminatory or unfairly prejudicial to the applicant. The Hodders alleged that the Bakers' refusal to sign a resolution approving the proposed sale was oppressive and/or unduly prejudicial to the Hodders and to the company.

## The proceedings so far

*High Court*

[4] Ellis J accepted a submission from the Hodders that the matter was urgent and truncated the timetable for the conduct of the proceeding. She granted the Hodders' application under s 174 and ordered the Bakers to sign a special resolution under s 129

of the Companies Act to authorise the sale of Heron Creek forthwith.[1] She refused to stay her decision to allow the Bakers to appeal to the Court of Appeal. The Bakers complied with the order and Heron Creek was sold.

*Appeal to Court of Appeal*

[5] The Bakers appealed to the Court of Appeal. At the commencement of the hearing the Court asked counsel to address the question of whether or not the appeal was moot given that Heron Creek had been sold, an issue that had not been raised by the Hodders in their submissions. Having heard from the parties, the Court dismissed the appeal on the grounds that it was moot and subsequently recorded the reasons for that decision.[2]

*Appeal to this Court*

[6] The Bakers sought leave to appeal to this Court. Leave was granted.[3] The approved question was whether the Court of Appeal should have heard and determined the Bakers' appeal. This Court sought submissions on the issue of mootness as well as on the substantive issues that the Bakers wished to have determined in the Court of Appeal.[4]

**Issues**

[7] The issues for decision in the appeal are:

(a) whether the Court of Appeal should have heard and determined the Bakers' appeal to that Court; and

(b) whether the High Court was correct to make an order under s 174 of the Companies Act requiring the Bakers to sign a special resolution authorising the sale of Heron Creek.

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1 *Hodder v Baker* [2016] NZHC 2384 [HC judgment].
2 *Baker v Hodder* [2017] NZCA 355 (Clifford, Simon France and Toogood JJ) [CA judgment].
3 *Baker v Hodder* [2017] NZSC 171.
4 At [1].

[8] For the reasons set out below we have concluded that the Court of Appeal ought to have heard the appeal. Having reached that conclusion, we have decided that we should address the substantive merits rather than remitting the case to the Court of Appeal, given the costs that have been incurred by the parties to date and the fact that we heard full argument on the substantive issues. We will address the question of mootness first. Before doing so, we will set out a summary of the factual background.

**Facts**

[9] The company was incorporated in July 2008. The Hodders held 4,200 shares each and the Bakers held 1,800 shares each. Shortly after its incorporation the company purchased Heron Creek, a 175 hectare farm property in Hawke's Bay, for $4,300,000. The intention was that the Bakers would work on Heron Creek to establish and enhance a farming business there. The company borrowed $1,200,000 from the Bank of New Zealand, secured by a mortgage over the property and guaranteed by Belvue Downs Ltd (Belvue) a company wholly owned by the trustees of the Hodder Family Trust (a trust associated with the Hodders). The remainder of the purchase price was provided either by the Hodder Family Trust or Belvue.[5] The company leased Heron Creek to Mr Baker's company, DB Contracting Agriculture Ltd (DB Contracting).

[10] In April 2009 Belvue purchased an 80 hectare property adjacent to Heron Creek called Iramutu. Belvue leased Iramutu to DB Contracting. The intention was that the Bakers would farm this property in conjunction with the farming operation on Heron Creek.

[11] The farming business operated on the combined properties did not succeed and DB Contracting fell into default in relation to its obligations under the leases of the

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5 In the HC judgment, above n 1, Ellis J says that Belvue provided a loan of $3,100,000 for the acquisition of Heron Creek (at [5]) that was secured by a second mortgage (at [6]). However, the judgment later records (at [10]) that the 2015 accounts for the company showed that it had a debt of approximately $1,000,000 to the Bank of New Zealand and a current account debt of $4,600,000 to the Hodder Family Trust (which was unsecured, and therefore ranked equally with any debt owed by the company to the Bakers). As the respondents accept, this apparent inconsistency also features in the evidence given by the company's accountant, Kevin Landrigan. We think the position in the company's accounts, prepared by Mr Landrigan's firm, should be preferred.

two farms.[6] The company was not able to pay all of its mortgage obligations without assistance from either the Hodder Family Trust or Belvue, which Ellis J said had contributed over $350,000 to the company in the eight years prior to the events leading to the present proceedings, although there is some dispute about the precise amount of support provided and the terms on which it was provided.[7] As a result of these difficulties, the company was effectively insolvent.

[12] In late 2014 the Hodders indicated they wished to exit the Heron Creek venture. The Bakers indicated that they wished to buy it if possible and it was agreed that, if they did, the price would be $4,300,000. A valuation obtained in May 2015 indicated that Heron Creek was worth about $4,500,000 and another valuation obtained in November 2015 set its value at $5,000,000. By December 2015, the Bakers accepted that they would not be able to purchase Heron Creek and that any sale would be to a third party.

[13] Efforts were made to sell Heron Creek in late 2015. The parties hoped to achieve a price of $4,300,000. An offer of $3,500,000 was received in March 2016 but rejected. In May 2016 the company obtained a marketing proposal from a real estate agency including an assessment of the price per hectare of between $23,000 and $24,000, which would equate to a total property price of between $4,025,000 and $4,200,000 plus GST.

[14] In late May 2016, the company received an offer for Heron Creek of $4,000,000 from David Stewart, Paul Stewart and Stewart WHK Trustee Company Ltd (the Stewarts). There was a discussion between Mr Hodder and Mr Baker about the offer. Mr Baker suggested a counteroffer of $4,800,000. However, after discussion between the Hodders and without further consultation with the Bakers, Mr Hodder made a counteroffer on behalf of the company of $4,300,000 on 27 May 2016. The Bakers strongly objected to this unilateral decision and wrote to the Hodders recording their objection on 28 May 2016.

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6 Counsel for the Bakers disputed the amount of overdue rent.

7 HC judgment, above n 1, at [9].

[15] This disagreement prompted what was described in the High Court as a "fire storm" letter on 8 June 2016 from a lawyer acting for the Hodders, Mr Coleman of Dean & Associates, an Oamaru firm.[8] Mr Coleman was also acting for the company in relation to Heron Creek and for the Hodder Family Trust and Belvue. It appears his instructions to act for the company against the Bakers came from the Hodders alone, despite the Bakers comprising half of the board of the company at that time. The letter:

(a) gave notice by the company of cancellation of the company's lease of Heron Creek to DB Contracting for non-payment of rent unless arrears of over $400,000 were paid by 22 June 2016;

(b) gave notice by Belvue of cancellation of Belvue's lease of Iramutu to DB Contracting for non-payment of rent unless arrears of about $190,000 were paid by 22 June 2016;[9]

(c) demanded payment of $680,000 said to be owing under a loan agreement between Belvue and DB Contracting, guaranteed by Mr Baker. Such payment was required by 22 June 2016. The Bakers dispute the amount owed by DB Contracting;

(d) gave notice on behalf of the company of a shareholders' meeting on 22 June 2016 for the purpose of considering and voting on the removal of the Bakers as directors; and

(e) made a call of $1 per share on the 1,800 shares held by each of the Bakers.

[16] The Bakers' solicitors responded. The Bakers offered to stand down as directors of the company and to sign an agreement for sale and purchase of Heron Creek as long as the company's debt to the Bank of New Zealand was repaid and they

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8 At [17].

9 According to the letter Iramutu had been sold by Belvue, so it is unclear on what basis the lease was said to be still on foot.

were paid $225,000 as recognition of their development work on Heron Creek. This offer was rejected.

[17] A resolution of the shareholders of the company to remove the Bakers as directors of the company was passed on 22 June 2016. The Bakers voted in favour of this resolution in an attempt at resolving issues between the parties. The lease of Heron Creek by the company to DB Contracting was terminated and DB Contracting relinquished possession of Heron Creek in early July 2016. The Stewarts were allowed to enter into possession of Heron Creek under a leasehold arrangement and the evidence in the High Court was they had planted crops on the property and were using it for grazing.[10]

[18] The Stewarts did not accept the $4,300,000 counteroffer and eventually the Hodders agreed that the company would sell Heron Creek to the Stewarts for $4,000,000. The Hodders' solicitors advised the Bakers' solicitors of this on 21 July 2016. The agreement for sale and purchase was conditional on the necessary approval of at least a 75 per cent majority of the shareholders of the company under s 129 of the Companies Act. The Bakers were asked to sign a written resolution in lieu of a meeting approving the sale but declined. They requested a meeting to discuss the proposed sale and other issues affecting their relationship with the Hodders and the entities associated with the Hodders. No such meeting occurred. They offered to sign on the condition that a meeting of shareholders of the company was convened to discuss the proposed sale and other matters. The Hodders alleged that the Bakers were insisting that the debts they owed to entities associated with the Hodders be forgiven but the Bakers denied this.

[19] The Stewarts' offer was initially due to expire on 4 August 2016, but was extended to 10 August, then 19 August, then 26 August and finally 7 October. On 5 August 2016 another offer was received for Heron Creek from a Mr M Hall. The price was $4,300,000, but the offer was subject to a due diligence condition with a 60 working day duration. The Hodders saw this as too uncertain and caused the company to decline the offer. The Bakers did not agree with that course of action.

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[10] HC judgment, above n 1, at [18].

[20] On 5 August 2016 the Hodders' solicitors proposed a shareholders' meeting to take place by telephone on 9 August 2016, but this did not eventuate (it would have been an informal meeting because the required notice had not been given). The Hodders blamed the Bakers for this and vice versa and the High Court Judge did not consider she could resolve that conflict.[11] The Bakers made a number of requests for a shareholders' meeting of the company to be convened but the Hodders refused to allow this.

[21] On 12 August 2016, the Hodders (as the sole directors of the company) met and resolved that the company would sell Heron Creek on terms that the directors considered reasonable in all the circumstances. But this did not resolve the need for a special resolution under s 129 of the Companies Act. An impasse was then reached where the Hodders declined to call a shareholders' meeting as requested by the Bakers and the Bakers refused to sign a written resolution in lieu of a shareholders' meeting.

[22] The Hodders commenced the present proceedings on 20 September 2016.[12] Mrs Baker was served on 21 September 2016 and Mr Baker on 22 September 2016 but neither was given notice of a teleconference to be held on 26 September 2016.

**Truncated proceedings in High Court**

[23] At the 26 September teleconference, at which the Bakers were not represented, Ellis J agreed to a substantially truncated timetable in response to the Hodders' request for urgency, which was based on the fact that the last extension of the Stewarts' offer was until 7 October 2016. The Bakers disputed the need for an urgent hearing.[13] Although the High Court Judge accepted that there was urgency, she recorded in her judgment the fact that the Stewarts had entered into possession and planted crops and expressly acknowledged "that there may be a degree of artificiality about the current 7 October deadline".[14]

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11 See HC judgment, above n 1, at [24].

12 See HC judgment, above n 1, at [30].

13 Mr Baker's evidence was that not only were the Stewarts already in possession of Heron Creek but they had also planted crops on it. He argued this showed the possibility of their refusing to extend the offer further if asked to do so was minimal.

14 At [18] and [46].

[24] The Bakers claim the truncation of the proceedings prevented them from responding adequately to the case before them. The truncation was complicated by a failure on the part of the Hodders' solicitors to serve on the Bakers and their solicitors notice of the telephone conference on 26 September 2016 at which the order truncating the proceeding was made. It is not necessary for us to go into detail as to the various procedural steps that occurred, but we record that the Judge ordered at the teleconference on 26 September 2016 that the Bakers must file a statement of defence by 29 September 2016 and the hearing would take place on 4 October 2016. This was subsequently changed and the hearing took place on 5 October 2016. Judgment was issued in favour of the Hodders on 6 October 2016 and the Judge made an order under s 174 requiring the Bakers to sign the special resolution approving the sale forthwith. They complied with the order on 7 October 2016 and the agreement for sale and purchase became unconditional on that day. So the proceedings were completed and a final judgment delivered in a period of 15 days from the date they were first served on Mrs Baker.

[25] We asked Mr Maassen, counsel for the Bakers, why the Bakers did not seek an urgent stay from the Court of Appeal. He said he did not consider that option was open to them given that the order required the signing of the resolution "forthwith" and the High Court Judge had refused a stay.

[26] We will address the reasoning of Ellis J when we come to our analysis of the substantive issue.[15]

[27] In a later judgment Ellis J ordered the Bakers to pay the Hodders costs and disbursements of $40,000.[16]

**Should the Court of Appeal have heard and determined the Bakers' appeal?**

*Court of Appeal decision*

[28] The Court of Appeal decided the case was moot on the basis that the property had already been sold. It rejected a submission made on behalf of the Bakers that there

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15 At [45]–[54] below.
16 *Hodder v Baker* [2017] NZHC 548 [costs judgment].

was utility in the Court of Appeal deciding the point of jurisdiction at issue, namely whether s 174 of the Companies Act provides for the type of order the High Court made.[17] The Court said that until the Bakers commenced new proceedings against the Hodders in which that issue arose, the Court would simply be providing an advisory opinion, which was not its role.[18] The Court accepted a submission that the High Court decision did not act as a bar to any foreseeable way in which the Bakers might wish, through new legal processes, to resolve their dispute with the Hodders.[19] It considered that until such proceedings were commenced and the issues which the Bakers sought to determine by their appeal to the Court of Appeal actually arose, they were moot.[20]

[29] The Court of Appeal also noted a submission that the jurisdiction issue could be dealt with in the context of a challenge to the costs order made by Ellis J. The Court pointed out that no separate appeal against the costs award had been filed. It said if such an appeal was to be pursued, the Bakers would need to seek an extension of time to commence such an appeal.[21]

*Submissions of the parties*

[30] Mr Maassen argued that the Court of Appeal was wrong to decline to determine the Bakers' appeal on the merits. In particular, he argued:

(a) the appeal affected the costs award made against the Bakers in the High Court;

(b) the Bakers faced the stigma of a judgment which said their actions had been oppressive or unfairly prejudicial;

(c) the judgment prevented the Bakers from pursuing remedies against the Hodders, should they choose to do so;

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17 CA judgment, above n 2, at [12].
18 At [12].
19 At [13].
20 At [13].
21 At [14].

(d) there were important issues of company law at stake, which may affect future cases; and

(e) the procedure adopted in the High Court was unfair and the Court of Appeal needed to address that from a rule of law perspective.

[31] The Hodders' position was that the Court of Appeal was correct not to hear or determine the appeal. Counsel for the Hodders, Mr Parker, submitted that this case had no public law element which might justify hearing an otherwise moot appeal. He argued that the case was peculiarly fact dependent and that it was unlikely that a similar situation would arise again in future.

*Moot appeals*

[32] There is no doubt the Court of Appeal had jurisdiction to hear and determine the Bakers' appeal: the Bakers had a right of appeal and they had validly exercised it. As this Court made clear in *R v Gordon-Smith*, mootness is not a matter that deprives a court of jurisdiction to hear and determine an appeal; rather the court has a discretion whether to hear the appeal.[22] Appellate courts do not, however, generally decide appeals where the decision will have no practical effect on the rights of the parties before the court, in relation to what has been at issue between them in lower courts.[23] The Court said the policy of restraint in dealing with moot appeals was based on the following:[24]

(a) the importance of the adversarial nature of the appellate process;

(b) the need for economy in the use of limited resources of appellate courts; and

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22 *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [16].
23 At [16].
24 At [18], citing *Borowski v Canada (Attorney-General)* [1989] 1 SCR 342 at 358–363.

(c) the responsibility of the courts to show proper sensitivity to their role in the system of government; in general, advisory opinions are not appropriate.[25]

[33] *R v Gordon-Smith* was a public law case, where questions of mootness may be less compelling in the decision whether to entertain an appeal. But the court's discretion is not limited to public law cases. It is not possible to state a "test" governing the exercise of the discretion, or to give a comprehensive statement of the circumstances in which it might properly be exercised. All that can be said is that, in light of the considerations underlying the policy of restraint, a decision to hear a moot appeal should be made only in exceptional circumstances. These might be found in the circumstances of the particular case (for example, serious procedural unfairness at the first hearing) or the broader public interest (for example, where an important legal point is raised).

[34] In this case we accept that the appeal was moot in the sense that Heron Creek had been sold and the original relief sought in the statement of claim was no longer available.

[35] We will now address each of the arguments advanced by the Bakers in turn as to why the Court of Appeal should have heard the appeal.

*Costs*

[36] The High Court Judge awarded costs of $40,000 against the Bakers.[26] That costs award depended on the validity of the determination made by Ellis J in the substantive proceeding. In *Elders Pastoral Ltd v Bank of New Zealand* the Privy Council observed:[27]

> It appears from the authorities that even if the only effect of a successful appeal between the parties will be to reverse an order for costs made in the Courts below, there remains a lis or issue between the parties.

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25 The context for that observation in *Borowski* was that the case involved a constitutional challenge to the validity of a statutory provision in the Criminal Code dealing with abortion.

26 See above at [27].

27 *Elders Pastoral Ltd v Bank of New Zealand* [1990] 3 NZLR 129 (PC) at 133, followed in *Bovaird v J* [2008] NZCA 325, [2008] NZAR 667 at [2].

[37] The fact that costs remain at issue will not, however, necessarily mean an appellate court would hear an otherwise moot appeal.[28] But an award of costs may be a circumstance that adds weight to the case for hearing a substantive appeal even if the relief originally sought in the proceeding is no longer available.[29]

[38] The Court of Appeal considered that it was necessary for the Bakers to institute a separate appeal against the High Court judgment dealing with costs.[30] We doubt that a separate costs appeal would have had any utility if the appeal against the High Court decision in the substantive proceeding was dismissed on the grounds it was moot, leaving the High Court decision as a final decision on the matters in issue in the substantive proceeding. If a separate costs appeal had been filed, the Bakers would have wished to argue that the costs award should not have been made because the substantive proceeding should not have been decided against them. That would have faced the argument that the High Court decision in the substantive proceeding created a res judicata, which would have prevented any challenge to the outcome of the substantive proceeding.

[39] In this case, Heron Creek was disposed of in circumstances where the peremptory terms of the order made by the Judge gave the Bakers no real option but to acquiesce. The Bakers had not had an opportunity to comment on the terms of the order and the order required them to sign the resolution to authorise the sale of Heron Creek "forthwith". The Judge refused to stay the order pending an appeal. The contract for the sale of Heron Creek required the condition relating to shareholder approval to be satisfied by the day after the order was made. Once they signed the shareholders' resolution, the sale became unconditional, so their compliance with the order effectively rendered any appeal against the decision moot. Given this, there is potential unfairness in preventing their challenging the High Court decision on appeal because the sale was completed. If the Bakers succeed in the substantive appeal, the

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28 See the comments of Lord Brown in *R (Bushell) v Newcastle upon Tyne Licensing Justices* [2006] UKHL 7, [2006] 2 All ER 161 at [28]. See also *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 60 at [33].

29 Whether an award of costs on its own could ever justify hearing an otherwise moot appeal is not something we need to resolve in the present case.

30 CA judgment, above n 2, at [14].

present justification for the award of costs cannot stand. In those circumstances the costs award against them would have almost inevitably been quashed.

*Stigma*

[40] The alleged stigma that the Bakers were found to have been in breach of s 174 of the Companies Act is real to them. There may be cases where this could be a factor in determining whether to hear a moot appeal, but we do not need to address the point in this case because we see other factors as decisive.

*Impact on potential action against the Hodders*

[41] Both the High Court and the Court of Appeal considered that the Bakers had potential remedies against the Hodders that would not be precluded by their conclusion on the s 174 issue.[31] We do not consider it is clear that any such remedies arising out of the sale survive the resolution of the present proceedings in the High Court. Whether the Bakers would have pursued further proceedings is speculative and, given the other factors in favour of hearing the appeal, we do not need to reach a firm conclusion as to whether the High Court decision would have been an impediment to any such proceedings.

*Important company law issue*

[42] The High Court decision raises important questions about the interaction between ss 129 and 174 of the Companies Act. We do not accept the submission made by Mr Parker that the case depends on its particular facts. For reasons to which we will come, we consider that there are significant issues about the use of s 174 in circumstances where there is a dispute about the passing of a special resolution required under s 129. We also consider there is an important issue arising out of the remedy chosen by the High Court Judge in this case, following the earlier High Court decision in *Fairway Holdings Ltd v Furno Ltd*.[32] In both *Fairway* and in the present case, the matter was dealt with in the High Court as a matter of urgency. In the present

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31 HC judgment, above n 1, at [46]; and CA judgment, above n 2, at [13].

32 *Fairway Holdings Ltd v Furno Ltd* [2014] NZHC 858. However, as Ellis J acknowledged, the order made in *Fairway* was not, in fact, an order that the dissenting shareholder sign a s 129 special resolution: see below at [66].

case, there was no opportunity for debate about this remedy because the remedy had not been the subject of either pleading or argument. Given the potential importance of the issue in future cases and the likelihood that future cases may well feature the same issues of urgency as the present case, we think the Court of Appeal should have decided that it was appropriate to address the issue in the present appeal.

*Fair procedure*

[43] We accept Mr Maassen's submission that the issues arising from the truncation of the process in the High Court in circumstances where the outcome was a final, rather than interlocutory, decision were also of significance, and counted in favour of the Court of Appeal addressing the substantive issues in the present appeal.

*Conclusion*

[44] We consider that, applying the considerations highlighted in *R v Gordon-Smith*, the Court of Appeal should have heard and determined the Bakers' appeal. There remained a real dispute about costs, there were issues of fairness arising from the procedure that was adopted in the High Court and there was a proper basis for concern that the decision could affect the ability of the Bakers to pursue a future claim against the Hodders. There were also important company law issues at stake that could affect future transactions. Both parties were before the Court, were represented by counsel and were ready to argue the substantive issues, having filed written submissions in advance of the hearing. The resources of the Court would not have been stretched, given the case was on a confined point and the Judges had no doubt already read the written submissions. Finally, there was nothing about the case that gave rise to any issue of sensitivity in relation to the role of the courts.

**Was the High Court correct to make the s 174 order?**

[45] Section 174 of the Companies Act provides:

> **174 Prejudiced shareholders**
>
> (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be,

> oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the court for an order under this section.
>
> (2) If, on an application under this section, the court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order—
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> (a) requiring the company or any other person to acquire the shareholder's shares; or
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> (b) requiring the company or any other person to pay compensation to a person; or
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> (c) regulating the future conduct of the company's affairs; or
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> (d) altering or adding to the company's constitution; or
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> (e) appointing a receiver of the company; or
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> (f) directing the rectification of the records of the company; or
>
> (g) putting the company into liquidation; or
>
> (h) setting aside action taken by the company or the board in breach of this Act or the constitution of the company.
>
> (3) No order may be made against the company or any other person under subsection (2) unless the company or that person is a party to the proceedings in which the application is made.

*High Court decision*

[46] The Judge was satisfied that the affairs of the company were being conducted in a manner that was unfairly prejudicial to the Hodders in their capacities as directors and shareholders of Belvue and as trustees of the Hodder Family Trust.[33] She acknowledged that the Bakers were merely exercising their rights as 30 per cent shareholders in the company by withholding their approval under s 129.[34] But against this she saw it as significant that the company was effectively insolvent and she considered that any unsecured claims the Bakers might have against the company could not be prejudiced by accepting the Stewarts' offer (at a level lower than the

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33 HC judgment, above n 1, at [45] and [48]. We note that while the s 174 remedy is only available to shareholders or former shareholders, it extends to acts which affect shareholders "in that capacity or in any other capacity".

34 At [43].

Bakers thought was appropriate) because on any analysis there was no prospect of those claims being satisfied.[35]

[47] The Judge said unless Heron Creek were sold, the company's debts to the Hodder entities would continue to increase with no prospect that the increase in indebtedness would be repaid.[36] For that reason alone she was prepared to accept there was prejudice to the Hodders in their capacities as directors and shareholders of Belvue and as trustees of the Hodder Family Trust.

[48] The Judge accepted there was room for debate as to whether the Stewarts' offer was better than Mr Hall's offer. She acknowledged that there could be a degree of artificiality about the 7 October deadline but she considered that the Bakers could, if unhappy about how the state of affairs had come to an impasse, have shareholder remedies against the Hodders as directors potentially available to them.[37] Given that her judgment in the present proceeding resolved the case, this must have been a comment as to the potential for new proceedings to be commenced by the Bakers against the Hodders.

[49] The Judge could not see any rational basis for the Bakers continuing to withhold their consent and she considered there was no legal foundation for the proposition that the Bakers' separate indebtedness to the Hodder entities should somehow be put into the mix.[38] She concluded that the Bakers' refusal to agree to the special resolution was unfairly prejudicial to the Hodders.[39]

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35 At [44]. This appears to have been based on her assumption that the debt owed to the Hodder Family Trust was in fact a debt owed to Belvue and subject to Belvue's second mortgage: this appears to be incorrect for the reason given above at n 5. Ellis J said at [61] that it did not matter whether the debt was owed to the Hodder Family Trust or Belvue. The company's accounts recorded that the company had guaranteed obligations of the Hodder Family Trust to the Bank of New Zealand (said to have been incurred to finance the purchase of Heron Creek) but there was no further evidence of this and no indication whether Heron Creek was security for the company's obligations under the guarantee.

36 At [45]. The Bakers disputed this, arguing in this Court that interest was not payable in respect of the loan made by the Hodder Family Trust, but did not point to any contemporary document to support this.

37 At [46].

38 At [47].

39 At [48].

[50] Having reached that conclusion, the Judge turned to whether it was just and equitable to make a remedial order. She considered that it was. She noted the demonstrable detriment to the Hodders' interests if Heron Creek were not sold and thought the only real detriment to the Bakers was that they lost their "bargaining chip" in relation to their indebtedness to the Hodder entities.[40]

[51] The Judge then turned to what the remedy should be. The Hodders had sought orders either altering the level of shareholding required for a special resolution or an order under s 172 of the Companies Act directing the board to sell Heron Creek (presumably without a s 129 special resolution).[41] The Judge recorded that she had, when preparing for the hearing, formed a preliminary view that the remedies sought by the Hodders were beyond the Court's jurisdiction, and had issued a minute pointing this out and suggesting the possibility that the Court instead exercise its power to appoint a liquidator. In the minute she expressed the view that there were ample grounds for doing so. She invited the parties to consider their positions on that suggestion and to turn their minds as to who an appropriate appointee might be.[42]

[52] At the hearing, counsel for the Hodders accepted the relief sought in the statement of claim was unobtainable and asked the Court to permit an amendment to seek an order under s 174(2)(a) of the Companies Act requiring the Hodders to acquire enough of the Bakers' shares (at $1.00 per share) to take their own shareholding to 75 per cent so they could pass the special resolution under s 129 without the agreement of the Bakers. He said that if the Court was not prepared to do this then the Hodders would support an order putting the company into liquidation, although this would result in their losing the benefit of tax losses.[43]

[53] In her judgment, the Judge said she was reluctant to interfere with the parties' shareholdings. She said there was authority for a more straightforward way.[44] That

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40 At [50].

41 Section 172 empowers the court, on application of a shareholder, to order the board to take any action required by the constitution of the company or the Companies Act if satisfied it is just and equitable to do so.

42 At [52].

43 At [53].

44 At [55].

authority was the decision of Lang J in *Fairway*.[45] In that case Lang J had directed a shareholder who had refused to sign the special resolutions necessary to authorise a major transaction involving the sale of company property to take such steps as were necessary to enable the sale and purchase agreement to be completed.[46] Ellis J thought that was the most appropriate outcome and made the following order:[47]

> I order that the [Bakers] are, forthwith, to sign the special resolution necessary to authorise the sale of Heron Creek to the Stewarts.

[54] The Judge refused to stay her decision to allow the Bakers to appeal to the Court of Appeal, although she accepted that this would render nugatory any appeal by the Bakers.[48]

*Legislative history*

[55] The enactment of the Companies Act followed a recommendation for company law reform by the Law Commission.[49] In its report, the Commission proposed that the new Companies Act should separate management from ownership of companies. Where a company constitution conferred management powers on shareholders (as it was envisaged would be common in cases of closely held companies), the shareholders exercising such powers would be under the same duties imposed on directors.[50] The Commission had indicated its rejection of giving the general meeting a larger role because it would entail development of fiduciary duties of shareholders, which the Commission considered could "undermine the concept of the share as property".[51] The rights reserved to shareholders in the draft Companies Act were what the Commission described as "residual property rights".[52] One of these was the approval of major transactions.

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45 *Fairway*, above n 32.
46 At [57].
47 HC judgment, above n 1, at [64]. As noted above, at n 32, Ellis J's order was not the same as that made in *Fairway*; Lang J declined to make an order requiring the dissenting shareholder to sign a resolution authorising the sale.
48 At [66]–[67].
49 Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) [the Commission Report]. The Report included a draft Companies Act.
50 At [94].
51 At [210].
52 At [373].

[56] The Commission said the basis for its view that directors' powers of management should be restricted in the case of major transactions by a requirement for shareholder approval and the provision of dissentient rights (the right of dissentients to be bought out) was that some dealings have such far-reaching effects, they should be referred to shareholders.[53] The types of dealings the Commission was concerned about were those which result in "abrupt and substantial change", as opposed to change which occurs over time.[54]

[57] The Commission suggested the inclusion of a provision in the new Companies Act stating that a shareholder exercising shareholder powers reserved to them under the new Act "does not owe any duty to the company or to any other person and does not incur any liability in respect of the exercise of or failure to exercise votes to which that shareholder is entitled".[55] This provision does not appear in the Companies Act. The explanatory note to the Companies Bill 1990 explained its omission as follows:[56]

> This Part of the Bill does not carry forward a provision proposed by the Law Commission that a shareholder exercising the rights attaching to his or her shares does not owe a duty to the company or any other person. This would have enabled a shareholder in all cases to vote in the shareholder's own interests. The effect of omitting the provision is that the general law will apply. In most cases a shareholder can vote according to self-interest, but the courts recognise cases in which a shareholder must act in the best interests of the company.

[58] The Companies Act generally follows the proposals in the Law Commission report. The duties and powers of the directors are contained in Part 8, and shareholder rights and obligations are contained in Part 7. As recommended by the Commission, if shareholders exercise directors' responsibilities pursuant to the company's constitution, they are treated as subject to the obligations imposed on directors.[57] The Companies Act contains no provision imposing an obligation on a shareholder to the company or to other shareholders. As foreshadowed in the explanatory note, any such obligations were left to "the general law" and, in most cases, a shareholder can vote according to self-interest.

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53 At [498]–[499].
54 At [499].
55 See cl 80(1) of the draft Act attached to the Commission Report at 229.
56 Companies Bill 1990 (50-1) (explanatory note) at v.
57 Companies Act 1993, s 126(2).

[59] In summary, the Companies Act maintains the distinction drawn by the Law Commission between the powers of management exercised by the directors and the rights of shareholders (with the exception of the situation where shareholders are exercising the responsibilities and duties of directors under the Companies Act, as provided for in s 126(2)). So, the scheme of the Companies Act is that, in usual circumstances, shareholders exercising their voting rights are not subject to obligations of the kind imposed on directors (and shareholders who are deemed to act as directors) including obligations in relation to self-dealing.

[60] The general management powers of directors are restricted in relation to major transactions, which are specifically reserved for special resolution of shareholders and trigger dissentients' rights. Shareholders exercising their voting rights in relation to a major transaction are, in usual circumstances, not subject to any obligations to each other or to the company, although the Law Commission's proposed provision expressly ruling out any such duty was not carried forward into the Companies Act.

[61] A further indication as to the absence of any obligation by a shareholder to the company or to other shareholders is contained in s 97 of the Companies Act. Section 97 deals with the liability of shareholders. Section 97(3) provides:

> Nothing in this section affects the liability of a shareholder to a company under a contract, including a contract for the issue of shares, or for any tort, or breach of a fiduciary duty, or other actionable wrong committed by the shareholder.

[62] Both the scheme of the Companies Act and the language of s 97(3) indicate that such duties of shareholders to a company do not arise simply by the status of being a shareholder or exercising the rights reserved to shareholders under the Companies Act. Something more is required, otherwise the purpose of the special resolution provisions would be undermined. And the importance of the scheme of the Companies Act is made clear both by the Law Commission Report and by s 175 of the Companies Act, which provides that failure to comply with s 129 in relation to a major transaction "is conduct which is unfairly prejudicial for the purposes of s 174".

[63] In conclusion, there is nothing in the Companies Act indicating that, in the circumstances of this case, the Bakers owed any statutory duty to the company or to the Hodders in the exercise of their voting rights in relation to the sale of Heron Creek.

Mr Parker did not suggest any extra-statutory basis for the imposition of any such liability on the Bakers.

**Relationship between ss 129 and 174**

[64] Mr Maassen submitted that the High Court should not have made the order requiring the Bakers to sign the s 129 special resolution and that the order was invalid. He argued that:

(a) the High Court process was unfair;

(b) the High Court had no jurisdiction to make the order; and

(c) some of the High Court's reasons for making the order were erroneous.

Mr Parker took issue with all of these points. He argued that the order was validly made: the process was reasonable and the Court had jurisdiction to make the order under s 174. His position was premised on the view that s 129 does not have a level of pre-eminence that would preclude orders under s 174 from being made.

*Unfair process*

[65] Mr Maassen argued that the process leading to the making of the order was unfair because of the truncation of the timetable and the procedures adopted in the High Court. We do not intend to engage with these arguments in detail, but we accept that the truncation of the process did affect the way in which the case for the Bakers could be presented. In addition, the making of the order to require the Bakers to sign the s 129 resolution was not a matter that had been the subject of pleading or advance notice. And, for reasons we will come to, we do not consider that the fact that an order had been made in *Fairway* was a basis for concluding that there was an established process justifying the making of such an order.

[66] While the *Fairway* case had a number of similarities to the present case, it is notable that the order made in that case was made as an interim order, following an analysis that there was a serious issue to be tried and that the balance of convenience

justified making the order. In *Fairway*, Lang J did not order the defendants in that case to sign a special resolution authorising the sale, as happened in the present case. He accepted such an order would be inappropriate because the draft resolution referred to the sale being made at fair value, and the defendants did not want to compromise their ability to argue that the price did not represent fair value.[58] In light of this Lang J ordered the defendants to take such steps as were necessary to allow the sale to be completed. He made it clear that, although the effect of the order was to allow the sale to proceed, the order was interim only and the issues in dispute between the shareholders would be dealt with at trial at a later date.[59]

[67] That can be contrasted with the present case where Ellis J made a final determination that the conduct of the Bakers was unfairly prejudicial in terms of s 174, a finding that may stand in the way of any future proceedings by the Bakers against the Hodders. The truncation of the process in this case may have been appropriate if the case had been dealt with as an interlocutory application in which interim relief granted to the Hodders had been subject to an undertaking as to damages. The Bakers were entitled under the High Court Rules to a trial but the process adopted by Ellis J meant the proceeding was finally resolved against the Bakers without all the normal procedural safeguards inherent in the trial process.

*Jurisdiction*

[68] Mr Maassen argued that the High Court had no jurisdiction to make the order requiring the Bakers to sign the resolution approving the sale of Heron Creek. He said the use of s 174 in this way undermined the rights of shareholders under s 129. He argued that, if the function of s 174 was for the court, rather than the shareholders, to decide the appropriateness of a major transaction, then the Companies Act would have expressly said so.

[69] Mr Parker argued that there was no such constraint on the s 174 remedy. He said the view that there is a pre-eminence about s 129 that prevents the court from responding to oppressive conduct in respect of a major transaction was incorrect.

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58 *Fairway*, above n 32, at [57].
59 At [59].

[70] As is apparent from its wording, s 174 applies where *the affairs of the company* have been, are being or are likely to be, conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to the party claiming under s 174. Although this language is not obviously apt where the oppression complained of consists of a shareholder invoking the right to decline to approve a major transaction under s 129, s 174(3) contemplates that a s 174 order may be made against a person other than the company, including a shareholder. That could be taken as suggesting that s 174 could apply where a shareholder or group of shareholders refuses to approve a major transaction under s 129. Even if s 174 did apply in such a situation, however, the power to make an order under that section would need to be exercised with great caution.

[71] One situation in which it may be appropriate to make an order under s 174 against a minority shareholder who refuses to approve a major transaction is where there are particular circumstances that mean the minority shareholder is breaching a duty owed to the company or to another shareholder or an understanding among shareholders as to the ongoing conduct of the affairs of the company. There may be others; it is not necessary for us to reach a definitive view on that in the present case.

*Reasoning*

[72] Even if there was power to make an order under s 174 and such an order was justified in this case, the form of the order made by the Judge, requiring the Bakers to sign a special resolution approving the sale of Heron Creek, was inappropriate. Section 129 is part of a regime imposing restrictions on the management powers of the board and providing a way for shareholders opposing a major transaction to exit the company by exercising their buy-out rights.[60] The problem with requiring the Bakers to sign a special resolution was that the Court was, in effect, usurping their position as shareholders. The Judge justified this on the basis that there was no rational basis for the Bakers not to sign the resolution, given that the company was effectively insolvent and its shares were valueless. This left only the "bargaining chip" in relation to the Bakers and their associate entities' indebtedness to entities associated with the

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[60] Companies Act 1993, s 110.

Hodders.[61] However, that presupposes that the Bakers were not able to act out of self-interest.

[73] It may be that, in a situation such as the present, if a breach of s 174 can be established, the appropriate remedy would be to appoint a receiver to carry out the sale. Or, alternatively, as Mr Maassen suggested, the more appropriate course of action for the major shareholders may have been to apply to the court for an order appointing a liquidator under s 241 of the Companies Act.

*Conclusion*

[74] We do not need to be definitive on the circumstances in which exercise of minority rights under the Companies Act might itself constitute oppression. That is because we consider that the hearing miscarried. The truncated process followed meant that the Judge was not in a position to determine a number of factual disputes including why there had not been a shareholders' meeting as requested by the Bakers, whether 7 October was as critical as the Hodders claimed, the comparative merits of two competing offers, and whether the Bakers really were, in effect, blackmailing the Hodders. There may have been other issues that would have emerged, which may have provided a better understanding of the family dynamics and the nature of the dispute. There has not been a fair hearing. Ellis J should not have made final orders requiring the Bakers to approve the sale.

**Result**

[75] For these reasons we allow the appeal. We consider that the Court of Appeal ought to have heard the appeal to that Court. Accordingly, we quash the order made under s 174 against the Bakers. We record that the Bakers did not seek to invalidate the sale of Heron Creek to the Stewarts.

[76] We award costs to the appellants of $15,000 plus usual disbursements. We quash the costs orders made in the High Court and Court of Appeal. Costs should be

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[61] As noted above at [46], this was premised on the view that accepting the Stewart offer could not have prejudiced the Bakers because there was no prospect of their unsecured claims against the company being satisfied. See the discussion above at n 5.

re-determined in those Courts in light of this judgment. We do not consider that there is any proper basis for increased costs in either Court.

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