IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2016-419-000261
[2019] NZHC 2191

BETWEEN	PURE ELITE HOLDINGS LIMITED First Plaintiff/First Counterclaim Defendant
	PEH NEW ZEALAND LIMITED Second Plaintiff/Second Counterclaim Defendant
	EVER HEALTH NEW ZEALAND LIMITED Third Plaintiff/Third Counterclaim Defendant
AND	BODCO LIMITED First Defendant/Counterclaim Plaintiff
	BRIAN NOEL WAGSTAFF Second Defendant
	RICHARD CHEW YOUNG Third Defendant

……/Contd…

Hearing: 29 – 31 July, 1 – 2, 5 – 9 and 12 – 13 August 2019

Appearances: A S Ross QC, T J Lindsay and E C R Offner for Plaintiffs and Counterclaim Defendants
P J Morgan QC, T Burtenshaw and E Anderson for First Defendant and Counterclaim Plaintiff
J MacGillivray and S Jass for Second and Third Defendants

Judgment: 3 September 2019

JUDGMENT OF WYLIE J
[Liability]

This judgment was delivered by Justice Wylie
On 3 September 2019 at 2.00pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

/Contd…..

RANDOLPH EDWARD CASIMIR VAN DER BURGH
Fourth Counterclaim Defendant

GEOFFREY IAN POLLARD
Fifth Counterclaim Defendant

Solicitors/counsel:
A S Ross QC, T J Lindsay, E C R Offner, Auckland
Norris Ward McKinnon/P J Morgan QC, Hamilton
Tompkins Wake, Hamilton

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Introduction

[1] These proceedings concern the scope and effect of a business relationship entered into between a number of entities including the first plaintiff, Pure Elite Holdings Ltd ("PEH"), the second plaintiff, PEH New Zealand Ltd ("PEHNZ"), the first defendant, BODCO Ltd ("Bodco"), the second defendant, Brian Wagstaff and the third defendant, Richard Young.

[2] In short:

(a) Messrs Wagstaff and Young, through interests associated with them, had formed a company known as Danpac (NZ) Ltd ("Danpac") with the intention of building an infant milk formula blending and canning plant at Te Rapa in Hamilton. They were seeking to raise capital by attracting investors so that Danpac could complete the construction of the plant in a timely fashion.

(b) PEH had been involved in the distribution of infant milk formula and it was interested in acquiring both a base milk powder manufacturing plant and a blending and canning plant.

(c) Mr Wagstaff met with representatives of PEH. Ultimately, PEH, PEHNZ (then still to be incorporated), Bodco and Messrs Wagstaff and Young, along with other entities, entered into "heads of agreement" on 24 September 2014.

(d) It was the intention that PEHNZ and Messrs Wagstaff and Young would, either directly or indirectly, contribute the necessary capital so that the construction of the Danpac plant could be completed. PEHNZ was to take a controlling shareholding in Danpac.

(e) It was known from the outset that there would be a delay before Messrs Wagstaff and Young could contribute their share of the required capital, but PEH, through PEHNZ, was to provide the required capital nevertheless, with later adjustment to recognise the contributions actually made.

(f) Some steps were taken pursuant to the heads of agreement. In particular, on 20 October 2014, Messrs Wagstaff and Young, through entities controlled by them, transferred 51 shares in (or 51 per cent of) Danpac to the third plaintiff, Ever Health New Zealand Ltd ("EHNZ"), a wholly owned subsidiary of PEH. PEHNZ was subsequently incorporated and, on 24 November 2014, the shares were transferred to it.

(g) Promises were made and assurances were given by PEH and PEHNZ but the anticipated capitalisation of Danpac did not eventuate. Eventually, Messrs Wagstaff and Young lost patience with PEH and PEHNZ and they unilaterally took various steps to transfer the shares back from PEHNZ to Bodco.

[3] Very broadly, Mr Ross QC, for the plaintiffs, said that the heads of agreement created binding legal obligations and that the plaintiffs had entered into a joint venture with the defendants. He argued that the heads of agreement did not expire and that the joint venture created fiduciary obligations as between the parties. He submitted that the steps taken by Messrs Wagstaff, Young and Bodco to "take back" the shares in Danpac were unlawful, and that those unlawful steps repudiated the joint venture. He put it to me that the destruction of the joint venture was intentional, and that it was calculated to free Bodco from its obligations to the plaintiffs, so that the defendants could take advantage of the Danpac business opportunity for their own gain. The plaintiffs claim that they suffered significant losses as a result. The amount claimed is approximately $270 million, plus interest.

[4] Mr Morgan QC, for Bodco, argued that the heads of agreement did not create any material obligations on Bodco, except to subscribe for additional ordinary shares in Danpac when that company was capitalised. He accepted that there was a joint venture and that there were fiduciary obligations owed as between the parties. He submitted that PEH was advised from the outset that there would be a delay by Messrs Wagstaff and Young in making their capital contributions to Danpac, and that in the interim, PEHNZ was to provide the required capital. He said that this did not happen and that the heads of agreement (and/or joint venture) came to an end through mutual non-performance. He argued that PEHNZ acquired the shares in return for capitalising

Danpac, and that when this did not happen, PEHNZ had no entitlement to keep the shares.

[5] Mr MacGillivray, for Messrs Wagstaff and Young, submitted that the heads of agreement created neither an enforceable obligation on the part of PEHNZ to contribute capital to Danpac, nor an enforceable obligation on Bodco or on Messrs Wagstaff and Young, to transfer the shares in Danpac to PEH or EHNZ. Rather, he said that the heads of agreement outlined a proposed transaction and recorded various agreements the parties would try and reach. He denied that there was a joint venture and that fiduciary obligations were owed. He submitted that the transfer of the shares in Danpac to EHNZ took place in the expectation of the imminent completion of other aspects of the contemplated transaction, but that the parties were unable to complete the transaction as envisaged. He also asserted that PEHNZ had no right to retain the shares in Danpac thereafter.

Procedural matters

[6] Initially, it was proposed that the hearing would deal with both liability and quantum and four weeks was allocated so that all matters could be put before the Court. Unfortunately, the plaintiffs belatedly filed additional evidence relevant to the damages claimed. The defendants did not oppose the receipt of that evidence, but sought that the trial should be split between liability and quantum, to give them the opportunity to respond to it. After hearing from counsel, I made orders, by consent, directing that there should be a split trial – dealing initially with liability and later with the quantum of damages (if any). I refer to the minute I issued on 30 July 2019.

Factual background

[7] As all counsel acknowledged, there was relatively little dispute about much of the factual background. In large part what happened is tolerably clear from the voluminous contemporaneous documentation and my factual findings follow. What was in issue was more the scope and effect of the business relationship and these are issues for the Court.

The infant milk formula supply chain/Chinese market

[8] The infant milk formula production and supply chain has three primary stages:

(a) Milk collected from dairy farms is collected and processed. In New Zealand it is separated, standardised, pasteurised and homogenised. It is then dehydrated to produce processed base milk powder. All of this occurs at a dedicated milk powder plant. Nutrients can be added as part of this primary drying process.

(b) The base milk powder is then blended with further nutrients and other ingredients in accordance with distributors' specifications, and the resulting product is canned, all at a blending and canning plant, to yield infant milk formula (together with other products such as whole milk powder and growing up milk formula). Infant milk formula is normally packaged in either 400g or 900g cans. The cans are labelled with the distributors' brand names.

(c) The cans of infant milk formula (and other processed milk powder products) are then distributed and sold both domestically and internationally through wholesale and retail distributors. The product is sold either at retail stores or, increasingly, online.

[9] China is the largest infant milk formula market in the world, and it is important to most, if not all, infant milk formula manufacturers. It is particularly important to manufacturers in New Zealand, in part because of the free trade arrangements between China and New Zealand.

[10] In 2008, China suffered a widespread dairy product safety incident, known as the melamine scandal. Melamine is not fit for human consumption, but some Chinese infant milk formula manufacturers had been using it to falsify the protein content of a range of infant milk formula products. The contaminated infant milk formula resulted in the deaths of six babies and over 50,000 hospital admissions in China.

[11] As a result, dairy exports into China boomed. New Zealand enjoyed a market advantage, because this country was seen as providing a high quality and safe product.

[12] At the same time, the scandal led to plans by the responsible authorities in China to impose greater regulatory restrictions on infant milk formula manufacturers. By 2013, it was common knowledge that the Chinese authorities were proposing to require that all foreign manufacturers and exporters obtain official registration in order to export infant milk formula and similar products into China. A close association between the brand owning exporter and the product manufacturer would likely be essential to obtaining registration.

[13] The registration requirements came into force on 1 May 2014 and there has been increasing regulation since.

[14] As at mid-2014, there were basically two alternatives for those seeking to export infant milk formula into China – either exit the business or acquire their own, or an interest in, a manufacturing facility.

The plaintiffs

[15] PEH was incorporated in the British Virgin Islands in 2012. It traded in part through a group known as the Ever Health Group, including at the relevant time Ever Health Group (HK) Ltd ("EHHK"), EHNZ and Ever Health China. They were all wholly owned subsidiaries of PEH. PEH also had other wholly owned subsidiaries, Pure Elite Holdings (HK) Ltd and PEHNZ.

[16] David McCann, an assets manager from Hong Kong, was, in effect, the chairman of PEH. He was one of its founding shareholders. So were Randolph van der Burgh, an accountant and businessman from New Zealand, and Geoffrey Pollard, managing director of an entity in Singapore that provides advisory and other services to companies, hedge funds and private equity investors. PEH had a number of other shareholders and most were high net worth individuals or entities controlled by such individuals. They were referred to in the hearing as the "angel investors" or "angels".

[17] Mr McCann and Mr van der Burgh had developed a strategy for PEH to establish (in stages) a vertically integrated "grass to glass" infant milk formula business. They decided to proceed using what they called a "demand-pull" strategy – i.e. to first develop their own infant milk formula brand and establish a viable market for their product, and then to consider participation in other stages of the supply chain, namely a plant to produce base milk powder and a plant to blend and can the base milk powder. To this end, PEH and interests associated with it, spent substantial time and monies in developing a fledging business selling New Zealand made infant milk formula, under the brand name A+Puro, into China. It put in place a sales and distribution network and employed staff in China through EHHK. It established valuable contacts with Chinese distributors, in particular, with a leading food distributor in China – the Dah Chong Hong Group ("DCH"). It entered into a distributorship agreement with a DCH subsidiary in May 2014.

[18] Prior to the events at issue in this proceeding, PEH and EHHK obtained A+Puro from an independent manufacturer in New Zealand – GMP Dairy Ltd ("GMP"). The orders had been relatively modest – three containers of 900 gram cans at 9,000 cans per container. Unfortunately, A+Puro's introduction into the Chinese market occurred at much the same time as another market scare occurred – the discovery of botulism in New Zealand manufactured whey protein concentrate which had been used to produce infant milk formula and other products. A+Puro nevertheless received the appropriate clearances and it sold reasonably well, albeit that some cans were given away on a "buy one, get one free" basis and others did not sell at all. Notwithstanding this modest start, by mid-2014, PEH nevertheless considered that it was well positioned to execute the next stage of its business strategy and to acquire a blending and canning plant. Ideally, from its perspective, that acquisition would be coupled with a raw milk supply and a base milk powder processing facility.

[19] In July 2014, in anticipation of receiving significant orders from DCH, Mr van der Burgh contacted GMP, and sought to place a significant order with that company. GMP replied, advising that it was unable to accept any further production orders from PEH/EHHK for infant milk formula. It said that it did not have enough resources to produce the volumes requested. Moreover, requirements imposed in China meant that GMP had to reduce the number of brands it manufactured.

[20] In August 2014, DCH, through its subsidiary, did place a significant order for A+Puro with EHHK. The order was for a total of 47 containers – 43 of 900 gram cans at 9,000 cans per container, and four of 400 gram cans at 18,000 cans per container. EHHK (and PEH) had no means of fulfilling this order and it was placed on hold. Obtaining a New Zealand blending and canning plant and security of supply became critical for PEH's ongoing business viability.

The defendants

[21] Mr Wagstaff has had significant experience in the dairy industry. He has held senior roles in various New Zealand companies and multi-nationals based in Europe, Asia and the United States. His life's work has largely focused on dairy plant design and execution.

[22] In 2011, he incorporated a company for the purpose of procuring infant milk formula for sale into the Chinese market. The company developed a brand – B&I – and that brand was launched into China in July 2013. It was manufactured by GMP.

[23] In 2012, Mr Wagstaff met Mr Young, through their involvement in the NZ Infant Formula Exporters' Association.

[24] Mr Young is of Chinese descent, although he was born in New Zealand. He was formerly involved in market gardening and he had become involved in the food supply/export industry. In 2011, he became involved in exporting infant milk formula through his company, RC Young Holdings Ltd. He exported infant milk powder into China under the brand name Yum Yum. It was also manufactured by GMP.

[25] Faced with the prospect of further regulation and the likely need for a close association between the manufacturer and the brand owning exporter, in 2013, Mr Young and Mr Wagstaff started discussing the "grass to glass" business model. Both were faced with the prospect of being shut out of the market, unless they could develop a close association with a manufacturer.

[26] By mid-2014, Mr Wagstaff and Mr Young, through their respective entities, had exported some 400,000 cans of infant milk formula. However, they also were

advised by GMP that it could no longer supply them. Mr Wagstaff and Mr Young were in much the same position as PEH. They did not have a supplier. Nevertheless, they continued to promote their brands, hoping that they could keep their brand awareness alive until they could get their own blending and canning plant into operation. They were keen to do so as quickly as was reasonably practicable.

[27] Mr Wagstaff and others had some years earlier incorporated a company known as WOGA Trustee Ltd. One of the persons involved in WOGA Trustees Ltd was Ole Andersen, a Dane. He and Mr Wagstaff were old friends and Mr Andersen was involved in exporting New Zealand manufactured infant milk formula into China under the brand name "Pharmalac". He also was unable to source any further supplies of Pharmalac.

[28] WOGA Trustee Ltd, together with other parties, had incorporated another company, Mataura Valley Milk Ltd ("MVM"), in early 2008. Mr Wagstaff, his friends (including Mr Andersen, but not Mr Young) and various associated interests, held approximately 42 per cent of the shares in MVM. Mr Wagstaff however was not a director of MVM. MVM's business plan was to build a state of the art milk powder plant to make nutritional products, including infant formula base powder, at Mataura in Southland. The global financial crisis intervened and the MVM project stalled. MVM did however hold suitably zoned land, and the necessary resource consents, for the establishment of a base milk powder plant.

[29] Mr Wagstaff and others associated with MVM had an interest in another asset which they hoped would prove useful and which would benefit them. They had acquired an Anhydro spray drier. It still had to be assembled but Mr Wagstaff and his associates hoped that it might be able to be utilised in any plant built by MVM.

[30] Mr Young had no interest in MVM, and although Mr Wagstaff hoped that it might be possible for MVM to be established as well, as noted, he was not a director of that company. Rather, the shareholders and board of MVM pursued an independent strategy to sell/capitalise MVM's business proposals. An entity known as Clavell Capital Ltd, a merchant banker, was engaged to manage the process of finding new capital and/or partners for MVM.

[31] Mr Wagstaff considered that it might be possible to resurrect MVM's proposed milk powder plant in Mataura, that he, Mr Young and Mr Andersen would be able to source base milk formula directly from MVM and that the base milk formula could be blended into infant milk formula and canned at the proposed new blending and canning plant to be built in Hamilton.

[32] Messrs Wagstaff and Young decided to pursue the blending and canning plant business opportunity as 50/50 partners. They knew that they would not be able to build the plant, at least in a timely fashion, without bringing in additional capital investment, but they decided, before seeking outside capital, to build up the business insofar as they could from their own resources, to make it attractive to potential investors. They undertook preliminary investigations to find a suitable site; they engaged Mr Wagstaff's son-in-law, David Leeson, as a project manager; they began discussions with various prospective investors; they leased office premises in Hamilton; they engaged Mr Wagstaff's daughter, Alexandra Leeson, to assist with various matters such as trademarks, regulatory compliance, shipping, branding and the like; they prepared tender documents for the various activities required to manufacture infant formula.

[33] To further advance their proposal, in March 2014, Mr Wagstaff and Mr Young incorporated Danpac. It initially had 100 shares, 50 held by Mr Wagstaff's company, St Croix Holdings Ltd, and the other 50 held by one of Mr Young's companies, Pezdan Enterprises Ltd. It subsequently transferred its shares to RC Young Holdings Ltd. It was intended that Danpac would build the blending and canning plant. Danpac leased suitable premises in Te Rapa, Hamilton, and Messrs Wagstaff and Leeson had various preliminary meetings with equipment suppliers. They obtained proposals from those suppliers.

[34] Independently, Mr Wagstaff, through St Croix Holdings Ltd, purchased a second-hand, but unused, canning plant from Indonesia, and imported that canning plant into New Zealand. It was his intention to transfer that plant to Danpac.

The negotiations

[35] Coincidentally, Mr van der Burgh, on behalf of PEH, had expressed an interest in MVM. He had conducted, informally, due diligence on the company. When the shareholders and board of MVM appointed Clavell Capital Ltd to sell/capitalise the company, PEH decided to participate in the process.

[36] In September 2014, Clavell Capital Ltd produced an equity information memorandum for prospective investors in MVM. It recorded that MVM was seeking an 80 per cent equity partner who would provide between $64.1 and $80.2 million of equity, and arrange a debt facility, to construct the base milk powder processing plant in Southland. The total capital requirement was estimated to range from $155 to $187 million. It further recorded that the foundation shareholders expected to retain an interest in the business but that they could contemplate the sale of a 100 per cent interest in the venture. It valued the existing shareholders' equity at $13.5 million.

[37] Mr Wagstaff became aware of Mr van der Burgh when a representative from Clavell Capital Ltd contacted him, asking for information in relation to MVM that had been requested by Mr van der Burgh. Mr Wagstaff spoke direct to Mr van der Burgh, and in the course of their conversation, he became aware that Mr van der Burgh, and the interests he represented, might also be interested in investing in a blending and canning plant.

[38] Mr Wagstaff and Mr Leeson had already prepared a preliminary business plan for the proposed Danpac blending and canning plant. It recorded that Messrs Wagstaff and Young were seeking to raise $11.75 million, so that the blending and canning plant could be completed and commissioned by mid-November 2014 and start producing infant milk formula in mid-December 2014.

[39] Mr Wagstaff had already had numerous discussions with potential investors in Denmark. Nevertheless, he was happy to talk to Mr van der Burgh as well.

[40] In late May 2014, Mr Wagstaff, Mr Young and Mr van der Burgh met at Mr van der Burgh's offices in central Auckland. They discussed both the MVM project and the Danpac blending and canning plant project, and the potential

investment opportunities in both businesses. A second meeting was held in early June 2014. That second meeting was also attended by Mr McCann. It was Mr Wagstaff's evidence[1] that Mr McCann presented himself as a director of a large and successful venture capital firm, and that Mr McCann was "extremely bullish" about raising the required money. Mr Wagstaff says that he was told that the Ever Health Group had access to $100 million of funding for dairy industry investment in New Zealand. He said that he took Mr McCann at face value and was encouraged by his confidence.

[41] Although the Danish investors initially showed interest, in the event, their interest fell away.

[42] Mr Wagstaff and Mr van der Burgh stayed in touch. Mr Wagstaff gave the preliminary business plan for the Danpac proposal to Mr van der Burgh. At the time Danpac's assets comprised a lease of land and a pharmaceutical grade building at Te Rapa, all the necessary resource consents for the operation of an infant milk formula blending and canning plant and the associated intellectual property. Mr Wagstaff had acquired the canning line and it could be transferred to Danpac. The line had the capacity to process up to 6,000 tons of infant milk formula per year. Mr van der Burgh saw the proposal as presenting a great opportunity for the PEH group. It would enable PEH to accelerate its business plans, and in particular to secure its operating future and independence for its A+Puro brand.

[43] There were a number of subsequent meetings between Messrs McCann, van der Burgh, Pollard, Wagstaff, and, at times, Mr Young. The discussions related to both the Danpac project and the MVM project. The parties discussed expanding the Danpac project to allow for the introduction of a second canning line, to increase the plant's capacity up to an estimated 34,000 tons per year. Mr Wagstaff sent a budget simulator (or budsim) projection to Messrs van der Burgh and McCann. It showed production rising from 2018 onwards once the second canning line was added. He also sent through his best guess at sale, cashflow and working capital requirements. He was anxious to progress the project and he stressed the need for haste to Mr van der Burgh, Mr McCann and Mr Pollard. Updated budsims and various other

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[1] I accept this evidence. It is consistent with later events and representations made to the defendants.

spreadsheets and the like were made available. All showed the need for a capital injection, with initial funding required in late 2014.

[44] On 27 July 2014, Mr van der Burgh emailed to Mr Wagstaff a draft heads of agreement. Mr van der Burgh proposed that PEHNZ would acquire a 72 per cent interest in Danpac, and that it would invest $7,500,000 in the company. Mr Wagstaff rejected this proposal. He told Mr van der Burgh that he and Mr Young were only prepared to proceed if they retained a 49 per cent shareholding in Danpac.

[45] On 15 August 2014, Mr Young and Mr Wagstaff adopted and signed a constitution for Danpac. Notice of the adoption of the constitution was not however given to the Register of Companies.[2]

[46] Various further draft heads of agreement were exchanged. At one stage it was proposed that Mr Wagstaff and his interests would transfer their MVM shares to Danpac, and this was incorporated into the drafts.

[47] At various meetings, and in particular at a meeting held on 10 September 2014, a number of matters were discussed:

(a) Mr Wagstaff wanted to remove the MVM share transfer provisions from the heads of agreement relating to Danpac.

(b) Mr Wagstaff made it clear that Danpac needed an investor able to provide immediate funding to advance the business. He and Mr Young were anxious to accelerate matters. They had managed to obtain an early handover of the leased premises. They had had to personally put a bond in place to secure rental payments. They wanted to commit further funds to pay deposits to manufacturers, so that they could book time slots to get the required components for the plant manufactured. Mr Wagstaff and Mr Young had largely exhausted their own readily available funds. Mr Wagstaff told Mr van der Burgh that if PEH could

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2 A company may, but is not required to, have a constitution – Companies Act 1993, s 26. If a company adopts a constitution, notice has to be given to the Registrar. It is an offence not to do so – s 32.

not provide immediate funding, he and Mr Young would look elsewhere as they had no time to waste. In response, Mr Wagstaff was told that the Danpac business was only a small part of PEH's wider plans, and that funding for Danpac was "small beer" and a non-issue.

(c) It was agreed between the parties that brand ownership would not be part of any business relationship. Rather it was contemplated that each would negotiate separate supply (or off-take) agreements with Danpac, and that each would then promote its own brand in China.

(d) Mr van der Burgh and Mr Pollard wanted more financial information, in particular about Danpac's costings and the contribution St Croix Holdings Ltd was making to Danpac by transferring the canning line to it for $1.6 million. Mr Wagstaff responded that the figure attributable to St Croix's contribution was "non-negotiable".

(e) Mr Wagstaff discussed with Mr van der Burgh the idea of creating a separate holding company – Bodco – to hold his and Mr Young's shares in Danpac.

[48] It seems that all parties anticipated that the heads of agreement would be signed.

(a) Mr van der Burgh sent an email to a business associate in early September 2014 saying:

> … we have commenced construction of our own canning and blending plant this week and have an option to secure a stake in a 'shovel ready' fully consented milk processing plant.

Neither statement was true at the time it was made, but they do demonstrate optimism on the part of the plaintiffs.

(b) The defendants incorporated Bodco on 10 September 2014. On the same day Messrs Young and Wagstaff, as its directors, resolved to

purchase from St Croix Holdings Ltd the canning line and related equipment for $1,600,000.

[49] Curiously, given what was at stake, both sides had an aversion to obtaining legal advice. The various draft heads of agreement that were circulated were prepared by Messrs van der Burgh and McCann without the benefit of legal input. Similarly, they prepared the final drafts which were ultimately signed. Neither Mr Wagstaff nor Mr Young sought legal advice at the time.

[50] On 19 September 2014, Mr van der Burgh sent separate heads of agreement, one for the Danpac venture and the other for the MVM venture, to Mr Wagstaff. He recorded that he envisaged both heads of agreement being signed contemporaneously, and advised that the documents were ready to be executed from PEH's perspective.

The MVM heads of agreement

[51] The MVM heads of agreement seems to have been signed first. It has been dated 19 September 2014.[3]

[52] The MVM heads of agreement is between PEH, PEHNZ (which was then yet to be incorporated), WOGA Trustee Ltd, Mr Andersen's company - N.K.N. ApS, Bodco, Mr Wagstaff, Mr Young and Mr Andersen. It was essentially a "lockup" agreement. It provided that, subject to PEH completing due diligence, Bodco was to sell or procure the sale of 42.675 per cent of MVM's shares to PEH at a price to be "determined by the contestable process outlined in [Clavell Capital Ltd's] MVM equity information memorandum", such sale to be conditional upon PEHNZ acquiring 76 per cent or more of the total shares in MVM. Bodco was to enter into a conditional sale and purchase agreement with PEHNZ in respect of the shareholding, and prior to completion, exercise its pre-emptive rights under MVM's shareholder agreement in a manner determined by PEHNZ at its sole discretion.

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[3] I note that Mr Wagstaff was still requesting the document on 24 September 2014, and that Mr van der Burgh sent "a clean copy" on that date. It may be that the heads of agreement were signed contemporaneously and that the MVM heads of agreement was backdated, but nothing turns on this.

[53] It is noteworthy that the MVM heads of agreement was not conditional on the Danpac heads of agreement being completed and the plaintiffs do not sue on the MVM heads of agreement.

The Danpac heads of agreement

[54] Notwithstanding that the MVM heads of agreement had been agreed and, perhaps, signed, there were further difficulties with the Danpac heads of agreement.

[55] There was a meeting between Mr van der Burgh and Mr Wagstaff on 23 September 2014. They discussed the timing of the parties' respective cash contributions. Mr Wagstaff hoped to obtain his contribution from the sale of his shares in MVM and perhaps the Anhydro drier; Mr Young was obtaining his contribution from a land subdivision which was underway but not completed.

[56] The matters discussed at the meeting were summarised in an email Mr van der Burgh sent to Mr Pollard early on 24 September 2014. Relevantly, the email read as follows:

> Most of yesterday's meeting with Brian [Wagstaff] was about the timing of our respective contributions over the next 3/4 months. DY [Mr Young] cannot contribute his $1.6m until the end of October and BODCO's $1.9m cannot come in until they have monetised MVM, say Dec/Jan. Hence he wants our cash now (surprise surprise). …

Mr Pollard responded:

> As expected.
>
> …
>
> No way they [Messrs Wagstaff and Young] are going to be able to hold at 49%.

[57] A further version of the Danpac heads of agreement was sent by Mr van der Burgh to Mr Wagstaff at 3.55pm on Wednesday 24 September 2014. Relevantly, in his email attaching the document Mr van der Burgh stated as follows:

> Further to our meeting yesterday and discussions this morning, we have now agreed the MVM HoA and substantially agreed the Danpac HoA. What remains to be agreed is the timing of each party's cash contributions.
>
> …

> In the interim I have made a "light modification" to the Danpac HoA and suggest that we agree the cash contribution timetable as part of the first 10 day DD period.
>
> With respect to BODCO/Dick's [Mr Young's] $1.6m I thought you said end of October?
>
> With respect to the monetisation of your MVM position, we need to factor in a possible OIO approval process which may delay the balance of the BODCO $1.9m beyond Dec/Jan. We also need to factor in a possible scenario where the successful bidder for MVM only partly cashed you out, or cashed you out over time …

[58] Mr Wagstaff responded at 4.19pm on the same day. His email reads as follows:

> I have a major concern around the timing of the capitalization 31 to 90 days, This will delay our project too long with a considerable down side in the market place for our products B&I and YUM YUM we have orders to fill!
>
> I am getting the impression that you do not in fact have the funds available and are seeking investors ??? You will have to commit to October or we will have to go it alone.
>
> Alternatively, we need to see some form of cash deposit to confirm your commitment.. David McCann comments to me in Shanghai was that you were ready to go!
>
> As far as Dick Young's capital input goes we have allowed for some buffer hence November or earlier.
>
> Please discuss this with your guys as once we sign this we are restricted in bring in other partners.

[59] Mr van der Burgh in turn responded at 5.13pm, also on the same day, as follows:

> We haven't changed anything on our side. All our funding will be deployed in accordance with the agreed timeline as we have stated from day one.

[60] The Danpac heads of agreement was signed and it is dated 24 September 2014.[4] It was between PEH, PEHNZ (yet to be incorporated),[5] Danpac, Bodco, Mr Wagstaff,

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4 Discussed further below – see [141] to [147].

5 A company can enter into a pre-incorporation contract and later ratify it, either within such time as is specified in the contract, or, if no period is specified, then within a reasonable time after the incorporation of the company. Here PEHNZ was incorporated on 22 November 2014. On 24 November 2014, Mr van der Burgh, as the company's sole director, signed a resolution recording that the company assumed all the benefits and obligations in, and as contemplated by, the Danpac heads of agreement. It does not seem that notice of this resolution was given to the other parties to the heads of agreement. It is a moot point whether notice is required – see Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at 366. The point was not raised by counsel and I take it no further.

Mr Young and Mr Andersen. It recorded that it was intended to create binding legal obligations between the parties. It noted that Danpac required capital to complete the construction and commissioning of its blending and canning plant, and for working capital, and that PEHNZ was to provide the necessary capital to complete the construction of the plant in consideration for a controlling shareholding in Danpac. The agreement was conditional on a number of things – PEH completing due diligence (split over two timeframes), the parties agreeing a revised business plan and budget, and each party receiving acceptable legal and tax advice. Various terms were set out and obligations were placed on various entities. There was a timeline for completing the transaction. Relevantly, within a 10 day period, PEH was to complete financial and legal due diligence and the parties were to complete and agree on a revised business plan and budget. Within the period 11-30 days, the parties, either singly or jointly, were to complete a shareholders' agreement, incorporate PEHNZ, complete the transfer of various assets to Danpac, and undertake "initial capitalisation of Danpac as per business plan". Within 31-90 days, the parties were to complete the capitalisation of Danpac as per the business plan and complete construction of the plant. The heads of agreement also contained an exclusivity provision, and provisions for costs, confidentiality, governing law and against assignment. There was a schedule recording the proposed shareholding structure and the anticipated capital contributions. It was proposed that Bodco would contribute $5,102,370 (comprising $3,502,370 in cash and $1,600,000 from Mr Wagstaff's – St Croix Holdings Ltd's – canning line) and that PEHNZ would contribute $5,310,630.

Funding endeavours

[61] Contrary to the assurances given to Messrs Wagstaff and Young, PEH and the Ever Health Group did not have funding available or arranged, either for the MVM project or for the Danpac project. PEH did have a trade finance facility with an entity known as Male Capital Holdings LLC in the sum of US $1.5 million. Mr McCann gave evidence that this facility could have been used to ensure cashflow to Danpac. This however never happened. Rather, it is clear from contemporaneous documents that PEH and its Ever Health Group subsidiaries were under considerable financial pressure at the time.

(a) In August 2014, Mr McCann was trying to raise funds. He was expecting to receive the same, but as at 15 August 2014, they had not come through.

(b) On 18 August 2014, Mr McCann advised his colleagues that "from a cashflow perspective, we need USD $40k this week as a matter of urgency".

(c) On 20 August 2014, Mr McCann told his colleagues that:

> USD $50k will buy us a few days. Then other $250 for August. But USD $1m sees us to end of September and cleans the slate.

(d) On 27 August 2014, Mr McCann in an email to his colleagues said:

> I've met with DCH again. Bottom line the JV will happen. … Honestly, I don't know how this will go. We really need to start processing the orders but we can't fund them.

(e) On 26 September 2014, Mr McCann sent an email to his colleagues referring to PEH's/the Ever Health Group's financial position. Relevantly, the email read as follows:

> 5. Pressing needs
> Last months management payroll circa $50k
> This months payroll circa $100k (in particular the promotion girls $8k)
> Creditors screaming ones $200k
> DCH reimbursements on AP fees $10

(f) On 30 September 2014, Mr McCann told his colleagues that anticipated funding from an angel shareholder had not been received. He commented:

> … we really need this funding by Friday to cover most of the payroll and rent.

(g) On 1 October 2014, Mr McCann was advising his colleagues that:

> Our total outstanding trade creditors at an EHG level stands at approx USD $435 exl payroll. which is approx another $140K.
>
> At a PEH level our outstanding creditors is approximately $250K.

> The pressure is mounting on from the creditors side. …

(h) On 15 October 2014, Mr McCann sent an email to his colleagues. Relevantly, it read as follows:

> We have a threat. Its the agency that controls and manages the promotion girls. They're screaming and crying.
>
> We need USD $30K to bring them upto date. We may need to go a friendly and allow them to lend into us and then pay them out higher. We need to think about this. This any other time isn't a big number but at the moment it is …

(i) There was a discussion in early November 2014 about laying off staff. As at 13 November 2014, the total outstanding payroll, including for December, was US $215K. It was recorded in emails that the legal pay out PEH needed to make "to let everybody go" was "$177K on top of this". In an email Mr Pollard noted as follows:

> I have a concern about the visual of cutting all of the China piece right at this time. We've made a lot here in NZ of our China access, and the sales we will generate through his channel as being key to our interest here. Its highly inconsistent we drop this now …
>
> My preference would be to see a skeleton staff retained … Is there a middle road … that preserves a presence there but reduces overhead.

[62] Mr van der Burgh accepted in cross-examination that "they were a bit tight". When it was put to him that the group was having liquidity problems, he responded – "look, no different to any other growth company".

[63] Mr Wagstaff and Mr Young were not told of these difficulties. It was their understanding that PEH had available funding to advance both the Danpac project and the MVM project.

[64] It was against this background that PEH was trying to raise the requisite funds for both the MVM and Danpac projects. Mr McCann assumed primary responsibility for this. Mr van der Burgh assisted, and he made various endeavours himself. So did Mr Pollard.

[65] Mr McCann was trying to raise much more than the $5,310,630 which was PEH's share of the initial capital referred to in the Danpac heads of agreement. He was trying to raise approximately US $200 million, to fund both the Danpac project and the MVM project. He wanted to ensure that PEH had ample funds to ensure that it had 100 per cent of the anticipated Danpac development costs and to give it protection in case Bodco was unable to raise its share of the capital. He also wanted funding for the proposed second canning line. He did not expect that Bodco would be able to contribute any of the additional capital required for this. It was his expectation that PEH would in the long run be responsible for most of Danpac's capital needs.

[66] A number of prospective funders were approached. They included:

(a) OCP Asia (Hong Kong) Ltd. It indicated that it was willing to assist PEH with US $10 million of funding, but required as a pre-condition that PEH raise US $5 million in equity. It also wanted to take warrants, which would give it the option of converting the debt to equity, at a discount. It later amended its offer, and said that it was prepared to lend US $14.5 million, subject to PEH raising US $3 million in equity. It maintained its requirement for warrants. PEH considered that this was not an optimal arrangement from its perspective. Exercise of the warrants would dilute the value of its existing shareholdings. Mr McCann made the decision in October 2014 to instead pursue other prospective investors.

(b) Gleneagle Securities (Aust) Pty Ltd, in Sydney. Gleneagle is a privately owned investment bank managed by Lance Rosenberg. Mr Rosenberg and Gleneagle were interested in funding PEH's participation in both projects, but they were not in a position to do so at the time.

(c) The Wang family, based in Singapore. The family is apparently very wealthy, and the evidence suggested that it has diversified investments and connections throughout Asia. Mr McCann was introduced to a member of the family – Dodo Wang – by Terence Kwong. Mr Kwong

is a shareholder in PEH through an investment company. Mr McCann met Ms Wang on several occasions in late September/early October to discuss the investment proposal. He was proposing that the Wang family should make a total investment in both projects of US $250 million. It was Mr McCann's evidence that Ms Wang told him that the Wang family would initially provide short-term bridging finance of US $7 million, and the balance after formal approval by the Wang family's investment fund managers. On 10 October 2014, Mr Kwong advised Mr McCann that the Wang family had agreed to advance the money. Mr McCann sent an email to Mr van der Burgh and Mr Pollard on the same day saying that he had a deal, that the deal had been approved by Ms Wang's family, and that the funds were available. Mr McCann did caution that "this might change by lunchtime as her father has a meeting with her in the morning". By 14 October 2014, Mr McCann was emailing his colleagues saying:

> These last few days were fantastic for me …
>
> They say you should always fake it until you make it and never give up believing.

Mr McCann's confidence proved to be premature. Over the next few weeks he continued to work on the deal. He prepared loan and subscription agreements and sent them to Ms Wang. He sent her a draft term sheet for the initial US $7 million bridging loan. Mr McCann was told by Mr Kwong that the Wangs had given instructions for payment of a first transfer of US $1 million to PEH. Based on this advice, he prepared and signed a cheque on behalf of PEH, for US $30,000, being an initial interest payment (interest was payable in advance). He gave this cheque to Ms Wang at an airport express train station. He put a hold on it, pending receipt of a countersigned copy of the loan agreement relating to the promised advances. Mr McCann received further assurances that the bridging finance would be released, and on 3 November 2014, he approved the release of the advance interest payment to the Wangs. No countersigned loan agreement was delivered. Bizarrely, given that Mr McCann was dealing with the Wang

family from Singapore and their investment entity, Enertech LLC, draft loan agreements were received, purportedly on behalf of the Wang family, from someone called Reza Ghiam, whose residential address was given as Biella in Italy (in respect of a first bridging loan of US $1 million) and Lisa Olive, whose residential address was given as Deva, Romania (in respect of a further US $6 million bridging loan). Despite increasingly desperate pleas by Mr McCann to Ms Wang and her sister, Ana Wang, no monies were ever received from the Wangs. Nor could Mr McCann recover the US $30,000 he had paid over. It appears that Mr McCann was the victim of a not particularly sophisticated scam.

(d) Fortman Kline Capital Markets. Mr Pollard approached this entity. It apparently expressed interest in providing short-term bridging finance for the Danpac venture, with a view to playing a role in the larger funding required.

(e) BHD Capital Pty Ltd. Mr van der Burgh led these discussions. It was also seeking an equity contribution from PEH.

(f) Visy Packaging Holdings Pty Ltd. Again, Mr van der Burgh led these discussions.

[67] Notwithstanding the efforts of Messrs McCann, van der Burgh and Pollard, no funding was obtained by PEH, either in October 2014 or at any relevant time thereafter. Nor were any binding loan documents ever signed.

Danpac's position – October 2014

[68] While these various endeavours were being made by PEH to obtain funding, construction of the plant was proceeding. By the end of September 2014, construction of Danpac's offices had been completed. The canning line was on-site. Contractors and suppliers had been approached and proposals had been obtained from them. Various set up works had been undertaken, including project engineering, construction procurement, on-site fabrication and pre-work for the installation of the canning line. Calculations for building and construction materials were undertaken; cranes were

arranged; fire design works were commissioned; health and safety protocols were put in place; inspections of the site by certification authorities were arranged. Funding was urgently required to keep the project going. Mr Wagstaff and Mr Young had exhausted their readily available funds. At the start of October 2014, Mr Andersen lent Danpac $20,000 to assist it in meeting a rental shortfall.

[69] Mr van der Burgh and Mr Wagstaff met on 2 October 2014. Notes of that meeting were kept by Mr van der Burgh. "Pre-project" expenses were discussed. It was noted that these were then approximately $495,000, and there was express reference to the rental bond, ongoing rental, insurance and salaries due to Alexandra and David Leeson.

[70] Mr Wagstaff and Mr Leeson provided Mr van der Burgh with various documents he wanted to review for the purposes of undertaking due diligence, pursuant to the heads of agreement. Mr van der Burgh attended Danpac's building on 5 October 2014, and Mr Pollard and two consulting engineers attended on 8 October 2014. Mr van der Burgh sent an email to Mr Wagstaff indicating that, by the end of the week of 6 October 2014, the parties needed to have agreed the opening fixed asset and working capital figures, so that they could agree their respective capital contributions – both as to amount and timing, commence legal documentation and have an agreed basis for a build cost deviation. He prepared an amended schedule to the heads of agreement, providing for capital contributions of $5,767,586 by Bodco, and $6,002,997 by PEHNZ.

[71] Mr Pollard conducted financial due diligence. He was assisted by Justine Trethewey. She was a senior manager employed by an accountancy business run by Mr van der Burgh – Astus Services Group New Zealand Ltd. Once initial due diligence had been completed, Mr van der Burgh suggested that his firm be engaged by Danpac to do the accounting work previously done by Mr Wagstaff's wife, Jan. Mr Wagstaff agreed and Astus was retained to carry out the work. It was paid for its services.

[72] On 13 October 2014, Mr van der Burgh confirmed that the initial 10 day due diligence in relation to financial and legal matters had been satisfied, and that PEH

was proceeding with the additional due diligence – primarily into engineering related matters. He indicated that PEH hoped to complete this process within 14 days, rather than the 21 days provided for in the heads of agreement.

[73] Neither Mr Wagstaff nor Mr Young was told that PEH did not have access to funds and they were not informed of the difficulties that PEH was having in endeavouring to raise money. Rather, Mr Wagstaff took the various events occurring in early to mid-October as confirming that PEH was on track to make PEHNZ's initial capital contribution in mid to late October 2014, as contemplated by the heads of agreement.

[74] It was at this stage that Mr van der Burgh requested that Mr Wagstaff and Mr Young transfer 51 per cent of the shares in Danpac to PEH or its nominee. This was first suggested at a meeting held on 17 October 2014. Mr van der Burgh kept notes of that meeting. There was a reference to "51% to PEH now", and to "EHNZ in the interim". There was also a reference to the appointment of Messrs van der Burgh and Pollard as directors of Danpac. It was noted that a deposit was due "yesterday" in relation to the engineering works required to complete the drying tower forming part of the plant. There was also reference to creditors and overheads due on Monday 20 October 2014, in a total sum of approximately $900,000. Mr van der Burgh also asked Mr Wagstaff to complete the transfer of the canning line from St Croix Holdings Ltd to Danpac, and he advised that PEH would establish PEHNZ within the week. Mr van der Burgh also indicated that he would get a shareholders' agreement prepared for Danpac, so that the heads of agreement could be completed.

[75] Again, Mr Wagstaff was encouraged by this apparent sense of urgency. It seemed to him that PEH was ready to capitalise Danpac in the near future, which was "good news" from his and Mr Young's perspective.

[76] As it transpired, many of the steps contemplated at the meeting were not taken. For example, PEH did not incorporate PEHNZ until much later. Further, an email chain records that Mr van der Burgh discussed the preparation of a shareholders' agreement with a solicitor. He was told the likely costs involved, and he reported the estimate back to his colleagues, commenting that the solicitor's estimate was likely to

be on the light side, as the solicitor had not been fully briefed. He stated – "I will sit on this until the tank is full". Mr McCann replied on the same day, protesting at the likely costs. Mr van der Burgh replied that PEH needed to complete some of the documents within the next 15 days, in accordance with its commitments under the heads of agreement. He stated however that "… nothing will be started/committed until we have fuel in the tank". Mr Pollard responded a little later saying "We'll have [t]he fuel, and it will mean a slightly different model of engagement with Brian [Wagstaff] and co".

The share transfers

[77] On 21 October 2014, Mr van der Burgh drafted share transfer forms and sent them to Mr Leeson. Mr Leeson responded saying that he would let Mr Wagstaff sort out the necessary documents and querying what form to use in obtaining Mr van der Burgh's and Mr Pollard's consent to act as directors. Mr van der Burgh replied.

[78] The Wagstaff family debated whether or not Mr Wagstaff and Mr Young should execute the share transfer documentation and agree to the changes in Danpac's directorship. Alexandra Leeson was uncomfortable with these steps being taken. She thought that Mr Wagstaff was placing too much trust in Mr van der Burgh. So did Mr Leeson. Nevertheless, Mr Wagstaff and Mr Young decided to execute the documentation, and they instructed Mr Leeson to work with Mr van der Burgh to get the documentation completed.

[79] Share transfers were signed to record the following:

(a) On 22 October 2014, Mr Wagstaff, on behalf of St Croix Holdings Ltd, signed a transfer of 50 shares in Danpac to EHNZ, in consideration for the sum of $50. It was recorded that the transfer had occurred on 20 October 2014. The share transfer form was signed by Mr van der Burgh on behalf of the transferee, EHNZ, on that day.

(b) On 20 October 2014, Mr Young, on behalf of RC Young Holdings Ltd, transferred 1 share in Danpac to EHNZ for $1, and 49 shares in Danpac to Bodco.

Cheques were presented for the 51 shares being transferred to EHNZ. They were not banked.

[80] On 23 October 2014, Messrs Wagstaff and Young convened a board meeting of Danpac. They resolved as follows:

(a) a new joint venture party had been appointed and that in the interim, that party would be referred to as EHNZ;

(b) the share transfers in favour of EHNZ were to be entered in Danpac's register;

(c) the share transfer in favour of Bodco was also to be entered in Danpac's register;

(d) Mr Young had resigned as a director;

(e) Messrs van der Burgh and Pollard had been appointed to the board of Danpac;

(f) the ANZ Bank account signatories were to be changed. Mr Young and Mrs Wagstaff were to stand down and Ms Trethewey and Mr van der Burgh were to be added; and

(g) the Companies Office records were to be updated accordingly.

[81] Notification was given to the Companies Office and the various changes were recorded. Danpac did not however have a share register at the time,[6] and no steps were taken by either the outgoing or incoming directors to create a register or to alter it to record the share transfers.

[82] The parties disagree as to why the share transfers were called for in late October 2014. I deal with this topic below at [181] to [185].

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[6] A company must maintain a share register – Companies Act 1993, s 87(1). If it does not do so, both the company and every director commit an offence – s 87(4).

[83] On 24 November 2014, EHNZ transferred the 51 shares to PEHNZ, and, on 5 December 2014, the share transfer was directed to be entered on the share register of Danpac by a resolution signed by all of Danpac's directors –Messrs Wagstaff, Pollard and van der Burgh. Mr Wagstaff said that he signed this resolution because he understood from Mr van der Burgh that all funding issues had been resolved and that the funds were to become available more or less immediately. Again, I accept this explanation. It is consistent with what was occurring at the time – see below at [97].

The conditions

[84] As already noted – see above at [60] – the Danpac heads of agreement was conditional on four things.

[85] In this regard:

(a) On 13 October 2014, Mr van der Burgh advised Mr Wagstaff that financial and legal due diligence had been satisfactorily completed. It is not clear whether he advised the other parties of this.

(b) There is no evidence that PEH ever advised Messrs Wagstaff and Young or the other parties to the heads of agreement, that the further due diligence (as to engineering matters), which, in the heads of the agreement was supposed to be completed in the 11-30 day period, was completed to PEH's satisfaction or that the condition was waived by PEH.

(c) The parties did not agree to a revised business plan and budget and there is no evidence that this condition was waived.

(d) There is no evidence to suggest that any of the parties advised the others that they had received acceptable legal and tax advice or that this condition was waived.

[86] Mr van der Burgh gave evidence that once the shares were transferred, the joint venture between the parties in relation to the Danpac business was confirmed. He

stated that, to him, the transfer of the shares meant that the parties were moving forward with mutual obligations of trust and good faith, to develop the Danpac business together.

Danpac – late October-December 2014

[87] Danpac's debts were mounting. On 24 October 2014, Mr Wagstaff sent an email to Ms Trethewey advising that the amount needed to meet creditors the following week was $648,046.84. He also sent Ms Trethewey a schedule recording the amounts advanced by him through St Croix Holdings Ltd ($640,157.43), by Mr Young through R C Young Holdings Ltd ($182,050), and by Mr Andersen ($250,948.81), to keep the project on track, and to enable Danpac to pay its bills.

[88] Danpac's debts continued to increase thereafter.

[89] On 25 October 2014, Mr van der Burgh advised Mr Wagstaff that he was heading to Hong Kong to finalise and sign the drawdown documentation. Mr Wagstaff responded on 27 October 2014, saying that he was looking forward to "… a BIG week !!!".

[90] Notwithstanding Mr van der Burgh's advice, no capital contribution was received from PEH/PEHNZ.

[91] On 30 October 2014, Mr Wagstaff sent an email to Mr van der Burgh, Mr Pollard and Ms Trethewey. He stated as follows:

> I note that as of 9.45 pm today no funds have been lodged by Everhealth. We need absolute confirmation as to the funding from Everhealth. I have heard mixed messages from you and I am somewhat disappointed as to the lack of communication given the fact that we have not pursued any other offers on the basis of your verbal commitments. I have made personal commitments to many contractors and suppliers and I will not in any way put my reputation at risk. If no funds are available by tomorrow we will be placed in a position to accept alternative funding from other parties.
>
> I don't like to put this so bluntly but to date we have heard promises and no supporting facts we have done our due diligence on Everhealth and can find no evidence of any financial standing or that you can meet the promises made.. We have been open and honest in giving you every opportunity to participate in Danpac and Mataura Valley Milk.. This is not the way we would expect a partnership to work.

> I hope that you will acknowledge our concerns and assure us of your commitment to meet your part of the deal.

Mr van der Burgh responded –

> We have agreed the draw down schedule and are finalising documentation.

This statement was, at best, hyperbole – at worst, and more likely, untrue.

[92] Thereafter, there were various emails, either seeking or promising funding. By way of example:

(a) 31 October 2014 – Mr Wagstaff to Mr van der Burgh:

> … we have invoices due today and, from your reply I take it you are in no position to act on this … I would assume that you have funds in NZ that will be able to fulfil your part. of the deal. If you wish to be a partner going forward this is the only solution … I can only take from your comments that in fact you are reneging on what you have assured us would take place. … I am not interested in statements like "managing invoices" this is not how we operate in the real world as a company going forward.

(b) 31 October 2014 – Mr Pollard to Mr Wagstaff:

> Quick update on funds – we're waiting on our initial inwards transfer and should be in a position to start distributing to Danpac Monday/Tuesday.

(c) 1 November 2014 – Mr Wagstaff to Messrs Pollard and van der Burgh:

> HK morning has come and gone and still no call from you. I take people at their word!! In the case of Ever Health your word means very little, … We have made it plain we will in no way operate Danpac in an insolvent position … nor be liable for any consequences as a result of your failure to act in a timely manner as agreed.
>
> We have today had a legal opinion that the HOA is at an end …

(d) 1 November 2014 – Mr Pollard to Mr Wagstaff:

> As I indicated yesterday, and by email late last night, we have finalised arrangements for cash injection to Danpac. Transfers are incoming to our HK accounts over the weekend …

(e) 3 November 2014 – Mr Pollard to Mr Wagstaff:

> Regarding the funds transfer … we're expecting funds from HK to Danpac to be available Monday/Tuesday and will update as soon as further particulars are available.

(f) 4 November 2014 – Mr Pollard to Mr Wagstaff:

> Re funds – conscious of timing and as at 3pm waiting for confirmation from HSBC that the transfers have been initiated. We have instructed the transfer of NZD $500k and once we receive the advice that its completed will pass on to you.
>
> Second transfer to cover the balance of the current outstanding, the other items approved today and a float is still expected to be initiated at the end of the week.

[93] Surprisingly, given the background, on 5 November 2014, EHNZ made a non-binding indicative offer to Clavell Capital Ltd of $8 million for the MVM assets. The offer stated that the Ever Health Group had acquired a 51 per cent interest in Danpac. It said that the final and binding offer would not be conditional on securing bank funding or any other financing, and that details of financial capacity would be provided then.

[94] By 10 November 2014, no funds for Danpac had arrived and Mr Wagstaff arranged to meet with Mr van der Burgh and Mr Pollard to try and get things back on track. The meeting occurred on 11 November 2014.

[95] Minutes of the meeting were kept by Mr Wagstaff's wife, Jan. No significant issue was taken with them by either Mr Pollard or Mr van der Burgh, both of whom were present. Relevantly, the minutes record that various consultants remained unpaid and that this had caused delays and lost manufacturing spots for the project prior to Christmas 2014. It was also noted that the credibility of Danpac had been affected by the delays in obtaining funding. The minutes then went on to record as follows:

> Ever Health assures that major funding for MVM secured and also bridging funds for DANPAC. First bridging piece five hundred thousand, second piece several million, combined ten million (to provide for equipment orders).
>
> Bridging Funds secured from bank in Italy initiated more than one week ago. Funds due last Thursday but were returned in error to Italy and then re-processed so expected time of receipt now Thursday 13th November. Ever

> Health didn't meet 31st October funding target and failed to initiate open communication regarding these matters.

The timeline for the completion of the project was discussed. It was agreed that the project was to be completed by mid-March 2015. Mr Young was required to inject his capital no later than the end of March 2015. The minutes then recorded that the 31st March 2015 would be "the equalising date for shareholders in Danpac". It was common ground that this meant that each party's capital injections would then be tallied up, and that the respective shareholdings in Danpac would then be adjusted to accord with the amount each had put in.

[96] Mr van der Burgh said in evidence that, at the meeting, everyone was content not to impose any strict deadlines on financing. He was challenged on this and I do not accept his evidence in this regard. The assertion is inconsistent with the minutes where it was expressly noted that PEH/PEHNZ's capital was expected on 13 November 2014. Further, Mr van der Burgh's assertion is inconsistent with the agreed goal, recorded in the minutes, of completing the project by mid-March 2015. This could not happen if the funds were not to be made available until some unspecified time in the future. Further, agreeing to an indefinite delay in funding would have made no commercial sense, given the avowed intention of Messrs Wagstaff and Young to complete the plant as soon as reasonably practicable, and given that none of the parties could then obtain infant milk formula to export to China. Finally, Mr van der Burgh's assertion is at odds with what happened thereafter, and in particular with subsequent events, and with promises and assurances made by Messrs van der Burgh, Pollard and McCann, which I now summarise.

[97] I set out some of those events, promises and assurances as follows:

(a) On 7 November 2014 – Mr van der Burgh's company – Casburgh Financial Services Ltd – lent $13,013.40 to PEH/PEHNZ, who in turn advanced it to Danpac to enable it to pay an invoice due to engineers.[7] The engineers were threatening to walk off the job and to take legal

[7] This was a loan – not a capital injection. It was subsequently repaid.

action. Had that occurred, it would likely have created a domino effect, and other contractors might well have taken the same stance.

(b) 16 November 2014 – Mr Wagstaff to Mr Pollard:

> I understood that you would call David Leeson, as of today David has not received a call from you!!!!!!!!!!
>
> Geoff [Pollard] this was a commitment from you.
>
> David [Leeson] has therefore made arrangements for a creditors and suppliers meeting Tuesday morning at our facility in Hamilton. Our lawyers will be in attendance.
>
> The HOA time has expired and I have today talked to David McCann in HK to express our disappointment …
>
> As a director I will not in any way act outside of the law, I take my fiduciary responsibilities very seriously …

(c) 16 November 2014 – Mr Pollard to Mr Wagstaff:

> My apologies re the call to David [Leeson]. …
>
> I'm due to speak to David [McCann] this evening so will close the loop with him as I communicated in Friday, we were advised by HSBC that funds were in the system and addressed to us; we're waiting for them to provide documents to us. …

(d) 17 November 2014 – Mr McCann to Mr Wagstaff:

> … HSBC confirmed for us that the funds have not shown up in our account.
>
> I'm now chasing our Singaporean partners and expect an answer.

(e) 17 November 2014 – Mr McCann to Mr Wagstaff:

> … neither Randolph [van der Burgh] or Geoff [Pollard] has lied to you. We don't enter into agreements Willy nelly. We've taken the commitment to execute this very serious and our nuts are purely in the proverbial jar as well.

(f) 18 November 2014 – Mr Wagstaff to Mr McCann:

> This is not the news we needed. … I have made personal commitments to suppliers and creditors today to keep the project timing on track …

What is the contingency plan if we do not have funds by Thursday this week.

(g) 18 November 2014 – Mr McCann to Mr Wagstaff:

I have got a hold of our partners via email … all parties insist funds have been transferred and remain committed.

(h) 20 November 2014 – Mr van der Burgh to his colleagues:

Brian and Jan [Wagstaff] will be here at 1pm to work through what needs to be paid today. There is $200 in the Danpac bank account. The most urgent are: Wages and PAYE due today total $6,000, Ho[l]mes Consulting $27,400, Alto $2,000 and Hamilton City Council building consent fee $9,600. No doubt they will ask for our 51% contribution. Casburgh Financial Services has no further capacity.

I can manage this until about 4pm today, then we need to make a call whether to fold or not. Is there any further information, documentation, cash?

(i) 20 November 2014 – Mr McCann to Mr van der Burgh:

There's no update as of yet.

(j) 21 November 2014 – Mr Wagstaff to Mr Pollard:

… can you please give me an update as to the funds etc. I have had today to deal with some angry creditors and suppliers and I have run out of excuses!!

(k) 21 November 2014 – Mr Pollard to Mr Wagstaff:

We were told yesterday that the transfer was set up and waiting approval overnight. We believe the approval was given (we were advised that overnight) and we expected to see funds today, however they have not appeared and we haven't been able to raise the approver (she is in Europe and heading back here on the weekend) or get hold of a transfer document. They do assure us that they are doing what they need to to get us the funds. We should get some paperwork over the weekend once the approver is back in touch and I'll pass on anything I get.

(l) 22 November 2014 – Mr McCann to Mr Wagstaff:

… I'm at the end of my tether with the incompetents of the people I'm dealing with …

> The issue is on the bridge which has been delegated and clearly not occurred. … I need the Principal to press go, that is authorise this transaction, which I have been told is set up. This person is in Europe …
>
> I have elevated this to another level …

(m) 26 November 2014 – Mr Pollard to Mr Wagstaff:

> I remain confident that our side will come together but I can't give the necessary assurances that it will do so on a timeframe that will enable us to achieve our joint objectives. In the meantime I understand that you need to protect your investment, and reputation, and you will have any support that you need in this from our side of the table.

(n) 28 November 2014 – Mr Pollard to Mr Wagstaff:

> Our contacts have categorically stated that the funds have been sent to us, all approved and authorised. On this basis we should see funds in our account in HK by latest 4pm today, but we do not have any documents supporting this as yet.

(o) 29 November 2014 – Mr Wagstaff to Mr Andersen:

> … had call from Geoff [Pollard] last night to say the funds have finally been transfers to Them in HK and will send to NZ Monday …

(p) 5 December 2014 – Mr Pollard to Mr Wagstaff:

> We've been given a clear understanding of the process and the roadblocks and what we need to do to clear them. ...

(q) 5 December 2014 – Mr Wagstaff to Mr Pollard and Mr McCann:

> I will see Randolph [van der Burgh] today as we need Ever Health to assist in some immediate funding, we need to pay our installation contractor, power bill, and a few other critical creditors by close of business today. I have this morning contacted the critical suppliers and informed them monies we expected today will not be until next week. I have pushed this as far as my personal relationship and credibility goes. We need something like 50k today and I'll go through this with Justine [Trethewey] and Randolph [van der Burgh]. … Awaiting some news on the drawdown timing today ….

(r) 6 December 2014 – Mr Pollard to Mr Wagstaff:

> … good progress regarding main drawdown. HSBC have accepted the transferring banks. Awaiting confirmation for timing from the transferring side. …

(s) 14 December 2014 – Mr Wagstaff to Mr McCann, Mr Pollard and Mr van der Burgh:

> The deadlines of Friday were not met. … Danpac has creditors that need to be paid and Ever Health has a responsibility together with ourselves as shareholders and Directors to make sure this happens. I'm stating the obvious but we must have funds available Monday to pay the contractors and all creditors cleared by Friday the 19th. Additional rent and fixed outgoings due the 1st January …
>
> Given the fact that three months has elapsed since we signed the HOA and we have been more than accommodating! Final plans (including backup) from Ever Health must be tabled.

(t) 14 December 2014 – Mr Pollard to Mr Wagstaff:

> We're all aware of the situation and have been working on plans and fall backs all weekend. …

(u) 15 December 2014 – Mr McCann to Mr Wagstaff:

> … I appreciate the problems this has created for you. Its generated significant issues for us as well …
>
> I will update once I have clarity.

(v) 17 December 2014 – Mr Pollard to Mr Wagstaff:

> Confirmed that once we've had the meeting we have short-term funds available to cover what's needed. [The meeting was proposed for that day, or possibly the following morning].

(w) 17 December 2014 – Mr Wagstaff to Mr Pollard.

> Thanks let's hope its tonight it is certainly pushing the time line …

(x) 20 December 2014 – Mr van der Burgh to Mr McCann and Mr Pollard:

> Brian mentioned that "one of the current major players" had rung him on Friday offering circa $18m on Monday to, essentially, take over the deal. …

> If this is real I'd like to explore the following:
>
> 1. Danpac agrees forward sale of the completed … approved facility.
>
> 2. PEH arranges a bridge facility against the forward sale agreement to complete the plant.
>
> This would keep us in the game for six months. Do we have the funding party for such a deal? …

[98] As can be seen, PEH and its subsidiaries did not inject any capital into Danpac, despite repeated assurances that it would do so.[8] Further, Mr Wagstaff told both Mr Pollard and Mr van der Burgh on more than one occasion, that he considered that the Danpac heads of agreement was at an end.

New investors

[99] It became apparent to on Mr Wagstaff that PEH/PEHNZ were unlikely to come up with the promised funding and that things needed to be brought to a head. He started to think about alternatives and, in mid-December 2014, he spoke with a Chinese food distributor, Junle Foods, and a Chinese investment group, Zhuhai Hengqin Aorta Investment Co Ltd (Zhuhai). They both expressed an interest in investing in Danpac and potentially in MVM. Mr Wagstaff made no secret about his discussions with Junle Foods and Zhuhai. He relayed the information to Mr van der Burgh. Mr van der Burgh in turn relayed the information to Messrs McCann and Pollard. It was not suggested that Messrs Wagstaff and Young, or Danpac or Bodco, were irrevocably committed to PEH/PEHNZ, or that they were not entitled to look for alternative investors.

[100] On 24 December 2014, Mr Wagstaff, Mr Young and Mr Leeson met with Mr van der Burgh at Mr van der Burgh's offices. Mr Wagstaff told Mr van der Burgh that it was Christmas Eve, that contractors had still not been paid, and that it was necessary to shut down the site over the Christmas and New Year period. Mr Leeson put it to Mr van der Burgh, in forthright terms, that no money had ever arrived. Mr Leeson kept on asking where the money was, and why he and Mr Wagstaff had

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[8] PEH did advance $18,917 to Danpac to enable it to pay creditors in early December 2014. This however was also a loan – not an injection of capital. It was subsequently repaid.

been told that the funding was in place when it clearly was not. It was the evidence of both Mr Wagstaff and Mr Leeson that Mr van der Burgh became agitated. Mr Wagstaff said that Mr van der Burgh responded that Ever Health had been let down by its funders, and that PEH/PEHNZ would need to renegotiate new terms if there was going to be any sort of future business relationship between the parties. Mr Leeson said that it was clear to everybody present, that "the 51% deal was dead". Mr Wagstaff explained to Mr van der Burgh that, if PEH/PEHNZ was still interested in investing in Danpac, the only option moving forward was for PEHNZ to instead take a 10 per cent shareholding in Danpac, on the basis that Junle Foods/Zhuhai would take a 40 per cent shareholding for a $8 million capital investment, and that he and Mr Young would hold the balance of the shares. Mr Wagstaff added that PEH/PEHNZ, and Messrs van der Burgh and Pollard, would need to take action to reverse the changes that had been made to Danpac's shareholding, and to resign from the directorships. Mr Wagstaff said that he provided forms to Mr van der Burgh that had been prepared in this regard.

[101] Mr van der Burgh accepted that Mr Wagstaff put "a new deal" to him. He also accepted that Mr Wagstaff presented him with director resignation forms for him and Mr Pollard to sign, and asked him to sign a blank share transfer form, providing for the transfer of all of PEHNZ shares in Danpac to an unnamed party. He accepted that Mr Wagstaff essentially said that the new deal was a take it or leave it proposal, and that Mr Wagstaff threatened to get lawyers involved if PEH/PEHNZ refused the deal. He said that he refused to sign the forms, because he considered that there was no basis for Mr Wagstaff to ask him to do so. He said that he told Mr Wagstaff that he and his colleagues were working in the best interests of Danpac and of the joint venture, and that they would "get there together soon". He said that he was used to Mr Wagstaff's threats, and that, to diffuse matters, he told Mr Wagstaff and Mr Leeson that he would discuss the new deal with the rest of the PEH team.

[102] Mr van der Burgh sent an email to his colleagues on the evening of 24 December 2014 advising them of what had occurred.

[103] On 29 December 2014, Mr Wagstaff sent an email to Messrs van der Burgh, Pollard and McCann outlining the proposal advanced at the meeting in greater detail. He confirmed that he and Mr Young were prepared to offer PEH/PEHNZ a 10 per cent

interest in Danpac on terms to be agreed, that Bodco would take a 50 per cent shareholding in the company, and that Junle Foods would take a 40 per cent shareholding. He asked them to forward their resignations, so that he could demonstrate to the new investors that this matter had been actioned.

[104] Mr van der Burgh replied on 31 December 2014. He advised that he and his colleagues had had initial discussions and that they were having a further meeting later that day. He stated that, in principle, he and his colleagues were not opposed to the direction that Mr Wagstaff had proposed. He however remained confident that PEH/PEHNZ would come through with funding, and he asked that Junle Foods' proposed terms should be compared with other funding proposals. He commented that the proposed equity raising suggested by Mr Wagstaff would result in "a material value shift away from PEH to Junle, whilst enhancing Bodco's position". He stated: "This is to be expected given where we are, but we wish to further discuss the proposed shareholder percentages". He attached to his email a document setting out a number of key issues which he suggested required discussion and "shareholder alignment".

[105] Mr Wagstaff responded later in the day. He copied in Mr McCann and Mr Pollard. Relevantly, his email read as follows:

> Whilst we appreciate your efforts in trying to be a part of the Danpac project. You are all aware that the HOA has expired and as a result affirmative action to find investor's has been made.
>
> We are prepared, to enter into a new discussion with you on the lines previously offered in our last email. We have new investors who will capitalize the required funds as soon as we have the Danpac records amended. The investors will be in NZ at the end of next week at the latest. By that time we need to have all Directors fiduciary matters settled. I am available on Monday 5th in the afternoon to discuss your possible continuation as a prospective investor. I'm sure that we both don't want to have to resort to lawyers and going down the legal path as once we start there is no turning back or compromise.
>
> …

[106] On 5 January 2015, Mr van der Burgh sent an email to Mr Wagstaff, advising that "previous blockages" had been "unblocked" and that the PEH/PEHNZ funding deal had been reapproved. He advised that he and his colleagues were finalising the details of the first drawdown (while acknowledging that they had promised the first

drawdown many times before, and that it had not materialised). He went on to state as follows:

> We appreciate that you have other plans in motion. As discussed last Wednesday, our preference is to proceed with you and Danpac. Having said this, we will need to renegotiate our deal in any event … Given our plans a 10% stake in Danpac does not work for us. If this is set in stone with Junle, it will be better for us to exit from Danpac so that you and Junle may proceed untrammelled by our requirements. The cleanest way to achieve this is for Junle/Bodco to buy all our Danpac shares. Please advise a reasonable price for our Danpac shares and, if agreeable, we can execute the share transfer documentation and director resignations.

[107] Mr Wagstaff was not prepared to accept any further assurances from Mr van der Burgh about funding. He considered that Mr van der Burgh's suggestion that the parties needed to renegotiate was just an attempt to buy time, and that the proposal that Junle Foods/Bodco should buy PEHNZ's Danpac shares was just a "brazen try on".

[108] Mr Pollard continued to contact Mr Wagstaff thereafter, providing updates about potential funding said to be coming in, and informing Mr Wagstaff that PEH's/Ever Health's indicative bid for MVM remained in place.

[109] In early February 2015, Mr Wagstaff instructed a firm of solicitors to act on his and Mr Young's behalf, and on behalf of Bodco. That firm prepared a share register for Danpac and a register of directors for Danpac. The documents did not refer to Mr van der Burgh and Mr Pollard as ever being directors of the company, nor to the transfer of 51 of the company's 100 ordinary shares to EHNZ, or subsequently, PEHNZ.

[110] On 9 February 2015, Mr Wagstaff contacted Mr Pollard on a speaker phone from his solicitor's offices. During the course of the conversation, Mr Wagstaff advised Mr Pollard that the Danpac heads of agreement was at an end, and that the Danpac shareholding and directorships would be changed on the company's register, to reverse the changes that had been made in anticipation of the heads of agreement being completed.

The taking of the shares

[111] On 19 February 2015, Mr Wagstaff, as a director of Danpac, and Mr Young, purporting to act as a director, signed a resolution. I set out the relevant parts of the resolution as follows:

> **BACKGROUND**
>
> 1. On 24 September 2014 the Company and Ever Health New Zealand Limited (**Ever Health**) entered into a heads of agreement (**HOA**), under which Ever Health agreed to (among other things) acquire 50% of the shares in the Company for consideration of NZ$5 million (**Consideration**).
>
> 2. Ever Health did not pay the Consideration and accordingly the transaction contemplated by the HOA (the **Transaction**) was not completed.
>
> 3. In anticipation of completion of the Transaction:
>
>   a. the Company authorised Randolph Edward Casimir Van Der Burgh and Geoffrey Ian Pollard (**Ever Health Directors**) as signatories on the Company's bank account.
>
>   b. Ever Health provided the Company with a short term loan of NZ$39,400 (**Ever Health Loan**); and
>
>   c. the records of the Company maintained on the Companies Office website (**Companies Office Records**) were erroneously amended in relation to the appointment of the Ever Health Directors, the resignation of Richard Chew Young as a director of the Company and the transfer of shares to Ever Health. However, in accordance with clause 5.1(c) of the Company's Constitution, the directors did not update the Company share register and the directors register.
>
> 4. Clause 10.16 of the Company's constitution allows the directors to pass a board resolution unanimously in writing without holding a meeting of the board and any such resolution may consist of several documents in like form, each signed by one or more directors.
>
> 5. The board proposes to change the Company's registered office and address for service.
>
> **IT IS RESOLVED**
>
> 1. The Company remove the Ever Health Directors as signatories on the Company's bank account.
>
> 2. The Company immediately repay the Ever Health Loan.
>
> 3. The Company rectify the Companies Office Records to reflect the Company's register by:

a. removing the Ever Health Directors as directors;

b. reinstating Richard Chew Young as a director of the Company; and

c. amend the shareholding to reflect the Company share register.

DATED: 19/2/2015

[112] On 23 February 2015, the defendants' then solicitors, through an agency company, procured the relevant changes to the Companies Office records for Danpac. The changes recorded that Bodco was the 100 per cent shareholder in the company, that Mr van der Burgh and Mr Pollard had been removed as directors, and that Mr Young had been reappointed as a director.

[113] The plaintiffs demanded on various occasions thereafter that the defendants correct Danpac's share register, and re-appoint Mr van der Burgh and Mr Pollard as directors. The defendants refused to do so.

Subsequent events

[114] In March 2015, Messrs Wagstaff and Young caused Danpac to enter into a memorandum of agreement with Zhuhai. That agreement resulted in Zhuhai advancing $500,000 to Danpac, to enable it to meet its immediate debts. Ultimately however a joint venture agreement with Zhuhai did not proceed and the loan made by Zhuhai was repaid in August 2015.

[115] Rather, Mr Wagstaff turned his attention to the possibility of bringing in China Animal Husbandry Group ("CAHG") as an investor. It is a Chinese based entity involved in the agricultural and farming industry. It is directed and controlled by China National Development Corporation, which in turn is owned by the Chinese Government and supervised by the State Owned Assets Supervision and Administration Commission. Mr Wagstaff met with representatives of CAHG on 2 April 2015. There was a further meeting in Shanghai at the end of April 2015. On 8 November 2015, Bodco entered into a subscription agreement with CAHG. Subject to due diligence, CAHG agreed to advance NZD $8 million to Danpac, in consideration for obtaining a 40 per cent shareholding in the company. The agreement

became unconditional, the monies were advanced and the shares were subscribed for by CAHG.

[116] The Danpac plant was completed in October 2015. It was then commissioned and certified. It started production in mid 2016.

[117] Ultimately CAHG acquired a substantial interest in MVM as well. MVM's base milk powder plant has also been built.

[118] In March 2015, Fonterra had challenged Danpac's use of the name "Danpac". It had a packaging company called Canpac. Rather than get into a fight with Fonterra, Mr Wagstaff and Mr Young resolved to assign Danpac's interests and rights to Bodco. In effect, Danpac and Bodco were amalgamated and that amalgamation was eventually completed on 30 November 2015.

[119] EHHK was placed into liquidation in April 2015.

[120] For their part, PEH/PEHNZ continued to believe that it might be able to resolve the Danpac issues. They approached Mr Rosenberg and Gleneagle afresh and, by August 2015, Gleneagle had confirmed its support for PEH. It provided PEH with a letter of intent in relation to the raising of pre-IPO funding of between US $20 million to US $25 million, so that PEH could complete stage two of the Danpac project, which involved the completion of an expanded production with two canning lines. The offer was conditional upon PEH resolving the shareholding dispute. This letter of intent was further negotiated and, in November 2015, Gleneagle gave PEH a binding term sheet. Under the term sheet, Gleneagle agreed to provide AUD $6 million to PEH by way of a convertible bond and subject to certain milestones being met. The offer was part of a pre-IPO funding of US $25 million. Again, the term sheet was subject to PEH resolving shareholding issues.

[121] The term sheet was shown to Mr Wagstaff, Mr Young and Mr Andersen's son in November 2015. It was rejected by them. In cross-examination, Mr McCann accepted that the offer set out in the term sheet was different from that proposed in the

Danpac heads of agreement. Inter alia, it required Danpac/Bodco to give security over the canning line, which had not been envisaged in the heads of agreement.

[122] Mr van der Burgh and Mr McCann, along with other investors (but not PEH), have established a new company – Happy Valley Milk Ltd. It is in the process of building its own blending and canning plant, intended to produce infant milk formula using A2 milk, from new premises in Otorohanga.

[123] As at April 2018, Bodco's shareholders were:

(a) CAHG – 57.26%;

(b) JMB Trust Ltd (associated with Mr Wagstaff) – 16.24%;

(c) N.K.N. ApS (associated with Mr Andersen) – 13.25%; and

(d) RC Young Holdings Ltd (associated with Mr Young) – 13.25%.

The pleadings

Plaintiff's pleadings/causes of action

[124] The plaintiffs initially raised eight causes of action. One was abandoned at the hearing. As noted all of the claims were made in relation to the Danpac heads of agreement; there were no claims made in relation to the MVM heads of agreement.

[125] The first alleges breach of s 87 of the Companies Act 1993. It is alleged that, when the shares were taken back by Bodco on or around 23 February 2015, PEHNZ was the beneficial owner of the shares, and EHNZ was on the Companies Office Register as the owner of the shares. It is said that the taking back by Bodco was unlawful, and that it occurred without PEHNZ or EHNZ signing any form of share transfer or delivering any share transfer to Danpac, or to any agent of Danpac. It is said that Danpac was in breach of s 87(1) & (2) of the Companies Act, that PEHNZ and/or EHNZ are a shareholder and/or person aggrieved for the purposes of s 91(1) of the Act, and that they have a direct right of recourse against Bodco pursuant to s 171. PEHNZ and EHNZ seek either that the share register of Bodco should be

rectified, or that compensation should be ordered in their favour pursuant to s 91(2)(b), in a sum yet to be quantified, but estimated to be $149,047,784. In the event that compensation is ordered, they also seek interest pursuant to the Interest on Money Claims Act 2016.

[126] The second cause of action alleges breach of s 90. Again, it is asserted that on or around 23 February 2015 PEHNZ was the beneficial owner of the shares, and that EHNZ was the registered owner. It is asserted that the taking was unlawful, and that it was conducted by Mr Wagstaff and Mr Young as directors (in the case of Mr Young - a de facto director). They repeat that neither PEHNZ nor EHNZ signed any form of share transfer, or delivered the same to Danpac or its agent, and they assert breach of s 90(1) & (2). Again, they repeat that PEHNZ and/or EHNZ are a shareholder or person aggrieved for the purposes of s 91(1), and assert that s 169 of the Act gives them a direct right of recourse against Mr Wagstaff and Mr Young. Again, they seek orders rectifying the register, or in the alternative, seeking the payment of compensation and interest.

[127] The third cause of action alleges conversion. It is asserted that PEHNZ shares in Danpac were converted by the defendants on or around 23 February 2015, and that the conversion has caused loss to the plaintiffs. Damages are sought in the sum of $149,047,784, being the loss of the shares, and in the sum of $119,183,431, being the loss to PEH of its prospective offshore profits. Interest is also sought.

[128] The fourth cause of action alleges shareholder oppression and unfair prejudice, pursuant to s 174 of the Companies Act. It is said that the affairs of Danpac were conducted in a manner that was oppressive, unfairly discriminatory and/or unfairly prejudicial to PEHNZ as a shareholder or former shareholder of Danpac. Particulars are given. It is argued that the breach of s 174 has caused loss to the plaintiffs in that they have been denied the benefits of the Danpac heads of agreement, and because PEHNZ has had its shares in Danpac unlawfully taken. An order is sought pursuant to s 174(2)(f) of the Companies Act rectifying Danpac's register, or in the alternative, damages in the sum of $149,047,784, together with interest.

[129] The fifth cause of action alleges breach of contract. It is argued that the defendants repudiated and therefore breached the Danpac heads of agreement by unlawfully taking PEHNZ shares on or about 23 February 2015. It is said that the plaintiffs accepted the defendants' repudiation on 12 May 2017, and that the defendants' breach of the Danpac heads of agreement has caused loss to the plaintiffs. Damages are claimed in the sum of $149,047,784 for loss of the shares, and in the sum of $119,183,431 for loss to PEH of its potential offshore profits. In addition, relief is sought pursuant to s 43 of the Contract and Commercial Law Act 2017. Interest is sought.

[130] The sixth cause of action alleges breach of fiduciary duty. It is argued that the Danpac heads of agreement and the parties' joint dealings with respect to the Danpac business gave rise to fiduciary obligations between the parties. It is said that the defendants owed the plaintiffs a fiduciary duty to act in good faith, that the plaintiffs were entitled to and did rely on the defendants to act in accordance with their fiduciary duty, and that the defendants failed to do so. Equitable damages are sought in the same sums as have already been noted.

[131] The seventh cause of action was abandoned.

[132] Finally, it is asserted that the defendants, or any two or more of them, wrongfully, and with intent to injure the plaintiffs, engaged in an unlawful means conspiracy, and combined to exclude the plaintiffs from Danpac and MVM. Losses as noted above are claimed.

Bodco's pleadings/counterclaims

[133] Bodco admitted that it owed a fiduciary duty to act in good faith with respect to the transactions set out in the Danpac heads of agreement. It however relied on its affirmative defences, and it said that it was able to pursue the same transaction with another party to the exclusion of the plaintiffs after 30 days had expired from the signing of the Danpac heads of agreement. Further it said that it relied on the plaintiffs to act in good faith in relation to their obligations, and that they failed to do so.

[134] Two affirmative defences are raised.

a) It is asserted that PEH failed to comply with its obligations, in particular, to subscribe for ordinary shares in Danpac in accordance with the schedule set out in the heads of agreement. It says it was an implied term of the heads of agreement that, should any of its shareholders fail to comply with its provisions, the heads of agreement were at an end. It further says that it was an implied term that it was entitled to re-commence any discussions, or to re-commence discussions previously undertaken, with any other person or entity for the purpose of entering into further agreements to engage in a transaction substantially similar to the Danpac project, after 30 days from 24 September 2014. It says that it was an implied term that, in the event that its shareholders failed to capitalise it, any steps taken by the parties pursuant to the Danpac heads of agreement would cease, and be reversed to restore the parties to the respective positions.

b) As an alternative, it says that the Danpac heads of agreement required all parties to commit the necessary resources and work together to plan, facilitate and complete the transaction within 30 days of signing the agreement, and that the heads of agreement contained a timeline for completion. It says that PEH and PEHNZ failed to comply with the agreed milestones, and that it was an implied term that if, by 24 December 2014 the milestones had not been met, the Danpac heads of agreement expired.

[135] Bodco then brings two counterclaims.

a) It alleges that PEH assumed various obligations pursuant to the heads of agreement, that it breached those obligations by not agreeing on a business plan for a capitalisation timetable, by not capitalising Danpac, by not subscribing for shares in Danpac, and by failing to honour its obligation under the heads of the agreement within the 90 day period stipulated. It says that PEH's breaches caused delay to it in acquiring an equity partner, and that that delay has caused it financial loss. It seeks an inquiry into damages, together with interest.

b) It alleges misleading and deceptive conduct under the Fair Trading Act. It is argued that the plaintiffs, together with Mr van der Burgh and Mr Pollard were in trade, that they represented that they had access to funds, and in particular could procure PEHNZ to invest $5,310,630 in Danpac, that this was capable of being misleading or deceptive, and that it (Bodco) was misled by it. It says it was reasonable for it to be misled, and that the representation was the effective cause of it entering into the Danpac heads of agreement. It asserts that it suffered loss in doing so. Further, it asserts that between 24 September 2014 and 31 December 2014 the plaintiffs made various additional representations to the effect that the funds required to meet their commitments under the Danpac agreement were, or shortly would become, available. It asserts that those additional representations were capable of being misleading or deceptive, that it was misled, and that it was reasonable for it to be misled. Again, it says that it has suffered loss as a result, and it seeks an inquiry into damages. It says that, to the extent the representations were statements of past or present fact, they were not correct and, to the extent they were predictions or opinions as to future events, they were unqualified and there was no proper basis for them.

Mr Wagstaff's and Mr Young's pleadings/counterclaims

[136] Mr Wagstaff and Mr Young say that, under the Danpac heads of agreement, the parties agreed to commit resources and to work together in an attempt to enter into binding legal commitments, but that the heads of agreement was an unenforceable agreement to agree, because the proposed transaction was entirely conditional on the parties reaching further commercial agreements. They say that there was no effective share transfer to PEHNZ, and that any entitlement the plaintiffs had to receive a transfer of the shares and to appoint directors was conditional on the proposed transaction being successfully completed.

[137] They deny a joint venture and that they owed fiduciary duties to the plaintiffs.

[138] Four counterclaims are raised by Messrs Wagstaff and Young.

a) They say that they were under no obligation to transfer any shares in Danpac to the plaintiffs, and that if a legally effective transfer did occur, then it was a voluntary transfer, made on the basis that the proposed transaction under the heads of agreement was going to be completed, and only thereafter would the plaintiffs become legally entitled to the shares. They assert that if the plaintiffs were to obtain any of the forms of relief claimed by them, they would be unjustly enriched, because it was never intended that the shares should be a gift, or that the plaintiffs would have any entitlement to the shares if the proposed transaction was not completed. It is asserted that the basis on which the shares were transferred has failed, because the plaintiffs did not commit and pay any capital to Danpac, and because the Danpac heads of agreement either expired, or was validly terminated. They seek declarations as to the nature and extent of their rights in respect of the shares, and requiring the plaintiffs, by way of restitution, to relinquish, without compensation, all claims and rights to and associated with the shares.

b) They rely on s 43 of the Contract and Commercial Law Act 2017. They assert that if the Danpac heads of agreement created a legally binding obligation to transfer the shares, the plaintiffs' entitlement was conditional on and subject to the performance of the other terms and conditions contained in the Danpac heads of agreement. They say that the plaintiffs breached their obligations under the heads of agreement, that they gave notice terminating the heads of agreement on or before 31 December 2014, and that it would be unjust for the plaintiffs to retain any ongoing rights in or claim to the shares. Again, declarations are sought, as well as an order under s 43 of the Act granting relief by ordering the plaintiffs to relinquish or transfer to the defendants, without compensation, all their claims and rights to the shares.

c) They seek declaratory relief under the Declaratory Judgments Act 1908. It is argued that if a legally effective transfer of the shares took place for valuable consideration, it was an implied term of the heads of agreement that, in the event that the proposed transaction was not

completed, the shares would be transferred back. They assert that the plaintiffs were obliged to transfer the shares back, because the transaction was not completed, and they seek declarations accordingly.

d) They assert that there was misleading and deceptive conduct under s 9 of the Fair Trading Act, and relief is sought under s 43. It is said that the plaintiffs were in trade at all material times, and that they made various representations to the effect that they had the necessary funding in place, and that they would be in a position to capitalise Danpac. They say that those representations were untrue, that they were misled by the representations, and that they have suffered harm and loss as a result. An order is sought under s 43(3)(a) of the Act declaring the contract for the transfer of the shares void and of no effect, and under s 43(3)(e), requiring the plaintiffs to transfer the shares back to them.

[139] No damages are sought by Messrs Wagstaff and Young on their counterclaims.

Issues

[140] I agree with Mr Ross and with Mr MacGillivray, that the matter is best approached by considering, first, the nature of the Danpac heads of agreement and whether it created binding legal obligations between the parties, and then, whether PEH/PEHNZ and Bodco, and the other parties to the agreement, were in a joint venture and whether they owed fiduciary obligations to each other. I will then turn to the shares, consider why they were transferred, and whether PEHNZ has a right to retain them. It will then be necessary to return to the various causes of action to determine whether any of them are well founded, or whether the defendants' counterclaims, or any of them, succeed so as to deny the plaintiffs a remedy or remedies.

Analysis

The Danpac heads of agreement – did it create binding legal obligations?

[141] The Danpac heads of agreement is between Pure Elite Holdings (BVI) Limited, PEHNZ (a company then yet to be incorporated), Danpac, Bodco, Mr Wagstaff,

Mr Young and Mr Andersen. After detailing the parties, but before the background recitals, it is recorded that the heads of agreement was intended to create binding legal obligations between the parties. The background was then set out. It was noted that:

(a) PEH is an investment company and the ultimate parent company of EHNZ;

(b) EHNZ is part of the Ever Health Group;

(c) Bodco currently owns 100 per cent of Danpac;

(d) Danpac requires capital to complete the construction and commissioning of its processing and canning plant, and for working capital purposes; and

(e) PEHNZ is to provide the necessary capital to complete the construction of the plant in consideration for a controlling shareholder in Danpac.

[142] There are then various definitions. Relevantly:

(a) the word "Transaction" is defined as meaning the successful capitalisation of Danpac by PEHNZ and Bodco in the amounts and shareholdings set out in Schedule 1 to the agreement;

(b) the words "Initial Working Capital" are defined to mean the working capital required for the period ending 31 December 2014 as per Schedule 1, Amount II. The amount there set out was $3M;

(c) the words "Total Investment" are defined to mean the sum of the Fixed Asset Cost and Initial Working Capital as per Schedule 1, amount III – a total sum of $10,413,000.

[143] There were then various terms – expressed to be major commercial terms – set out. Relevantly the heads of agreement provided as follows:

1.1 Subject to PEH completing due diligence to its satisfaction and the parties agreeing to a revised business plan and budget for the next 18 – 24 months within 30 days of signing this HOA, PEH will establish PEHNZ and capitalize Danpac in a manner that ensures the most appropriate corporate structure between the parties and provides PEH with a shareholding in Danpac of no less than 51%.

…

1.4 Danpac and PEH will together complete a revised business plan and budget for the next 18 – 24 months. This may have an impact on the Total Investment amount and Additional Working Capital amount.

1.5 Danpac and PEH will together complete a staff organisational structure commensurate with the revised business plan and budget.

1.6 BODCO will subscribe for additional ordinary shares in Danpac up to the amount as set out in Schedule 1, Amount VI, in consideration for BODCO's shareholders transferring, or procuring the transfer of, the Assets plus cash to Danpac up to the value set out in Schedule 1, Amount VI.

1.7 PEH or its nominee(s) will subscribe for ordinary shares in Danpac up to the amount set out in Schedule 1, Amount VII in consideration for PEH contributing Amount VII in cash, paid up in accordance with agreed milestones.

…

1.10 Any future investment in addition to the Total Investment amount will be on terms to be agreed by the parties at that time.

…

1.12 Danpac, will have up to five directors. BODCO will be entitled to up to two Board seats and PEHNZ will have up to three Board seats with voting power aligned with shareholding.

…

[144] The various responsibilities assumed were set out in clause 2 as follows:

2.1 Danpac and its direct and indirect shareholders will:

a. Provide a complete inventory of all the Assets of the Danpac business.

b. Complete a revised business plan and budget for the next 18 – 24 months together with a recommended staff organisational structure.

c. Ensure that BW [Mr Wagstaff] and the necessary key staff will make themselves available to provide their services to Danpac.

d. Assign and transfer at cost all Assets to Danpac and contribute cash up to a total value as set out in Schedule 1, Amount VI.

e. Introduce off-take relationships to Danpac.

2.2 EHNZ and its direct and indirect shareholders will:

a. Assist in development Danpac's revised business plan and budget for the next 18 – 24 months.

b. Facilitate the incorporation of PEHNZ and/or any other entities necessary to complete the Transaction.

c. Procure that PEHNZ make an investment in Danpac of an amount as per Schedule 1, Amount VII. The investment will be subject to the approval of the revised business plan and budget for the next 18 – 24 months. The investment may or may not be injected in tranches linked to milestones either time and/or goal orientated as per the business plan.

d. Contract or hire the appropriate operational management for Danpac.

e. Introduce off-take relationships to Danpac.

2.3 All parties agree to commit the necessary resources and work together to plan, facilitate and complete the Transaction within 30 days of signing this HOA.

…

[145] Clause 3 set out a timeline for completing the transaction.

(a) Within the period 0 – 10 days after signing the heads of agreement, the parties were to sign the heads of agreement, Danpac was to provide a complete asset inventory, PEH was to complete financial and legal due diligence, and the parties were to complete and agree on the revised business plan and budget for the next 18 – 24 months, including the capitalization timetable for PEHNZ and BODCO.

(b) Within the period 11 – 30 days the parties were to complete the shareholder agreement, review off-take arrangements, incorporate PEHNZ, complete the transfer of the assets to Danpac, agree on the operational and personnel plan, undertake the initial capitalization of Danpac as per the business plan, and identify candidates for the managing director and CFO of Danpac. In addition, PEHNZ was to

appoint an interim financial controller for the construction and commissioning phase.

(c) Within the period 31 – 90 days, the parties were to complete the capitalization of Danpac as per the business plan, and complete construction of the plan. They were also to put in place a managing director and CFO, agree a sales and marketing plan, and hire and deploy sales and marketing personnel.

[146] Clause 4 provided as follows:

> **Exclusivity**
>
> Danpac and its direct and indirect shareholders must terminate any discussions currently taking place with any person concerning the Transaction or any transaction substantially similar to the Transaction.
>
> Danpac and its direct and indirect shareholders may not permit any other person or entity to conduct due diligence on the investment opportunity in the Danpac business.
>
> This period of exclusivity is for 30 days from execution of this HOA.
>
> Danpac will be permitted to continue discussions with suppliers and potential customers.

[147] Schedule 1 dealt with the proposed shareholder structure and capital contributions. It was as follows:

> Input Assumptions:
>
> | Danpac Plant Investment | | Amount |
> |---|---|---|
> | Fixed Asset Cost | 7,413,000 | I |
> | Initial Working Capital | 3,000,000 | II |
> | Total Investment | 10,413,000 | III |
> | BW [Mr Wagstaff] plant and other costs | 1,600,000 | IV |
> | BODCO cash | 3,502,370 | V |
> | BODCO Contribution | 5,102,370 | VI |
> | PEHNZ Contribution | 5,310,630 | VII |
> | | 10,413,000 | |
> | Further Working Capital | 3,000,000 | VIII |

[148] There were a number of difficulties with the Danpac heads of agreement. By way of example:

(a) there was no such company as Pure Elite Holdings (BVI) Ltd. This matter was initially raised, but the challenge was abandoned by the defendants. They, in effect, accepted that this was a typographical error;

(b) PEHNZ had not been incorporated at the time the heads of agreement was signed. As already noted – see footnote 5 – this was not an insuperable difficulty;

(c) contrary to the recitals to the document, Bodco did not own 100 per cent of Danpac at the time;

(d) the obligations set out in cl 2.2 were imposed on EHNZ. It was not a party to the heads of agreement;

(e) there are numerous other examples of poor drafting and inconsistencies. For example:

(i) cl 2.3 contemplates that the transaction (as defined) would be completed within 30 days of signing the agreement, notwithstanding that, according to cl 1.1, the agreement was conditional for the same 30 day period; and

(ii) cl 1.4 imposes the obligation on both Danpac and PEH to revise the business plan and budget; cl 2.1(b) imposes the same obligation, but only on Danpac.

[149] None of these matters however are fatal.

[150] As noted at the beginning of this judgment –at [3] above – Mr Ross contended that the Danpac heads of agreement was a binding document, creating legal obligations. He submitted that it is clear from the heads of agreement that all parties

intended to be bound by it, and that the Court should strive to give effect to their express intention. He argued that it is not fatal that certain terms in the heads of agreement called for further agreement, or even that they were unworkable.

[151] Mr Morgan and Mr MacGillivray accepted that the parties recorded that they intended the heads of agreement to create legally binding obligations and both acknowledged that the Court should strive to give effect to that intention if it is possible do so. Further, they accepted that an agreement should not be held void for uncertainty if the parties have provided a workable formula for determining matters that have been left open. They submitted however that there are limits on the Court's ability to fill gaps in incomplete agreements. They argued that, in this case, there are essential matters not agreed upon, which cannot be determined by recourse to any formula, objective standard or other machinery provisions because none has been set out by the parties. They argued that the Court would be effectively making the contract for the parties, if it were to impose terms which the parties did not themselves agree to.

[152] As is noted in the leading text on contract law in this country,[9] the Courts have long insisted that any agreement which is to have contractual force must be in terms which define, with a sufficient degree of certainty, the obligations which the parties are to undertake.

[153] The law was summarised by the Court of Appeal in *Wellington City Council v Body Corporate 51702 (Wellington)* as follows:[10]

> [30] … The essence of the common law theory of contract is consensus. It follows that for there to be an enforceable contract, the parties must have reached consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined. Those objective means may be expressly agreed or they may be implicit in what has been expressly agreed. Taking price as an example, for a contract to be enforceable the parties must have agreed upon the price, or at least they must have agreed upon objective means of sufficient certainty whereby the price can be determined by someone else, or by the Court. If the price is left for later subjective agreement between the parties, the contract is not enforceable.

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9 Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 3.7.

10 *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA).

> [31] … the same theory of consensus applies by analogy to a process contract which obliges the parties to negotiate in good faith for the purpose of trying to reach agreement on all essential terms. Good faith in this context is essentially a subjective concept, as the House of Lords pointed out in *Walford*. There is thus no sufficiently certain objective criterion by means of which the Court can decide whether either party is in breach of the good faith obligation. The Court is unable in such cases to resolve the question whether a particular negotiating stance was adopted in good faith. The law regards the task of reconciling self-interest with the subjective connotation of having to act in good faith as an exercise of such inherent difficulty and uncertainty as not to be justiciable. The ostensible consensus is therefore illusory.

[154] The law was also discussed by the Court of Appeal in *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd.*[11] In that case the parties signed heads of agreement. Certain provisions had been annotated as "not agreed" and one as "to be agreed". The Electricity Corporation argued that the heads of agreement did not constitute a binding contract. The High Court held that the obligations of the parties were sufficiently clear, and found that a binding and enforceable contract had been made. On appeal, the Court of Appeal, by a majority, held that no contract had been concluded, because the parties had not at any time intended that the heads of agreement should constitute a concluded contract. The Court stated the relevant principles as follows:

> [50] The question whether negotiating parties intended the product of their negotiation to be immediately binding upon them, either conditionally or unconditionally, cannot sensibly be divorced from a consideration of the terms expressed or implicit in that product. They may have embarked upon their negotiation with every intention on both sides that a contract will result, yet have failed to attain that objective because of an inability to agree on particular terms and on the bargain as a whole. In other cases, which are much less common, the intention may remain but somehow the parties fail to reach agreement on a term or terms without which there is insufficient structure to create a binding contract. This latter situation is uncommon because normally negotiating parties will have an appreciation of what basic terms they need to reach agreement upon in order to form a contract of the particular type which they are negotiating. It is comparatively rare that, having an intention to contract immediately, not only do they fail to deal expressly with an essential or fundamental term but it also proves impossible for the Court to determine the contractual intent in that regard by implication of a term or by reference to what was reasonable in the particular circumstances or to some other objective standard.
>
> …

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[11] *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 (CA).

> [52] But even where the parties are *ad idem* concerning all terms essential to the formation of a contract – …– they still may not have achieved formation of a contract if there are other unagreed matters which the parties themselves regard as a prerequisite to any agreement and in respect of which they have reserved to themselves alone the power of agreement. In such cases, what is missing at the end of the negotiation is the intention to contract, not a legally essential element of a bargain. …
>
> [53] The prerequisites to formation of a contract are therefore:
>
> (a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and
> (b) An agreement, express or found by implication, or the means of achieving an agreement (e.g. an arbitration clause), on every term which:
> (i) was legally essential to the formation of such a bargain; or
> (ii) was regarded by the parties themselves as essential to their particular bargain.

[155] I seek to apply these principles to the Danpac heads of agreement.

[156] First, it is clear that the parties intended to create binding legal obligations between themselves. The heads of agreement so provides, albeit in the intitulement to the document. While such a declaration of intent cannot bind the Court, I accept that the Court should seek to give effect to what the parties have said. Where an obligation imposed under the heads of agreement is clear, the Court should uphold it. Accordingly, I accept that, for example, the exclusivity provision – clause 4, set out above at [146] – did bind the parties. There is however no assertion that this provision was breached.

[157] I accept that a number of steps were taken towards completing the transaction contemplated by the heads of agreement. In particular:

(a) an asset inventory was provided by Mr Wagstaff to the plaintiffs;

(b) PEH undertook financial and legal due diligence;

(c) PEHNZ was incorporated, although until not until 22 November 2019;

(d) Ms Trethewey was appointed as an interim financial controller;

(e) PEH, through Ever Health, did prepare a draft supply and governance agreement for Danpac, but this was never progressed; and

(f) candidates for the position of Managing Director and Chief Financial Officer were considered, but with only "a little bit of work being done in this regard".

[158] Further, the parties were ready to proceed with other aspects of the contemplated transaction but did not do so. For example:

(a) Mr van der Burgh initiated discussions with lawyers about the preparation of a shareholders' agreement. However, no shareholders' agreement was ever completed. Despite the parties acknowledging that this was essential to their transaction, the document did not go any further than an initial draft that Mr van der Burgh said was not what he wanted. The initial draft was not provided to either Mr Wagstaff or Mr Young, and it was agreed at the 11 November 2014 meeting that required documents, such as the shareholders' agreement, would not be completed until funding was in place; and

(b) St Croix Holdings Ltd was ready and able to partially capitalise Danpac through the transfer of the canning line and other assets owned by it. This transaction did not however take place. The original intention was for the assets to be transferred to Danpac for $1.6 million as part of Bodco's capital contribution. Evidence adduced for the plaintiffs suggested that they considered that this figure remained open for negotiation, notwithstanding the heads of agreement.

[159] Notwithstanding that some steps were taken, and others were ready to be taken, there were a large number of matters still to be agreed. In particular:

(a) the parties had to agree a revised business plan and budget for the next 18 to 24 months – see cl 1.1;

(b) the way in which PEHNZ was to be capitalised by PEH was to be "in a manner that ensures the most appropriate corporate structure between the parties" – see cl 1.1;

(c) Danpac and PEH were to, together, complete a revised business plan and budget. It was acknowledged that the revision would:

(i) have an impact on the total investment and working capital required – cl 1.4. Indeed, PEHNZ's investment in Danpac was "subject to the approval of the revised business plan" – cl 2.2(c);

(ii) set out the capitalisation timetable – cl 2.2 (c) and cl 3, timetable – days 0-10;

(iii) determine whether the investment was to be in tranches – cl 2.2(c);

(iv) drive the staff organisational structure – cl 1.5(c);

(v) affect the parties' shareholding in Danpac because of the impact on the total investment and working capital required – cl 1.9;

(d) PEH or its nominee was to subscribe for ordinary shares in Danpac in cash, paid up in accordance with "agreed milestones" – cl 1.7. Those words were not defined. The milestones still had to be agreed;

(e) any debt funding that Danpac might be able to arrange had to be on terms acceptable to the parties – cl 1.8; and

(f) any future investment in addition to the total investment amount set out in the schedule - $10,413,000 – was to be on terms to be agreed by the parties at the time – cl 1.10.

[160] The core purpose of the arrangements set out in the heads of agreement was to capitalise Danpac so that it could build the blending and canning plant in a timely way.

An agreed business plan and budget was critical to this core purpose and many of the important provisions in the heads of agreement drove off the revised business plan and budget. The plaintiffs' evidence was that PEHNZ would not advance capital (assuming it could raise the same) until a business plan and capitalisation programme were agreed. The need for an agreed business plan was confirmed by Mr Wagstaff in his evidence. The parties recorded in the heads of agreement that agreement on a revised business plan and budget was essential to their bargain; agreeing a revised business plan and budget was one of the "major commercial terms" and the heads of agreement was conditional on the parties agreeing a revised business plan and budget. Agreement on this core requirement was essential to the formation of their bargain and the parties recorded this for themselves

[161] The various matters left for further agreement went to the heart of the parties' bargain – how much was each to contribute to capitalise Danpac, when the contributions were to be made, and what shareholding each would take. In the event, no revised business plan or budget was ever agreed. There was nothing in the heads of agreement to say what was to happen if the parties failed to agree the revised business plan and budget. There was no obligation to seek to agree in good faith, and even if there had been, that would not have assisted. The heads of agreement provided no objective means of achieving agreement. The parties left the heart of their bargain for later agreement and provided no machinery or objective reference points which the Court can fall back on to ascertain the scope of the obligations they were intending to assume. I can only conclude that, in respect of these material matters, there was no enforceable agreement. There was simply an aspirational declaration of mutual intent. The Danpac heads of agreement was an agreement to agree, and except to the extent that I have noted, it did not create enforceable and binding obligations.

[162] Further, I agree with Mr MacGillivray that it is not possible to read the heads of agreement as a binding agreement, subject only to the satisfaction of due diligence. Even if the plaintiffs were satisfied with due diligence – and as noted at [84]-[85] above, complete satisfaction following due diligence (or waiver) was never communicated to the other parties, such satisfaction would have done nothing to overcome or resolve the matters requiring agreement.

[163] Having reached this point, it is not necessary for me to go on and determine whether the parties' rights and obligations under the heads of agreement came to an end, and if so, when. To the extent that it may assist, I note that:

(a) the Danpac heads of agreement was signed on 24 September 2014. It provided a 30 day exclusivity period. Thereafter, in my view, the defendants were entitled to enter into negotiations with other parties regarding the same or a similar transaction;

(b) Mr Wagstaff gave notice for the first time on 1 November 2014 that he considered that the heads of agreement had expired. He reiterated this position on a number of occasions thereafter; he made it very clear on 24 December 2014;

(c) If I am wrong and there was a binding and enforceable contract, the plaintiffs repeated failures to advance capital to Danpac were, in my view, each repudiations of the contract. Each of these repudiations entitled Messrs Wagstaff and Young and the other parties to cancel the contract. After 24 October 2014 there were numerous discussions between the parties – including by way of example the 11 November 2014 meeting – and Mr Wagstaff and Mr Young did not accept the initial repudiation when PEH/PEHNZ failed to capitalise Danpac in late October 2014. The plaintiffs thereafter took further steps to try and arrange funding. The repudiations were repeated as various promised capitalisation dates came and went. The defendants finally accepted one of the repudiations and broke off dealings with the plaintiffs as regards the transaction contemplated under the heads of agreement, on 24 December 2014, when Mr Wagstaff provided Mr van der Burgh with a share transfer form and directors' resignation forms, told Mr van der Burgh that he had found an alternative investor, and offered PEH/PEHNZ an alternative investment in Danpac.

Did PEH/PEHNZ, Bodco, and the other parties to the heads of agreement, enter into a joint venture, and did they assume fiduciary obligations to each other?

[164] Mr Ross submitted that the Danpac heads of agreement was the foundation for a joint venture that found expression in Danpac and that attracted fiduciary obligations. He argued that the open textured nature of many of the rights and obligations in the heads of agreement underlined the trust inherent in the parties' relationship, and he pointed to a number of features which, he submitted, demonstrated the fiduciary relationship between the parties. I note the following:

(a) the Danpac project arose out of a broader negotiation concerning not only the Danpac project, but also the MVM project;

(b) both parties needed to commit immediately to make the Danpac project a success;

(c) both parties brought different experience and expertise to the joint venture. This was beneficial to all and meant that the parties were dependent on each other;

(d) the joint venture required the plaintiffs to introduce their "off-take contacts" in China to Danpac, and the defendants to introduce their "off-take contacts" as well as construction and engineering plans and know-how;

(e) Danpac was an embryonic long-term business;

(f) each party was vulnerable to the other because so much detail remained to be decided;

(g) the parties had specific vulnerabilities to each other, with PEHNZ having majority control of Danpac but Bodco having effective control over the plant and the company's records;

(h) the parties' vulnerability was heightened by the fact that there were no other options for getting access to blending/canning plants at the time;

(i) the plaintiffs might lose their brand;

(j) the parties committed to the Danpac joint venture without a shareholders' agreement;

(k) the parties' contracts and arrangements were "home grown" and made without the benefit of legal input;

(l) the parties were each mutually dependent on the trust, fairness, good faith and honesty of the other in pursuing the Danpac project;

(m) the Danpac heads of agreement confirmed that the parties' relationship was fiduciary in nature; in particular, the heads of agreement required the parties to work together to further their joint venture.

[165] As already noted – at [133] – Bodco accepted that there was a joint venture, and that it involved fiduciary obligations.

[166] As also noted – at [173] – Messrs Wagstaff and Young did not accept either that there was a joint venture, or that fiduciary obligations were owed.

[167] The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading or commercial undertaking or endeavour, with a view to mutual profit, with each participant usually, but not necessarily, contributing money, property or skill.[12] The term "joint venture" can cover many forms of arrangement, not all of which will necessarily give rise to fiduciary obligations.[13] The absence of a written agreement does not preclude there being a joint venture.[14]

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12 *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 (HCA) at 10-11.
13 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433, at [14] per Elias CJ, and [52] per Gault J.
14 At [14] per Elias CJ; at [52] per Gault J; at [70] per Blanchard and Tipping JJ.

[168] The Supreme Court has cautioned that care should be taken before labelling arrangements as joint ventures. In *Paper Reclaim Ltd v Aotearoa International Ltd*,[15] Blanchard J for the Court noted as follows:

> [31] … To style a contractual relationship as a joint venture may be apt to distract. It is a term to be applied with caution. When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require co-operation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement, express or implied, to act on behalf of another and thus to put the interests of the other before one's own is a frequent manifestation of a situation in which fiduciary obligations are owed. Partners are the classic example of parties in that situation. Their position is different from that of parties to a contract who may have to cooperate but are doing so for their separate advantages.
>
> (citation omitted)

[169] In determining whether a joint venture is fiduciary in character, regard must be had to the facts of the particular joint venture. For example, have the parties chosen to regulate their relationship by means which suggest that fiduciary law is not to apply? Where the joint venturers elect to frame their relationship by adopting a corporate structure supplemented by a shareholder's agreement, fiduciary obligations are unlikely to be found.[16] The degree of trust and confidence that each party has reposed in the other, the stage in the venture that has been reached, and the degree of common purpose that the parties have, may also be relevant.

[170] The majority of the Supreme Court in *Chirnside v Fay* remarked as follows:[17]

> … [T]he true principle, in our view, resides in the idea that the circumstances must be such that one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement or undertaking is no more than a frequent manifestation of such a circumstance.

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15 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.
16 *Maruha Corp v Amaltal Corp Ltd* [2007] NZSC 40, [2007] 3 NZLR 192 at [19] - [20].
17 *Chirnside v Fay,* above n 13, at [85].

[171] I now turn to consider whether or not PEH, PEHNZ, Danpac, Bodco, and Messrs Wagstaff, Young and Andersen entered into a joint venture, and if so, whether or not that joint venture attracted fiduciary duties.

[172] Even though they did not (in my judgment) enter into an enforceable contract in material respects, the parties did enter into the heads of agreement, which broadly recorded what they wanted to achieve and what they still had to agree upon. They agreed to try and agree on a mechanism going forward to capitalise Danpac, so that it could build the blending and canning plant. They agreed that PEHNZ would contribute, and that Messrs Wagstaff and Young would also contribute, although they had not agreed how much each would contribute, when each would contribute, or what shareholding each would take in Danpac, as the joint venture vehicle. I accept that, in a broad sense, there was a joint venture, because the parties were trying to work towards a common end – the construction of a blending and canning plant, which PEH and its associated companies, Mr Wagstaff, Mr Young and Mr Andersen, would each use to obtain supplies of its or his particular brand of infant milk formula. There was a view to mutual profit. They had agreed on the apportionment of Danpac's anticipated net profits after tax – see cl 1.13.

[173] I do not, however, consider that the joint venture imported fiduciary obligations. There is nothing in the heads of agreement which suggests that any of the parties was entitled to repose or did repose trust and confidence in the other or others while the capital was being raised, and once the capital been raised, the parties intended to regulate their joint venture through Danpac and their shareholders' agreement.

[174] I turn to a number of the matters submitted by Mr Ross as being relevant to this issue:

(a) the Danpac joint venture did arise out of a broader negotiation concerning not only the Danpac project but also the MVM project. However, the MVM project did not define the Danpac project. Mr Young had no interest in MVM, and he did not stand to directly benefit from the MVM venture succeeding. Separate heads of

agreement were entered into in relation to each project. They were not dependent the one on the other;

(b) all parties did need to commit to make Danpac a success. Some of them – PEH, PEHNZ, Mr Wagstaff and Mr Young - had to commit capital. This however does not mean that all of the parties were reposing trust and confidence in each other in raising capital. PEH/PEHNZ were seeking to raise their share of the anticipated capital separately from Mr Wagstaff and Mr Young. Messrs Wagstaff and Young were seeking to raise their share of the anticipated capital independently from each other. There is no suggestion in the heads of agreement that any party could use Danpac's assets as security. It was rather a matter of the relevant parties making such arrangements as they could individually negotiate to enable them to put their capital into Danpac by subscribing for shares in the company;

(c) the parties had different experience and expertise. Mr Wagstaff's expertise was beneficial to PEH/PEHNZ, but the plaintiffs had no expertise that was particularly beneficial to Mr Wagstaff and Mr Young. Mr Wagstaff, Mr Young and Mr Andersen had their own infant milk formula brands and they had each been involved in exporting infant milk formula into China, with similar, if not more success, than the plaintiffs. Further, it was agreed that the parties would not transfer their separate brands to Danpac, and that each would be responsible for selling its or his own infant milk formula into China once the Danpac blending and canning plant was up and running. Their only common interest was in capitalising Danpac, so that the canning and blending plant could be built as soon as was reasonably practicable;

(d) the heads of agreement required Danpac and PEHNZ to introduce their off-take contacts to Danpac. Given that the parties had decided to keep their brands separate, those off-take arrangements were presumably other contacts the parties had made over the years. This does not

suggest that the parties were either entitled, or did, repose trust and confidence in each other;

(e) Danpac was an embryonic and long-term business, but again that does not compel the conclusion that any of the parties was entitled to repose or did repose trust and confidence in the other or others. The venture was at a very early stage, and PEH/PEHNZ, Bodco, Mr Wagstaff, Mr Young and Mr Andersen, had not previously been involved in any kind of joint venture;

(f) I do not consider that each party was vulnerable to the other, simply because considerable detail remained to be decided. It was not a matter of each party trusting the other to do the right thing by the joint venture. It was rather a matter of each party seeking to agree a revised business plan and budget; no party was required to set aside self-interest in so doing. Some financial and other information was exchanged, but there is nothing to suggest that that information was particularly confidential. The defendants had prepared it to show to potential investors. There is nothing to suggest that in exchanging that information, the parties were reposing trust and confidence in the other;

(g) I do not consider that the parties had specific vulnerabilities. PEHNZ acquired majority control of Danpac pursuant to the joint venture because the defendants were told that it was necessary to cede control to obtain funding – see below at [181] to [185]. Mr Wagstaff, through St Croix Holdings Ltd, had control of the plant but Danpac had resolved to acquire it. Had the joint venture succeeded, Danpac would have controlled the plant;

(h) I do not consider that the parties' vulnerability to each other was heightened by the fact that there were no other options for getting access to a blending and canning plant at the time. Rather, this heightened the need for all parties to get on and raise their share of the required capital promptly, so that Danpac could get on and build its

plant. All parties were vulnerable to losing the benefit of the brands they had developed, unless they could get the Danpac plant built in a timely fashion and each could start resupplying infant milk formula under its or his brand name;

(i) I accept that the parties entered into the heads of agreement without a shareholders' agreement, but I do not consider that this is relevant to the issue of trust and confidence. A shareholders' agreement was clearly contemplated but the parties decided to defer it until a revised business plan and budget had been completed, and monies had been raised. Neither occurred; and

(j) that the parties' arrangements were made without the benefit of legal input, while surprising, cannot of itself create fiduciary duties.

[175] Ultimately, I do not consider that the parties were mutually dependent on the trust, fairness, good faith and honesty of the others in seeking to advance the Danpac project. The heads of agreement, which evidenced the joint venture, did not require the parties to set aside their self-interest. Each was entitled to take its self-interest into account in seeking to capitalise Danpac and in seeking to agree a revised business plan and budget. Indeed, the heads of agreement recorded that each was entitled to take its own legal and tax advice and that that legal and tax advice had to be acceptable to each party – see cl 2.4.

[176] The parties to the heads of agreement were dependent upon PEH/PEHNZ, and on Messrs Wagstaff and Young, raising the requisite capital to advance to Danpac, but that of itself is not enough to create fiduciary duties.[18] Had Danpac been capitalised, the parties would have adopted its corporate structure, and their mutual obligations would have been founded in the company's constitution, in the legislation governing companies and in the shareholders' agreement which the parties indicated in the heads of agreement that they were intending to enter into. These circumstances suggest that the relationship as a whole was not fiduciary in nature.[19]

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18 *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 15, at [31].
19 *Maruha Corp v Amaltal Corp Ltd*, above n 16, at [19] – [20].

[177] The fact that the parties did not repose trust and confidence in each other is illustrated by what happened. For example:

(a) Mr Wagstaff refused to disclose how much St Croix Holdings Ltd had paid for the canning line which he proposed to use as part of his capital contribution;

(b) PEH/PEHNZ did not keep Messrs Wagstaff and Young informed of their endeavours to raise finance during October 2014 and misrepresented the position repeatedly in November/December 2014;

(c) Mr McCann, as the person primarily responsible, never sought to raise money purely for the Danpac project;[20]

(d) not all of the monies that PEH/PEHNZ was seeking to raise was to be used for Danpac. They hoped to obtain initial bridging finance from the Wang family of $1 million. The evidence was that $450,000 was to be channelled via PEH to Danpac, but that the balance was to be used to meet the indebtedness of EHHK. The second bridging loan of $6 million was to be used to buy out the angel shareholders in PEH, so that Ms Wang could take an interest in the company. Essentially, the foundation shareholders (Mr McCann, Mr van der Burgh, Mr Pollard, Alusch Amoghli, and perhaps Terence Kwong), were seeking to advance their own interests.

[178] In my judgment, there was nothing in the heads of agreement, either express or implied, suggesting that any of the parties was required to put the interests of the others before his or its own interests. The parties had signalled their intention to cooperate to a common end, but they were doing so for their own separate purposes, and in their own separate ways.

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[20] Curiously the evidence suggests that Mr Rosenberg and Gleneagle would have been prepared to advance the $5,310,630 required by the heads of agreement, had he been asked to do so in late 2014.

[179] Accordingly, I conclude that, although there was what might loosely be termed a joint venture, it was not a joint venture that was fiduciary in character and no fiduciary obligations were assumed as between the parties to the heads of agreement. Moreover each party was free to withdraw from the joint venture on giving notice to that effect.[21] In the present case, notice bringing the joint venture to an end was given at the latest on 24 December 2014 by Mr Wagstaff.

Why were the shares in Danpac transferred to EHNZ, and then PEHNZ, and does PEHNZ have a right to retain them?

[180] I have set out above at [77] to [81], and [83], what occurred. As I noted, the parties disagree as to why the share transfers were called for in late October 2014.

[181] Mr Wagstaff said that he was told by Mr van der Burgh that there was a significant capital injection coming from PEH/PEHNZ at the end of October 2014, and that, in order to draw down the funds, PEH had to show the lenders that it had a shareholding in Danpac and directors on its board. He said that he trusted Mr van der Burgh when Mr van der Burgh told him that the funding was in place, and that the explanation he was given made sense to him. He said that he would not have contemplated transferring the shares for any reason other than to enable PEH/PEHNZ to draw down the available funding. As he put it:

> We had put our heart and soul and most of our money into Danpac and I would never have agreed to give 51% of that away simply on the basis of an open-ended promise to make an investment at some stage. Instead I was told that a first and substantial injection would be made by the end of October and that proof of shareholding was needed to allow this to happen.

[182] In his evidence-in-chief, Mr van der Burgh said that the transfers were called for and signed pursuant to the Danpac heads of agreement. When cross-examined, he said that it was necessary to have the 51 shares in the company transferred on 20 October 2014, because DCH "… needed to see that we had a controlling stake in the canning and blending plants … that's what was driving that basically". This explanation however was at odds both with the timing (the distributorship agreement with a DCH subsidiary had been signed in May 2014 – see above at [17]) and with Mr McCann's evidence. Mr McCann said that his discussions with DCH regarding

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[21] *Chirnside v Fay*, above n 13, at [92]-[93] per Tipping and Blanchard JJ for the majority.

the joint venture with that company were on hold in October 2014. When it was put to Mr van der Burgh that he told Mr Wagstaff on 17 October 2014 that he needed Mr Wagstaff to transfer to EHNZ 51 per cent of the shares in Danpac, so that he could provide proof of shareholding to draw down on the funding that he said had been obtained, he responded as follows: "Anything is part of the mix. So, whether its, whether I, whether I said that specifically or not I don't recall". Mr McCann was asked in cross-examination whether or not prospective lenders needed to "… see PEH being the holder of 51% of the shares in Danpac" before committing themselves to a funding proposal. He answered "No, they didn't …". He said a little later " … typically the lenders don't necessarily need to see 51% but they want to know they've got mechanisms of control". He accepted that there was no pressing need requiring that the transfers be completed by 20 October 2014. He took the view that the shares had to be transferred at some stage, because the parties were in a joint venture. When it was put to him "… what was wrong with you going out, raising money and then saying to Mr Wagstaff and Mr Young, here's our money, we'd like 51% of the shares now", he responded "… that wasn't what we agreed to do". He asserted that there was an agreement, that all PEH needed to do was to pay $51, and that it could then take the shares.

[183] I prefer Mr Wagstaff's version of events. First, it is consistent with what was then happening. On 13 October 2014, Mr van der Burgh had confirmed that initial due diligence had been satisfactorily completed, and that the additional due diligence would be accelerated and completed within 14 rather than 21 days – see above at [72]. At the meeting on 17 October 2014, Mr van der Burgh told Mr Wagstaff that he would get a shareholders' agreement prepared, and he asked Mr Wagstaff to transfer the canning line from St Croix Holdings Ltd to Danpac – see above at [74]. Events pointed to the contemplated transaction proceeding. Secondly, Mr Wagstaff's version of events seems intrinsically likely. Messrs Wagstaff and Young were anxious to complete the blending and canning plant. They were short of funds. The promise of imminent funding explains their actions. Thirdly, Mr Wagstaff's version of events is consistent with the Danpac heads of agreement. In its terms it required an initial capital injection by late October. Fourthly, Mr Wagstaff was not challenged as to his version of events in cross-examination. Indeed, Mr Ross QC, acting for the plaintiffs, accepted (orally) in closing that Mr Wagstaff was told that it would help in raising the

required funds if EHNZ had 51 per cent of Danpac's shares. Fifthly, Mr van der Burgh effectively accepted Mr Wagstaff's version of events under cross-examination when he said that "anything [was] part of the mix". While he could not recall what he had said, he did not deny the comments attributed to him by Mr Wagstaff. Sixthly, Mr Wagstaff's explanation is consistent with the fact that the cheques totalling $51 given to the transferor companies were not presented – see above at [79]. Finally, Mr Wagstaff's version of events is consistent with what happened thereafter. I have already dealt with the contemporaneous documents in this regard – see above at [89] to [92].

[184] I also note that:

(a) the exclusivity period provided for under the Danpac heads of agreement expired 30 days after the agreement was signed – i.e. on 24 October 2014. I suspect that the timing of the share transfer was related to this. Although both Mr van der Burgh and Mr McCann denied it when the proposition was put to them, there seems to me to be considerable force in the argument advanced by Mr Morgan, on behalf of Bodco, that the plaintiffs knew that the exclusivity period was about to expire, and that they wanted to obtain the shares, to ensure that they could not be easily excluded from the Danpac business proposal, while they tried to find funds to capitalise the venture; and

(b) in making its indicative bid for the MVM assets, PEH advised that it had a 51 per cent interest in Danpac. That advice may have been intended to ensure that the indicative bid receive favourable consideration, given the crossover in shareholdings.

[185] It follows that, in my judgment, Mr Wagstaff signed the share transfer to EHNZ because he had been told that it was necessary for PEH/PEHNZ to provide proof of their shareholding and proof of control to its funders, before there could be any draw down of the funds that had been arranged. Mr Young says that he transferred one share to EHNZ for the same reason. He said that he was given this information not only by Mr Wagstaff but also, in the course of meetings, by Mr van der Burgh. I agree with

Mr MacGillivray's characterisation of the transfers – they occurred in the expectation, induced by Mr van der Burgh, of the imminent completion of other aspects of the contemplated transaction.

[186] I have held that the heads of agreement was, in material respects, unenforceable. In *Wellington City Council v Body Corporate 51702*,[22] the Court of Appeal observed (obiter) that where money has changed hands in return for a contractually unenforceable promise the Court:[23]

> … could well be able to order repayment on restitutionary principles. There would be some parallel with a total failure of consideration. A promise to negotiate in good faith, given in return for a money sum, if wholly unperformed, could well give rise to an equitable obligation to repay; …

[187] Generally, a party who has paid money or provided goods and services pursuant to an ineffective transaction may seek the return of their money or payment for the goods and services provided.[24] If a contract is unenforceable, any amount paid can be recovered providing there was a total failure of consideration.[25]

[188] Such claims are known as "failure of basis claims". They are based on the principle that, where one party has conferred a benefit on another, that other party's right to retain the benefit is conditional, and the condition is not fulfilled, the recipient must return the benefit.[26] They are a well recognised ground for the remedy of restitution. They can arise where a party has conferred a benefit on another in anticipation of a contract that never eventuates. Such claims can also be brought where the benefit has been conferred in the expectation of an event which fails to occur.[27] Such claims are based not in contract, but on the principle of restitution[28] – the premise underlying the right of restitution being that the entire basis of the arrangement which led to the payment being conferred on one party by another has failed. The claimant's

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22 Above n 10.
23 At [33].
24 Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand* Restitution (online ed) at [43].
25 At [62].
26 Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016) at [12-01]; Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2016) at ch 13.
27 *Hotchin v KA No 4 Trustee Ltd* [2013] NZHC 1881, (2013) 3 NZTR 23-013 at [45]-[46].
28 *Ecotech Homes (New Zealand) Ltd v Baumane* [2016] NZHC 1444 at [43].

intention was to confer the benefit, but it was in effect conditional on the occurrence of an event – in this case, the promised funding.

[189] An example of the application of the principle is the decision of the Privy Council (on an appeal from New Zealand) in *Goss v Chilcott*.[29] In that case, the appellants had executed a mortgage to secure an advance from the respondent. The appellants on lent the monies to a third party. The mortgage was never registered and it was later altered by the third party without the appellants' knowledge. The amendments to the mortgage, made without authority, had the effect of discharging the appellants from liability. The respondent nevertheless sued the appellants to recover the amount advanced, together with interest. The Privy Council held that while the appellants had been discharged from liability to repay the loan, the respondent was able to recover the amount of the advance on the basis that the money had been paid for a consideration that had wholly failed, namely of the failure of the appellants as borrowers to perform the contractual obligation to repay the loan.[30]

[190] A similar decision by the Court of Appeal in the United Kingdom – *Chillingworth v Esche*,[31] – has some similarities with the present situation. In that case, purchasers had agreed to buy a property from a vendor "subject to a proper contract to be prepared by the vendor's solicitors". The purchasers paid a deposit. A contract was prepared but not signed. The purchasers sought return of their deposit. The Court of Appeal held that the agreement was conditional, that it did not constitute an enforceable contract, and that the purchasers were entitled to recover their deposit. Pollock MR noted that, as no contract was entered into, the deposit was prima facia returnable. He observed as follows:[32]

> It seems to me that when the negotiations came to an end the rights of the parties were gone, and the purchasers were entitled to receive their money back.

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29 *Goss v Chilcott* [1996] 3 NZLR 385 (PC).
30 At 390-391 per Lord Goff.
31 *Chillingworth v Esche* [1924] 1 Ch 97.
32 At 107.

Warrington LJ held that the purchasers had paid the deposit in anticipation of a final contract and nothing more.[33] Sargant LJ observed as follows:[34]

> The parties were not agreeing that they would enter into a reasonable contract, but that they would enter into such contract, if any, as they might ultimately agree and sign. I look on the whole payment as being … an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at.

[191] Similar principles apply to frustrated joint ventures, where one party to the joint venture has acquired property on behalf of the joint venture and the joint venture has been aborted. I have found that there was a joint venture, albeit a joint venture which did not entail fiduciary duties. I have also found that the joint venture was terminated by the giving of notice, on 24 December 2014. The majority in Supreme Court in *Chirnside v Fay*[35] observed that where a joint venture is brought to an end on the giving of notice:[36]

> … any assets, tangible or intangible, held on behalf of the joint venture will usually be held on trust for both the erstwhile joint venturers. Appropriate steps will be necessary to agree, or obtain some external resolution as to how those assets are to be dealt with. There is, in a general sense, some analogy with the steps necessary when a formal partnership is dissolved.

The Court went on to observe that, in the absence of contractual regulation, equitable principles will "supply the solution".[37]

[192] The relevant equitable principles have been referred to as the "*Pallant v Morgan* equity".[38]

[193] In *Pallant v Morgan*,[39] the agents of two neighbours had agreed at an auction that one neighbour's agent would refrain from bidding for a wood, that the other neighbour's agent would bid, and that if he was successful, the wood would be divided between the two neighbours. The basis for division was not agreed. The defendant's

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33 At 112.
34 At 114 to 115.
35 *Chirnside v Fay*, above n 13, at [92].
36 At [92].
37 At [93].
38 And see generally Andrew S Butler and others *Equity and Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2009) at 40.5.
39 *Pallant v Morgan* [1953] 1 Ch 43; And see *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 at 9-10.

agent's bid succeeded and the defendant brought the wood. Following the purchase, the defendant refused to convey a portion of the wood to the plaintiff, who then sought specific performance. The Court held that the agreement between the parties' agents was too vague to be a contract, but that the defendant was a trustee of the wood on behalf of himself and his neighbour jointly.

[194] This authority was applied in a more explicitly commercial context in *Banner Homes Group Plc v Luff Developments Ltd.*[40] The respondent company was interested in purchasing a commercial property. It approached the plaintiff company with a joint venture proposal, and the two commenced complicated negotiations. They reached an agreement in principle to jointly purchase the property, but the respondent company then lost interest. The respondent company did not however tell the plaintiff company this and it continued to implement a shareholders' agreement which had been entered into. The respondent company purchased the property, purportedly on its own account. The Court imposed a constructive trust over the property and directed that it be held in equal shares, one share for each party. Chadwick LJ noted as follows:[41]

> The *Pallant v Morgan* equity does not seek to give effect to the parties' bargain still less to make for them some bargain which they have not themselves made, … The equity is invoked where the defendant has acquired property in circumstances where it would be inequitable to allow him to treat it as his own; and where, because it would be inequitable to allow him to treat the property as his own, it is necessary to impose on him the obligations of a trustee in relation to it. It is invoked because there is no bargain which is capable of being enforced; …

[195] The validity of this approach has been confirmed by the House of Lords in *Yeoman's Road Management Ltd v Cobbe*.[42] It has been referred to with approval in this country.[43]

[196] In my judgment, the various authorities I have cited are applicable in the present case. Mr Wagstaff and Mr Young, were in a joint venture with PEH/PEHNZ. The nature of the joint venture was encapsulated in heads of agreement, albeit that it was unenforceable. The purpose of the joint venture was to capitalise Danpac, so that

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40 *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372 (CA).
41 At 400.
42 *Yeoman's Rowe Management Ltd v Cobbe* [2008] 4 All ER 713 (HL).
43 *Orongomai Reserve Ltd v Cashmere Lakes Reserve Ltd,* HC Christchurch CIV-2005-409-2171, 28 February 2008; *Mahon v Edney* [2018] NZHC 1473.

it could build the blending and canning plant. Both time and money were tight. Messrs Wagstaff and Young could not themselves at the time make the required capital injections into Danpac. PEH and PEHNZ had agreed to capitalise the joint venture in the interim, until Messrs Wagstaff and Young could contribute their capital. PEH/PEHNZ had represented that they were in a position to do so. Specifically, Mr van der Burgh told Mr Wagstaff that PEH/PEHNZ would be making a significant capital contribution to Danpac at the end of October 2014. He told both Mr Wagstaff and Mr Young that, in order to draw down this funding, it was necessary to provide proof of shareholding and proof of control to the funder. Mr Wagstaff and Mr Young agreed to transfer the 51 shares in Danpac to EHNZ for this reason, and for this reason alone. In my judgment, the share transfers were, in effect, conditional on the funding being advanced. In the event the joint venture did not proceed, because neither PEH/PEHNZ, nor Messrs Wagstaff and Young, were able to contribute the required capital to Danpac.

[197] In my view, EHNZ acquired the shares in circumstances where it would be inequitable to allow it, and its successor in title, PEHNZ, to treat the shares as their own. The representation made by Mr van der Burgh to Mr Wagstaff and to Mr Young preceded the transfer of the shares. The representation was not contractually enforceable. It was to the effect that once EHNZ, as the acquiring party, had the shares, PEH/PEHNZ would procure the drawdown of the funds. Messrs Wagstaff and Young, as the non-acquiring parties, were to obtain, through Bodco, an interest in Danpac. Mr Young transferred 49 of his 50 company's shares to Bodco for this purpose. Bodco's interest in Danpac was to include the blending and canning plant once it had been completed, utilising the funding to be provided by PEH/PEHNZ. PEH/PEHNZ/EHNZ did not inform Messrs Wagstaff and Young that they could not honour the representation, by making the required capital contribution by the end of October 2014. By transferring the shares, Messrs Wagstaff and Young conferred an unintended advantage on PEH/PEHNZ/EHNZ which those entities now seek to exploit, having contributed no capital at all. In my judgement, the circumstances make it inequitable for PEHNZ, as EHNZ's successor in title, to retain the shares.

Are any of the various causes of action well founded?

[198] The first two causes of action pleaded rely on the Companies Act – ss 87 and 90 respectively.

[199] There is nothing to impugn the share transfers from St Croix Holdings Ltd and R C Young Holdings Ltd to EHNZ, and I accept that once the transfers were signed, EHNZ became the beneficial owner of the shares, and that it in turn transferred them to PEHNZ.

[200] The resolution entered into by Messrs Wagstaff and Young purporting to take back the shares – see above at [111] – was defective in a number of respects. I agree with Mr Ross that the resolution is disingenuous in suggesting that Messrs Wagstaff and Young deliberately chose not to enter the transfers into Danpac's register in October 2014. Rather, they resolved that such entry should be made. The reality is that there was no register. Nor did cl 5(c) of the constitution provide any basis for the steps taken, contrary to the assertion in the resolution. The resolution was signed by Mr Young purporting to act as a director when he did not hold that office. No transfer of the shares had been signed by PEHNZ. The actions taken by Messrs Wagstaff and Young were peremptory, and in my judgment, manifestly inappropriate. They should have sought to resolve their impasse with PEH/PEHNZ through the arbitration provisions contained in Danpac's constitution, or perhaps by bringing proceedings under s 174 of the Companies Act, rather than by taking matters into their own hands.

[201] The directors of Danpac – initially Messrs Wagstaff and Young, and then Messrs Wagstaff, van der Burgh and Pollard – did not ensure that Danpac maintained a share register, recording the shares issued by the company. That was in breach of ss 87(1) and (2) and 90(1) of the Companies Act. I accept that EHNZ is a person aggrieved, because its name was not entered in the share register. PEHNZ is also a person aggrieved, because its name was not entered in the register either when the shares were later transferred to it. Both companies have the right to seek rectification, or compensation for loss sustained, or both rectification and compensation – see s 91(1). The Court's power to make such orders however is discretionary.

[202] For the reasons I have set out, in my judgment, as from 24 December 2014, it became inequitable for PEHNZ to retain the shares. As a result, there is no relief available under s 91, unless there can be a claim from the date of the transfer to 24 December 2014. Further, and in any event, it is not possible to rectify the register to now give PEHNZ 51 per cent of the shares in the company, without trammelling on the entitlement of CAHG, which has acquired the majority of the shares in the company innocently and without any involvement in what occurred. While, technically the correct course would have been to record the transfers to EHNZ and then from EHNZ to PEHNZ in Danpac's register once it was created, but it is difficult to see that the failure to do so has caused any loss to the plaintiffs, given the conclusions I have reached. If there is some residual liability, any compensation payable can be dealt with at the resumed hearing into damages and quantum.

[203] I turn to the third cause of action. It asserts conversion, on the basis that the defendants by their actions converted PEHNZ's shares in Danpac. Conversion is committed where a party deliberately interferes with the property of another, without lawful justification and in a manner inconsistent with the other party's rights as owner.[44] As I have noted, the defendants' unilateral actions in taking back the shares were manifestly inappropriate. However, as the law stands at present, liability for conversion applies only to an interest in chattels, and not to a chose in action – including shares.[45] For this reason, the third cause of action must fail. Further, and in any event, any conversion cannot survive my finding that there is no ongoing entitlement to the shares.

[204] The fourth cause of action alleges shareholder oppression and unfair prejudice, pursuant to s 174 of the Companies Act. The section is not restricted to current shareholders. It can also apply to former shareholders. Pursuant to s 117 of the Act, a company must not take action that affects the rights attached to shares unless the action has been approved by a special resolution. Pursuant to s 175, any breach of s 117 is deemed unfairly prejudicial conduct for the purposes of s 174.

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44 Stephen Todd and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 12.3.
45 *OBG Ltd v Allan* [2008] 1 AC 1 (HL) at [95] to [100], [105], [106], [271], [321] and [322].

[205] It seems to me that this cause of action was made out, but under s 174(2), the Court can only make various orders if it considers it just and equitable to do so. Given my other findings, it would not be just and equitable to grant relief.

[206] The fifth cause of action alleges breach of contract. I have held that, in material respects, the Danpac heads of agreement was unenforceable. Even if I am wrong in that regard, I have held that the plaintiffs' failure to capitalise Danpac amounted to a repudiation, which the defendants accepted on 24 December 2014. Thereafter the plaintiffs had no right to retain the shares. In these circumstances, there was no breach of the Danpac heads of agreement.

[207] The sixth cause of action alleges breach of fiduciary duty. Again, this cause of action cannot survive my findings. I have found that while there was a joint venture, it did not import fiduciary obligations. Accordingly, there can be no damages available to the plaintiffs in this regard.

[208] The eighth cause of action alleged unlawful means conspiracy. Such conspiracy arises where two or more persons combine and agree that at least one of them use unlawful means to cause damage to the claimant. Conspiracy requires an intention to cause loss by unlawful means. Here, Mr Wagstaff and Mr Young believed that they were entitled to act in the manner in which they did, and they did so, not with the intention of causing loss, but with the intention of protecting their own interests. In any event, this cause of action is moot, given that, under my findings, PEHNZ had no right to retain the shares after 24 December 2014. The retransfer of the shares thereafter has caused no loss.

The affirmative defences/the counterclaims

[209] Bodco's two affirmative defences and its first counterclaim rely on the Danpac heads of agreement, and the first affirmative defence relies on implied terms which it is said bolster the heads of agreement. I have held that the heads of agreement was unenforceable. In those circumstances, the affirmative defences and the first counterclaim cannot succeed.

[210] I am however persuaded that the first counterclaim raised by Messrs Wagstaff and Young is properly made out. Messrs Wagstaff and Young voluntarily transferred the shares to EHNZ, on the understanding that the proposed transaction under the heads of agreement was going to be completed. It was not completed and for the reasons I have set out, I accept that, were the plaintiffs entitled to retain the shares and/or obtain any of the forms of relief sought by them, they would be unjustly enriched. In my judgment, it was never intended that the plaintiffs would have any ongoing entitlement to Danpac's assets if the proposed joint venture transaction was not completed. The basis on which the shares were transferred has failed, because the plaintiffs did not commit any capital to Danpac, and because such relationship as the parties were in was terminated on 24 December 2014. In my judgment, the second and third defendants are entitled to the relief they seek – namely a declaration that the plaintiffs have no right or entitlement to any shares in Danpac. There is however no need to require the plaintiffs, by way of restitution, to relinquish without compensation any claim or right they make to the shares, or which is associated with the shares. The shares have already been taken back.

[211] As a result of this finding, I do not need to go on to consider the other counterclaims raised by the second and third defendants and I decline to do so.

[212] Finally, there is the second counterclaim brought by Bodco. It alleges misleading and deceptive conduct under the Fair Trading Act. The counterclaim is brought only against Messrs van der Burgh and Pollard. I accept that both were in trade. I also accept that Mr van der Burgh either made, or was a party to the initial representations that PEH/PEHNZ had access to funds – see above at [40], [47(b)] and [59]. Both Mr van der Burgh and Mr Pollard made additional representations, to the effect that the funds required to meet the commitments were or would shortly become available, and that everything was in place to that end – see above at [92] and [97]. Both the initial and many of the additional representations were misleading or deceptive. To the extent that they were statements of past or present fact, they were wrong, and to the extent that they were predictions or opinions as to the future events, they were unqualified and there was no proper basis for them. Mr Pollard accepted in cross-examination that many of the emails he sent were untrue. In my judgment, Bodco was misled and it was not unreasonable for it to be misled.

[213] Whether Bodco has suffered loss as a result seems rather less likely. On Bodco's case, Messrs Wagstaff and Young were entitled to seek funding from alternative sources as from 24 October 2014. The evidence shows that they did approach alternative funders, but that no further monies were forthcoming from any alternative source until mid-2015. It seems unlikely that Bodco has suffered any quantifiable loss, but that is an issue which falls to be considered at the quantum hearing in July 2020.

Result

[214] For the reasons I have set out, I have found that the plaintiffs were not entitled to retain the 51 shares in Danpac, or to a 51 per cent shareholding in that company, as from 24 December 2014. I make a declaration accordingly.

Costs

[215] The defendants are entitled to their reasonable costs and disbursements. In this regard, I make the following orders:

(a) any memoranda seeking costs are to be filed within 15 working days of the date of this judgment;

(b) any memorandum in reply is to be filed within a further 15 working days;

(c) memoranda as to costs are not to exceed five pages.

I will then consider the issue of costs and disbursements on the papers, unless I require the assistance of counsel.

Quantum hearing

[216] The parties will require some time to consider this judgment, and its implications. I am unavailable from 20 September 2019 to 21 October 2019. The Registrar is to convene a telephone conference on the first available date after 21

October 2019, so that counsel can advise whether or not a damages and quantum hearing is required, and if so, how long it is likely to take.

Referral

[217] I have found that Messrs Wagstaff and Young breached the Companies Act and committed an offence by not giving notice of the adoption of the constitution of Danpac to the Registrar of Companies. Further, they did not maintain a share register for Danpac. Nor did Messrs van der Burgh and Pollard once they became directors of the company. Again, this was in breach of the Act and an offence was committed.

[218] I want to hear from counsel at the telephone conference if there is any good reason why a copy of this judgment should not be sent to the Registrar of Companies.

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Wylie J