IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-006729
[2014] NZHC 2430

BETWEEN	AQUAHEAT NEW ZEALAND LIMITED Plaintiff
AND	HI SEAT LIMITED (IN RECEIVERSHIP AND LIQUIDATION) AND LIA LIMITED (IN RECEIVERSHIP AND LIQUIDATION) (discontinued) First Defendants
	ANZ FIDUCIARY SERVICES PTY LIMITED (discontinued) Second Defendant
	ANDREW JOHN GRENFELL Third Defendant
	MINTER ELLISON RUDD WATTS (discontinued) Fourth Defendant

Hearing:	23-27 June 2014
Appearances:	M T Scholtens QC, B A Ross and J B Orpin for the Plaintiff A Challis and J Tomlinson for the Third Defendant
Judgment:	3 October 2014

JUDGMENT OF GILBERT J

This judgment is delivered by me on 3 October 2014 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Introduction

[1] The plaintiff, Aquaheat New Zealand Ltd (Aquaheat), entered into an agreement with Hi Seat Ltd and LIA Ltd (the first defendants) to purchase most of their assets on 8 August 2012. The purchase price of $5,250,000 was based on financial statements prepared as at 31 May 2012, and was payable on the date of completion, 31 August 2012. The purchase price was subject to adjustments for movements in working capital and outgoings between 31 May 2012 and 31 August 2012. A sum of $250,000 was held on escrow for the purpose of the working capital adjustment, but was insufficient to meet the actual adjustment required of $1,737,000. The adjustment required in favour of Aquaheat for outgoings was $13,716, bringing the total adjustments to $1,750,716.

[2] The first defendants were unable to meet the shortfall of $1,500,716, allowing for the $250,000 held in escrow, because they were placed in receivership on 7 September 2012. That was shortly after completion and prior to the adjustments being calculated.

[3] Aquaheat now seeks to recover this amount from the third defendant, Mr Andrew Grenfell, alleging that he was a shadow or deemed director of the first defendants at the relevant time.[1] Aquaheat claims that Mr Grenfell made all major decisions relating to the sale and the sole appointed director, Mr Paul De Bernardo, acted in accordance with his directions. Aquaheat claims that Mr Grenfell breached his duties as a director under s 136 of the Companies Act 1993 (the Act) by agreeing to the first defendants incurring obligations to pay the working capital and outgoings adjustments without reasonable grounds to believe that they would be able to meet those obligations. Aquaheat seeks an order pursuant to s 301(1)(c) of the Act requiring Mr Grenfell to pay the shortfall to it, rather than to the liquidators, on the basis that it is the only creditor to have suffered the loss.

[4] Mr Grenfell denies that he was a shadow or deemed director of the first defendants. He was a receiver of Hastie Holdings (NZ) Ltd (Hastie Holdings), the parent company of the first defendants, and his consent was therefore needed for the

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[1] The plaintiffs' claims against the other defendants are resolved and have been discontinued.

sale to proceed because it was a major transaction for the first defendants. He says that he acted in this capacity only and that all parties understood that this was his role. He denies giving any instructions or directions to Mr De Bernardo in respect of the sale.

[5] Mr Grenfell says that even if he is found to have been a shadow or deemed director, he did not breach his obligations under s 136 of the Act. He says that he believed on reasonable grounds at the time the agreement was entered into that the amount held on escrow would be sufficient to meet any adjustment. In any event, he says that he expected that the first defendant companies would be able to meet their obligations under the sale and purchase agreement from the funds paid on settlement and from cash deposits that were not included in the sale. He says that he did not expect that the companies would be placed in receivership prior to the adjustments being made. He says that the receivership occurred because Mr De Bernardo resigned unexpectedly on 3 September 2012, a few days after completion.

[6] Further, Mr Grenfell claims that he has a defence under s 138 of the Act. His defence is that he agreed to the figure to be held on escrow for the working capital adjustment based on advice he received from Grant Samuel & Associates Ltd, a corporate advisory firm that was engaged to assist the first defendants in respect of the sale.

[7] Mr Grenfell also claims that, because a director's duty under s 136 is owed to the company, the Court cannot make a compensation order under s 301 for a breach of that duty unless the breach has caused the company loss. On this basis, Mr Grenfell contends that no compensation order can be made in this case because the first defendants have not suffered a loss.

[8] In any event, Mr Grenfell contends that any compensation order should be reduced to reflect contributory negligence by Aquaheat in agreeing to the amount to be held on escrow for the working capital adjustment. He says that Aquaheat was privy to the same information available to him for the purpose of assessing the likely amount of any adjustment.

[9] Finally, Mr Grenfell contends that Aquaheat's claim is precluded by cl 22.15 of the sale and purchase agreement which provides:

> The parties agree and must ensure that, to the fullest extent permitted by law, no existing or former director or officer of either of the vendors will be liable to the Purchaser in respect of any act or omission of that director or officer in his or her capacity as a director or officer (as the case may be) of the relevant Vendor which occurred on or before Completion, other than an act of fraud by that person.

[10] The issues requiring determination therefore are:

(a) Was Mr Grenfell a shadow or deemed director?

(b) If so, did Mr Grenfell breach his duty under s 136?

(c) Is liability excluded under the agreement?

(d) Can an order for compensation for a breach of s 136 be made in favour of a creditor?

(e) Was Aquaheat contributorily negligent?

(f) Should compensation be ordered and, if so, how much?

Was Mr Grenfell a shadow or deemed director?

The law

[11] Section 126(1) of the Act relevantly provides:

> In this Act, **director**, in relation to a company, includes –
> (a) A person occupying the position of director of the company by whatever name called; and
> (b) For the purposes of sections 131 to 141, 145 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7 –
> (i) A person in accordance with whose directions or instructions a person referred to in paragraph (a) of this section may be required or is accustomed to act; and
> (ii) A person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and
> …

(c) For the purposes of sections 131 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7, a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board;
...

[12] Aquaheat contends that Mr Grenfell was a shadow director in terms of s 126(1)(b) because Mr De Bernardo, the sole appointed director of the first defendant companies at the relevant time, was required or accustomed to act in accordance with the directions or instructions of Mr Grenfell. In particular, Aquaheat alleges in its statement of claim that Mr Grenfell "initiated, organised and oversaw the process leading to the sale of the [first defendants'] assets" and was the "ultimate decision-maker" for the first defendants "in respect of the sale, the price the assets were sold for and the final decision to agree to the sale and purchase agreement". Aquaheat relies on these same particulars in support of its alternative contention that Mr Grenfell was a deemed director within s 126(1)(c) in that he exercised a power or duty of the board with the consent or acquiescence of the board.

[13] In *Re Hydrodam (Corby) Ltd*, Millett J considered the definition of a shadow director for the purposes of s 251 of the Insolvency Act 1986 (UK) as follows:[2]

> 'Shadow director' in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act ...

[14] Millett J set out what must be proved to establish that a person is a shadow director within this definition as:[3]

(1) who are the directors of the company, whether de facto or de jure;

(2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so;

(3) that those directors acted in accordance with such directions; and

(4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own but acted in accordance with the directions of others.

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2 *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 (Ch).
3 At 183.

[15] In *Hydrodam* the question was whether the directors of a corporate director of a company were shadow directors of that company. Millett J held that this did not necessarily follow:[4]

> The liquidator submitted that where a body corporate is a director of a company, whether it be a de jure, de facto or shadow director, its own directors must ipso facto be shadow directors of the company. In my judgment that simply does not follow. Attendance of board meetings and voting, with others, may in certain limited circumstances expose a director to personal liability to the company of which he is a director or its creditors. But it does not, without more, constitute him a director of any company of which his company is a director.

[16] An identical definition of shadow director in s 60(1) of the Corporations Law (Australia) was considered by Finn J in *Australian Securities Commission v A S Nominees Ltd*:[5]

> The reference in the section to a person in accordance with whose directions or instructions the directors are "accustomed to act" does not in my opinion require that there be directions or instructions embracing all matters involving the board. Rather it only requires that, as and when the directors are directed or instructed, they are accustomed to act as the section requires.
> ...
> ... [It] does not, in my opinion, require it to be shown that formal directions or instructions were given in those matters in which [the alleged shadow director] involved himself. The formal command is by no means always necessary to secure as of course compliance with what is sought...
>
> The question the section poses is: Where, for some or all purposes, is the locus of effective decision making? If it resides in a third party such as [the defendant], and if that person cannot secure the "advisor" protection of s 60(2), then it is open to find that person a director for the purposes of the Corporations Law.

[17] In *Re Kaytech International plc* Robert Walker LJ stated that the crucial issue is:[6]

> … whether the individual in question has assumed the status and functions of a company director so as to make himself responsible under the [Company Directors Disqualification Act 1986 (UK)] as if he were a de jure director.
> ...

This will be someone who has:[7]

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4 At 184.
5 *Australian Securities Commission v A S Nominees Ltd* (1995) 133 ALR 1 (FCA) at 52.
6 *Re Kaytech International plc* [1999] 390 (CA) at [402].
7 At [402].

> … exercised real influence (other than as a professional adviser) in the corporate governance of a company. Sometimes that influence may be concealed and sometimes it may be open. Sometimes it may be something of a mixture, as the facts of the present case show.

[18] The same definition of a shadow director in the Company Directors Disqualification Act 1986 (UK) was considered by the English Court of Appeal in *Secretary of State for Trade and Industry v Deverell*:[8] Morritt LJ, with whom Potter LJ and Morison J agreed, set out the following propositions:[9]

> (1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly construed because it also has quasi-penal consequences in the context of the Company Directors Disqualification Act 1986. I agree with the statement to that effect of Sir Nicolas Browne-Wilkinson V-C in In *re Lo-Line Electric Motors Ltd* [1988] Ch 477, 489.
>
> (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities. I agree with the statements to that effect of Finn J in *Australian Securities Commission v AS Nominees Ltd*, 133 ALR 1, 52-53 and Robert Walker LJ in In *re Kaytech International plc* [1999] BCC 390, 402.
>
> (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction.
>
> (4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of "direction" and "instruction" do not exclude the concept of "advice" for all three share the common feature of "guidance".
>
> (5) It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is

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8 *Secretary of State for Trade and Industry v Deverell and another* [2001] Ch 340 (CA).

9 At [35].

> necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act" "in accordance with" such directions or instructions.

[19] In *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*,[10] the New South Wales Court of Appeal considered the definition of a shadow director in s 9 of the Corporations Law (Cth). That section relevantly provides that a person is a director of a company if the directors of that company are accustomed to act in accordance with that person's instructions or wishes. Young JA, who delivered the principal judgment, distilled the following principles from the leading authorities:[11]

> First, not every person whose advice is in fact heeded as a general rule by the board is to be classed as a de facto or shadow director.
>
> Secondly, if a person has a genuine interest of his or her or its own in giving advice to the board, such as a bank or mortgagee, the mere fact that the board will tend to take that advice to preserve it from the mortgagee's wrath will not make the mortgagee, etc a shadow director.
>
> Thirdly, the vital factor is that the shadow director has the potentiality to control. The fact that he or she does not seek to control every facet of the company or the fact that from time to time the board disregards advice is of little moment.
>
> Fourthly, Millett J's proposition that the evidence must show "something more" than just being in a position of control must be shown. The whole of the facts of the case must be shown to see whether that power to control was put into practice. The emphasis that one must judge on the whole of facts and circumstances is made many times over in the leading cases.
>
> Fifthly, although there are problems with cases where the board of the company splits into a majority and minority faction, so long as the influence controls the real decision makers, the person providing the influence may be a shadow director.

The facts

[20] Whether or not a person is a shadow or deemed director of a company will always depend on a close scrutiny of the relevant facts. As noted, Aquaheat alleges that Mr Grenfell was a shadow director of the first defendant companies in that he initiated, organised and oversaw the process leading to the sale of the companies' assets and was the ultimate decision-maker for the first defendants in relation to the sale. To determine whether these assertions are correct, it is necessary to examine all

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10 *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47 (CA).

11 At 76 (citations omitted).

of the relevant facts relating to the initiation and conduct of the sale process and the finalisation of the sale and purchase agreement.

[21] The company that was originally called Aquaheat Industries Ltd was established in 1950 by Mr De Bernardo's father. Mr De Bernardo was appointed the managing director of that company in 1981. It grew to be the largest privately owned contracting company in New Zealand in the heating, ventilation and air conditioning industry.

[22] In April 2007, the De Bernardo Family Trust, which held all of the shares in the company, accepted an approach from the Hastie Group of companies based in Australia to purchase all of its assets, including its name. A new company was formed for the purposes of the acquisition and it took the name Aquaheat Industries Ltd (AIL). Hastie Group Ltd held 60 per cent of the shares with the remaining 40 per cent held by the De Bernardo Family Trust. Mr De Bernardo was appointed managing director. AIL is now called LIA Limited and is one of the first defendants.

[23] During 2008, Mr De Bernardo was appointed the regional manager for the Hastie Group MEP (mechanical, electrical and plumbing) companies in New Zealand. He was also appointed a director of Hastie New Zealand Ltd (HNZ), which is now called Hi Seat Ltd, the other first defendant. From 2007 to 2012, AIL and HNZ operated in tandem, with AIL having a strong market presence in Wellington and HNZ focusing on the Auckland market.

[24] The De Bernardo Family Trust sold its 40 per cent shareholding in AIL to Hastie Group Ltd in 2010. In 2011, Hastie Group Ltd transferred its shares in AIL to Hastie Holdings. The shares in HNZ, which had been held by an Australian company in the Hastie Group, were also transferred to Hastie Holdings at this time.

[25] Hastie Holdings, which is a non-trading holding company, guaranteed the obligations of the Hastie Group of companies and granted security over all its present and after acquired property pursuant to a general security deed in favour of the second defendant, ANZ Fiduciary Services Pty Ltd, as security trustee for a banking syndicate. The Hastie Group subsequently defaulted on its obligations to

the banking syndicate and was placed in voluntary administration in Australia. Mr Grenfell and his partner at McGrath Nicol + Partners (NZ) Ltd, Mr William Black, were appointed as receivers and managers of Hastie Holdings in New Zealand on 28 May 2012. The amount owed under the general security deed at the date of their appointment was approximately AUD506 million.

[26] The two Australian based directors of AIL and HNZ, who were executives of the Hastie Group, resigned shortly before Hastie Holdings was placed in receivership. Their resignations left Mr De Bernardo as the sole director of both companies.

[27] Immediately following his appointment, Mr Grenfell, who took primary responsibility for the receivership, arranged to meet with Mr De Bernardo at AIL's premises in Wellington. This was the one and only time that Mr Grenfell visited those premises. AIL's chief financial officer, Mr Terry Tanzania, also attended this meeting as did Ms Catharine Holland, an accountant working in Mr Grenfell's team at McGrath Nicol. Mr Grenfell emphasised at this meeting that AIL and HNZ were not in receivership and that he was not assuming any control over these companies. Instead, the companies would continue to operate under their own management and directorship.

[28] Given that Hastie Holdings was in receivership, it was obvious that a new owner would need to be found for AIL and HNZ, both of which were trading profitably. Mr De Bernardo recognised this. His primary concern was to look after the interests of staff and customers. He considered that the best course would be to sell the businesses as going concerns, thereby avoiding them also being placed into receivership. Mr De Bernardo decided that he would remain as a director of both companies to see the sale process through to a successful conclusion. Given that any sale was likely to be structured as an assets sale rather than a sale of shares, this would require Mr De Bernardo, as the sole director of the companies, to agree to the sale. It would also need the consent of Mr Grenfell, as the receiver of Hastie Holdings, because the sale would be a major transaction requiring shareholder approval.

[29] The fact that the companies remained under the control of its existing management and directorship was emphasised in communications to the media and to creditors. For example, on the day of his appointment, Mr Grenfell issued a press release which included the following statement:

> The individual New Zealand business units, Aquaheat Industries Ltd, Hastie New Zealand Ltd and Hastie Services Ltd are not in receivership and continue to be operated by their existing directors and management team on a business as usual basis.

[30] Mr De Bernardo prepared a similar statement for circulation to customers. This included advice that AIL and HNZ:[12]

> … are **NOT** in receivership and will continue to be operated by their existing directors and management team on a full business as usual basis.

[31] At Mr De Bernardo's request, Mr Grenfell accompanied him on visits to two key clients to reassure them that AIL and HNZ were not in receivership and would continue to trade under existing management and directorship. After one of these meetings, Mr Grenfell advised Mr De Bernardo that if he had any concerns about his position as the sole director of AIL and HNZ, he should seek his own advice. Mr De Bernardo said that he did not consider that this was necessary. However, he later took advice from his usual solicitors, Chapman Tripp.

[32] It is common ground that from the time of the receivership until the time the businesses were sold, Mr De Bernardo continued to manage the companies' operations with the support of his management team and that Mr Grenfell took no part in this.

[33] Mr Grenfell initiated the appointment of Grant Samuel to facilitate the sale process on behalf of AIL, HNZ and Hastie Holdings. Grant Samuel prepared an engagement letter which included its proposal for a two-stage sale process and an indicative timetable for this. Grant Samuel sent the letter to both Mr De Bernardo and Mr Grenfell on 6 June 2012. Mr De Bernardo advised Mr Grenfell on 8 June 2012 that he approved Grant Samuel's proposal. Mr Grenfell suggested some modifications to the letter. Mr De Bernardo acknowledges that Mr Grenfell advised

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[12] Emphasis in original.

him to take time to consider the revised engagement letter before signing it. A few days later, on 11 June 2012, Mr De Bernardo signed the engagement letter as the director of AIL and HNZ. Mr Grenfell also signed the letter as receiver of Hastie Holdings. Given the compressed timetable, it was desirable for Mr Grenfell to participate in the sale process and receive information from Grant Samuel as it progressed, thereby expediting the process for obtaining his consent to any sale on behalf of the shareholder.

[34] Minter Ellison was engaged to carry out the legal work and to provide legal advice. Minter Ellison was chosen because it was already acting for McGrath Nicol in Australia in relation to the administration of the Hastie Group of companies. Mr De Bernardo had not previously dealt with Minter Ellison and was not involved in appointing that firm. Mr Grenfell arranged this and agreed that Hastie Holdings would be responsible for payment of all invoices to ensure that Minter Ellison was not vulnerable to having these payments clawed back in the event of AIL or HNZ being placed into receivership or liquidation. However, as Minter Ellison was engaged to represent the interests of AIL and HNZ as its clients, it sent its engagement letter to Mr De Bernardo as the director of these companies. Mr De Bernardo was comfortable with the appointment and considered that Minter Ellison acted appropriately throughout, and in the best interests of the companies.

[35] Sometime later, prior to the sale, Mr De Bernardo asked Mr Grenfell to approve the payment of an outstanding dividend due to the De Bernardo Family Trust. Mr Grenfell said that as he was not a director of AIL or HNZ, he could not give the approval sought and Mr De Bernardo should seek his own advice on whether this would be appropriate. This reinforced Mr Grenfell's earlier advice that Mr De Bernardo remained solely responsible for the governance of AIL and HNZ.

[36] Grant Samuel prepared an information memorandum with Mr De Bernardo's assistance. This provided information about AIL and HNZ and described the two-stage sale process proposed by Grant Samuel. The indicative timetable involved circulation of the information memorandum to interested parties on 19 June 2012 with indicative non-binding offers to be submitted by 28 June 2012. Based on these

indicative non-binding bids, selected parties, or one single party, would then be invited to undertake due diligence commencing in early July 2012. Binding offers were to be submitted to Grant Samuel by 20 July 2012 with settlement to follow as soon as possible thereafter. Mr De Bernardo approved this information memorandum, including the proposed sale process and timetable.

[37] Grant Samuel distributed the information memorandum to prospective purchasers, which Mr De Bernardo assisted in identifying. On 21 June 2012, Minter Ellison sent an email to Mr Grenfell and Mr De Bernardo suggesting that a draft sale and purchase agreement should be prepared for their review. Mr Grenfell and Mr De Bernardo separately confirmed their agreement to this. It appears that at this stage, Grant Samuel was unclear whether the transaction would be structured as an asset sale or a share sale.

[38] Indicative non-binding offers were sent to Grant Samuel on 28 June 2012 and Grant Samuel invited the bidders to commence due diligence the following day. Bidders were provided with access to a virtual data room using a secure website administered by Grant Samuel. Mr De Bernardo and his management team assisted the prospective purchasers by providing information to them during this process.

[39] Grant Samuel prepared draft letters to the two main bidders proposing that they submit their final offers by 9.00 am on 11 July 2012 to enable the preferred bidder to be selected by noon that day. The preferred bidder would then be given the opportunity to complete its due diligence and acquire the business at the agreed price. Other parties would be permitted to continue with their due diligence in the meantime, in case the preferred bidder elected not to proceed at the indicated price. The proposal was for a sale of assets with an adjustment to allow for any increase or decrease in the value of the assets delivered on completion compared with those set out in the 31 May 2012 balance sheets.

[40] Grant Samuel sent these draft letters to Mr Grenfell and Mr De Bernardo for their comment on 9 July 2012. Mr Grenfell and Mr De Bernardo independently confirmed their agreement to Grant Samuel's proposal later that day. There is no

evidence to indicate that Mr De Bernardo was acting under any form of instruction or direction from Mr Grenfell in providing these instructions to Grant Samuel.

[41] Also on 9 July 2012, Mr De Bernardo proposed a meeting with Grant Samuel and Mr Grenfell to finalise the draft sale and purchase agreement which had been sent to him by Minter Ellison on 29 June 2012. Mr De Bernardo advised that he particularly wanted to discuss how any liabilities to Australian Hastie Group entities should be dealt with and he commented on how staff long service leave had been accounted for. It appears that this meeting was held at Minter Ellison's offices the following day.

[42] Horizon Energy Distribution Ltd (Horizon) submitted its final indicative non-binding bid on 10 July 2012. This offer, which was conditional on the successful completion of due diligence, was slightly modified on 11 July 2012 following discussions with Grant Samuel. Horizon sought commitments from AIL, HNZ and Hastie Holdings not to enter into any agreement, or make any commitment, relating to the sale of the assets or shares of AIL or HNZ until 31 July 2012 and that key personnel, including Messrs Tanzania and De Bernardo, would be available to assist with due diligence from 12 to 27 July 2012. Horizon advised that its board would consider the acquisition at a special meeting on 31 July 2012 to enable settlement to occur on either 3 or 6 August 2012.

[43] This offer was immediately accepted and it was returned by Grant Samuel to Horizon within one hour of its receipt, having been signed by Mr De Bernardo on behalf of AIL and HNZ, and Mr Grenfell on behalf of Hastie Holdings. Mr De Bernardo claims that he had no real input into the decision to accept this offer but I do not know why he says this. There is no suggestion that the Horizon bid was not the best option available; it seems that everyone recognised that it was. There is also no evidence that Mr Grenfell even requested Mr De Bernardo to sign the agreement, let alone that he directed or instructed him to do so. I conclude that Mr De Bernardo was satisfied that it was appropriate for him to sign the agreement because he considered that this was in the best interests of AIL and HNZ. Mr Grenfell reached the same conclusion from the perspective of Hastie Holdings.

[44] That same day, 11 July 2012, Minter Ellison circulated to the vendor group, including Messrs De Bernardo and Grenfell, a draft sale and purchase agreement for the proposed sale to Horizon and invited comment. Horizon had asked for this agreement to be supplied that day. Mr Grenfell promptly responded to the group with some minor suggested amendments. Grant Samuel suggested further minor amendments, as did Ms Holland from McGrath Nicol. A revised draft agreement was then re-circulated to the vendor group before being sent to Horizon.

[45] On 12 July 2012, Mr De Bernardo sent an email to Mr Ajay Anand, the chief executive of Horizon, proposing a meeting to discuss a post completion strategy:

> I spoke to Simon Cotter[13] and he has no objection to us communicating/meeting to overview a post completion strategy.
>
> As discussed I think it would be a good idea that we get together early next week so that I can start preparations and be ready when/if we get the green light on 31/07.
>
> I basically went through a similar process in 2007 so I am familiar with the processes, but need to understand the Horizon strategy on structure etc.
>
> I am clear all next week.

[46] Mr Anand responded on 14 July 2012 confirming that he and Horizon's chairman, together with an adviser from PriceWaterhouseCoopers (PwC), would meet with Mr De Bernardo the following week. Topics they wished to discuss included the post-acquisition legal structure, a communication plan to staff, the New Zealand stock exchange and key stakeholders, and the development of a 90 day operational plan for integration of people, places and systems.

[47] On 16 July 2012, the other main bidder offered to continue with due diligence so that if the preferred bid did not proceed they could be ready to complete in a short timeframe. This proposal, which was addressed to Grant Samuel, was conditional on the vendor contributing to the cost of the further due diligence. Mr Cotter circulated this to the vendor group, including Mr De Bernardo, recommending acceptance of this proposal up to a maximum of $50,000. Mr Grenfell confirmed his agreement to

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[13] Mr Cotter was the director at Grant Samuel responsible for running the sale process.

the proposal on behalf of Hastie Holdings which was meeting the professional costs associated with the sale.

[48] Messrs De Bernardo and Tanzania were heavily involved in assisting the bidders with their due diligence during the next two weeks.

[49] Late on 22 July 2012, Horizon wrote to Grant Samuel seeking an extension to the exclusivity period to 6 August 2012 and indicating that the board would make its decision that day, rather than on 31 July 2012 as earlier proposed. Grant Samuel drafted a response suggesting modifications to the sale process to accommodate Horizon's request while protecting the position of AIL and HNZ. Grant Samuel sent this draft to the vendor group, including Messrs Grenfell and De Bernardo. Mr Grenfell responded to the group suggesting minor amendments. Mr De Bernardo then confirmed that he approved the draft with Mr Grenfell's amendments. Grant Samuel sent the revised response to Horizon on 23 July 2012. This letter, which was addressed to Mr Anand at Horizon, read as follows:

> **Potential acquisition of Professional Building Services, Aquaheat Industries and Hastie New Zealand ("The Businesses") by Horizon Energy ("the Proposed Transaction")**
>
> **1. Time Extension**
>
> Thank you for your letter received 23 July 2012. We have had the opportunity to discuss this with the Vendors (as defined in the Information Memorandum) of The Business.[14] As you are aware one of the primary objectives of the Vendors is to ensure The Businesses are sold in an efficient manner, particularly, as you have also identified, that any delay in the sale process can only be detrimental to The Businesses.
> The Vendors of The Businesses are prepared to extend the period of acquisition certainty to 4.00pm on 6 August 2012, subject to the following conditions and process:
>
> 1. The Sale & Purchase Agreement must be agreed in its final form on or before 31 July 2012. The Sale & Purchase Agreement will then be placed in Escrow with Minter Ellison Rudd Watts subject to the approval of the Vendors and the Board of Horizon;
>
> 2. As soon as possible from the final form of the Sale & Purchase Agreement being agreed, the Vendors must confirm that the form and terms of the Proposed Transaction are acceptable to them or not. If the form and terms of the Proposed Transaction are acceptable to the Vendors, the form and terms of the Proposed

[14] AIL, HNZ and Hastie Holdings.

Transaction will be presented to the Board of Horizon Energy for its endorsement or otherwise;

3. If the Horizon Board approval is obtained on or before 6 August 2012, the Sale and Purchase Agreement will be taken from Escrow and signed by both parties. The Proposed Transaction will then proceed to completion and settlement.

4. If either the Vendors or the Board of Horizon reject the final form of the Sale & Purchase Agreement, the process will terminate and the Vendors will have no further obligation to the Purchaser (including as to acquisition certainty).

Acquisition certainty is defined as a commitment from the Vendors of The Businesses to sell the assets of The Businesses to Horizon, subject to agreeing the final form of the Sale & Purchase Agreement and provided that Horizon maintains its non-binding indicative offer price of $6 million. If Horizon changes its purchase price or does not meet the timetable above the Vendors can elect to sell The Businesses to any other party, at any time, at their sole discretion.

2. Sale & Purchase Agreement

Thank you for your markup of the SPA. We will provide comments on the markup by 9.00am on 25 July 2012.

3. Due Diligence

You refer in your letter to several legal questions for which you are still awaiting a response. All due diligence [questions] are being answered as fast as possible. On Saturday 22 July 2012 we received a further substantial batch of questions from your legal advisers, going to a level of detail that will be both time consuming, and in our opinion offer little additional commercial benefit.

As a potential solution can we suggest that if Bell Gully needs this information provided, that they physically meet at Aquaheat to review the files. We would be happy to facilitate such a meeting. We request that no further due diligence questions are submitted after 26 July 2012.

[50] The vendor group, including Mr De Bernardo, met on 24 July 2012 to discuss the sale and purchase agreement and various other outstanding issues. Grant Samuel circulated a list of the agreed action points following the meeting and emphasised the importance of Mr De Bernardo attending a meeting of all parties, vendors and purchaser, to be held the following Friday, 27 July 2012, to finalise the terms of the sale and purchase agreement.

[51] Minter Ellison prepared a revised draft of the sale and purchase agreement and circulated it to the vendor group later on 24 July 2012. This prompted a succession of emailed comments on 24 and 25 July 2012 from Mr Grenfell, Grant Samuel and Minter Ellison. These emails were sent to all members of the vendor group, including Messrs De Bernardo and Tanzania.

[52] On 26 July 2012, Horizon wrote to Grant Samuel advising that it was not prepared to proceed with the purchase at the indicated price because of various issues that had come to light in the due diligence process. It also set out the principal issues that needed to be addressed in the sale and purchase agreement. These related to customer contracts, contract retentions to meet defect liability obligations, and conditions to ensure the assignment of key contracts and the retention of key employees.

[53] Mr Grenfell did not attend the meeting of vendor and purchaser representatives on 27 July 2012 to negotiate the final terms of the sale and purchase agreement. Although Grant Samuel asked Mr Grenfell to attend this meeting, he did not do so because he did not consider that it was appropriate for him to be involved in the direct negotiations with the purchaser. The meeting, which lasted most of the day, was attended on the vendors' side by Mr Cotter and Mr Christopher Smith from Grant Samuel, Mr Neil Millar and Mr Matthew Makgill from Minter Ellison, and Mr De Bernardo. Mr Anand attended the meeting representing the purchaser with Mr Amon Nunns, from Bell Gully, and Mr Ian McLoughlin from PwC.

[54] Late in the negotiations, at Grant Samuel's request, Mr Grenfell attended a breakout session with the vendor group for approximately half an hour. Mr Millar says that only a few key points remained outstanding at this stage and Horizon had presented some options for dealing with these. Mr Millar recalls that these options were all acceptable to the vendor group but they needed Mr Grenfell's input given that he would have to approve any sale. Mr Grenfell says that, following discussion, the vendor group reached a consensus on which option was preferred. Mr Grenfell also asked Mr Cotter, who was conducting the negotiations, to see if he could negotiate an increased price. Mr Cotter subsequently succeeded in doing so.

[55] Late on Monday 30 July 2012, Bell Gully sent Minter Ellison a marked up version showing proposed changes to the draft sale and purchase agreement but noting that they had not yet obtained final instructions from Horizon. The following morning, Bell Gully sent a further draft incorporating another change requested by Horizon removing its obligation to replace the bond on an existing contract. Minter Ellison circulated these revisions to the vendor group. Again, there were a number of email responses, including separate responses from Mr Grenfell and Mr De Bernardo, following which Minter Ellison provided a preliminary response to Bell Gully.

[56] Mr Cotter proposed a conference call with all parties, including Mr Grenfell, to discuss the remaining issues. Mr Grenfell was unable to participate in this call which proceeded in his absence. However, he sent an email to the vendor group prior to the call stating his view that one of Horizon's proposals, which concerned the treatment of employee entitlements, was unacceptable.

[57] Good progress was made at the telephone conference on 31 July 2012, following which Bell Gully sent Minter Ellison a further draft showing marked up changes to the sale and purchase agreement. Mr Millar immediately circulated this to the vendor group noting that the "big points are all now agreed" and providing his comments on the remaining minor issues.

[58] Negotiations led by Minter Ellison and Bell Gully continued on these remaining issues over the following days. All members of the vendor group were copied in on the emails. Mr Grenfell and Mr De Bernardo independently provided their input where appropriate as did other members of the vendor group. Again, there is no evidence to suggest that Mr Grenfell instructed or directed Mr De Bernardo during this process.

[59] The Horizon board met to consider the draft sale and purchase agreement on 6 August 2012. Bell Gully wrote to Minter Ellison that evening attaching a marked up version of the sale and purchase agreement with further requested amendments following the board discussion. It was in this email that Bell Gully first proposed that each party hold sufficient funds to meet any adjustments required under the

agreement after the 31 August 2012 accounts were finalised. Bell Gully suggested that this could be dealt with by a side letter, rather than being included in the sale and purchase agreement. Bell Gully also noted that the purchaser would require evidence that the vendors' shareholder, referring to Hastie Holdings, approved the transaction.

[60] Mr Millar forwarded this email and the marked up agreement to the vendor group later that evening. He said that he had reviewed the amendments to the agreement and they all appeared to be in order. He asked whether anyone had any other issues. He also asked Mr De Bernardo to check the accuracy of the asset schedule. Mr Millar drew attention to the suggestion for a side letter dealing with adjustments and asked "which way do we think it will go?"

[61] Mr Nunns sent a further email to Mr Millar later that night raising a concern that Mr De Bernardo could find himself in a position of conflict following settlement if a dispute arose under the agreement. If he remained a director of the vendor companies he would have to act in their interests. This could be a problem given that it was proposed, following completion, he would have overall responsibility for the Aquaheat business, and obligations to the purchaser as a result. Mr Nunns wrote:

> Is there any reason why Paul needs to remain a director of the vendors? It seems that Paul will be in a difficult conflict position if he was to remain a director. As he will not be affiliated with the Hastie Group following the sale, it makes sense for the receivers to appoint new directors to the vendors. The concern is that in the (hopefully unlikely) chance that the vendors and the purchaser are on opposite sides of the table regarding a matter of dispute, Paul should not be representing the vendors while still being the executive with overall responsibility for the Aquaheat New Zealand Limited business.
>
> Even if Paul were to be the vendors' representative, we assume he would not be required to act in accordance with shareholder instructions. As such, the shareholder ought to consider if someone else can fill this role.
>
> Can you consider with GS and the receivers and let us know if there is a workable alternative.

[62] Mr Millar responded immediately pointing out the obvious difficulty of finding someone prepared to accept appointment as a director of the companies in the circumstances:

> Issue I suspect is that I doubt there is any way that the receivers (or anyone else) will be able to find anyone to be a director of the companies post deal – given situation.

[63] Mr Smith, from Grant Samuel, responded to Mr Millar the following morning, 7 August 2012. Mr Smith was concerned that time should not be wasted by management trying to calculate the adjustment that would be required as at 30 June 2012 since this was not the relevant date. Mr Smith copied his email to the other members of the vendor group:

> The SPA the changes seem ok.
> In regards to the adjustment amount, we don't really know with certainty. We don't have the June number calculated on a like for like basis, but earlier calculations suggest it could move in our favour. However, I don't have a handle on how July and August will play out.
> In the background PwC have asked Terry to prepare the estimated amount as at 30 June (requested by Horizon). I have had a conversation with them this morning pointing out that it is irrelevant and if required we can work together later in the month to forecast 31 August.

[64] Mr Grenfell confirmed his agreement with Mr Smith's approach in an email he sent to the group a few minutes later:

> Agree with June request. Management should no[t] be distracted from running the business for irrelevant requests.

[65] Mr Nunns sent an email to Messrs McLoughlin and Anand seeking advice as to the amount that should be set aside to cover any required adjustments under the agreement:

> We are proposing that the receivers agree to the retention of an amount of funds by each of the parties in an amount sufficient to meet the expected payment obligations for the adjustment amount.
> We also propose that the secured creditor release its security over those amounts to be held (at least to the extent payable to ANZL under the SPA).
> Ian – My question for you is whether there is a number that we believe is sufficiently large that it will cover the expected adjustment amount and apportionments. Minters seem happy in principle with the proposal so long as ANZL holds an equivalent amount in the event the payment obligation goes the other way.
> Ajay, are you happy for ANZL to agree to hold such a retention in case it has payment obligations?

[66] Later that day, PwC wrote to Mr Todd Campbell, the chief financial officer of Horizon, with a provisional calculation showing that the vendors would be entitled to

an adjustment in their favour of $189,000 as at 30 June 2012. However, PwC noted that the calculation was based on information available in the due diligence data room and was only an estimate because not all relevant details were available.

[67] Bell Gully then sent Minter Ellison a draft side letter, to be signed by AIL, HNZ, Messrs Grenfell and Black, and Aquaheat New Zealand Limited, confirming that the vendors and the purchaser would each hold $1 million to cover working capital and outgoings adjustments required under the sale and purchase agreement. Bell Gully's proposal was that Messrs Grenfell and Black should sign this letter as receivers to confirm that that they would procure the vendors to hold the retention and apply it in payment of any adjustments required under the agreement. The figure of $1 million was shown in square brackets and was accompanied by the following drafting note:

> The number is proposed as a significant amount given the large swings in working capital reflected in recent calculations. It is only for a short period and is a mutual obligation so $1m is proposed.

[68] Bell Gully also prepared a deed of release to be executed by ANZ Fiduciary Services Pty Ltd as security trustee for the banking syndicate, releasing its security over the amounts to be held as agreed in the side letter.

[69] Mr Nunns had inserted the figure of $500,000 in his initial draft. However, he was not involved with the financial aspects of the transaction; PwC was retained to assist Horizon with those matters. Horizon subsequently instructed Mr Nunns to propose the figure of $1,000,000 on the basis that the monthly swings in working capital had reached this level over the past 10 months. This proposal was made at a very late stage; it was sent to Minter Ellison at 4.57 pm on 7 August 2012, the night before the sale and purchase agreement was signed.

[70] Mr Millar sent these documents and Mr Nunn's email to the vendor group at 5.25 pm:

> See latest from Amon Nunns. His concern is that he now realises that the adjustment provision is not protected from a receiver of the vendors. In other words, the vendors could owe a payment to HENZ under the adjustment mechanism but they discover we've sucked all the money out and HENZ is just another unsecured creditor.

> I don't think we have a problem with the suggested amendments to the release but I am guessing you won't like the side letter! In particular I'm guessing you won't like the number (seems stupidly high) and that MN is unlikely to want to sign it.
>
> Do we need a call to discuss this?

[71] Anticipating that McGrath Nicol would not be prepared to sign the proposed side letter, Mr Millar immediately contacted Mr Nunns and persuaded him to drop this requirement. Mr Millar then sent the following email to the vendor group, including Mr De Bernardo, at 5.37 pm:

> Team
>
> Have made Amon drop the requirement to have MN sign this side letter. So really now the request is twofold:
>
> 1. Vendors agree to set aside X amount pending result of adjustment and apportionment exercise.
>
> 2. Security trustee agrees to release whatever cash is required to meet any payment owed to vendors if adjustment/apportionment goes against us.
>
> In principle this seems fair enough to me. Do you agree? If so, can we send send off the amended security release to Minters Sydney for approval.
>
> Question is how much should vendors agree to set aside for what could be 2-3 months all up?
>
> Amon says they need $1m because of monthly swings in working cap. What do we think is reasonable?

[72] Mr Cotter's reply to the group at 5.50 pm formed the basis of the eventual solution to this issue:

> My usual response to this is that both parties match the amount, and it tends to diffuse (sic) the issue or reduce the amount or both. They do have a valid concern which needs to be addressed, although it is very late for them to think of this. Options:
> - undertake that Aquaheat will remain cashed up for x number of days;
> - agree to have a matched amount for x days (argument being the same of (sic) theirs – receiver, if owed money will want it immediately and no[t] want to have to chase Horizon); or
> - sue the receiver in that event if it didn't pay.
>
> On the actual maths, the actual working capital swing over the last 10 months from August 11 to May 12 is $130k, with a maximum of $1m and a minimum of $1m (negative).

I would suggest:

- tell him the average working capital movement in the last 10 months is less than $150k, albeit with higher swings and lower swings;
- lets both agree to put $250k aside to cover it (i.e. total $500k)
- if there are variations above that (unlikely) then each party still has recourse to the other anyway (as they already do)

[73] Mr Millar sent a further email to the vendor group that day at 5.52 pm:

> They are agreeing it is mutual. So it's really just about the number then. Any reduction/advance on $250K?

[74] Around 9.00 pm, Mr Millar spoke to Mr Grenfell. Mr Grenfell said that he would prefer the matter to be dealt with in the sale and purchase agreement rather than in a side letter. Mr Millar reported this to his team at Minter Ellison at 9.07 pm:

> Just off the phone with Andrew and then Amon.
> Andrew favours another escrow on this issue with the retention for adjustment/apportionments. That means a further tweak to the agreement but no need for changes to the deed of release and no need for the side letter.
> Current Horizon position is document to be signed by all sides by 3pm tomorrow or no deal.
>
> So tomorrow we need to achieve the following:
>
> 1. SPA to be further changed to reflect escrow. We have to confirm amount of escrow – have said $250k.
>
> 2. Another escrow agreement prepared based on first one.
>
> 3. Matt to produce major transaction resolution plus board minutes etc to approve transaction. Get to Paul and MN to sign receive[r] bits.
>
> 4. Chris/Michael to form view on ability to sign SPA without syndicate consent as doubt it will come in time.
>
> 5. SPA to be signed.
>
> Easy!

[75] Mr Millar updated the vendor group, including Mr De Bernardo, at 9.13 pm:

> Having spoken with Andrew and Amon tonight – for various reasons we have suggested dealing with this adjustment/apportionment issue with another escrow. We have suggested a second escrow of $250k to meet any payment that might be due under the adjustment or apportionment.

> This will require another tweak to the agreement and another escrow agreement that we can prepare in the morning. It means no change to the deed of release (which I think is already agreed by the aussies) and no side letter.
>
> I have urged Amon to get his guys to accept the $250k, (rather than the $1m!).

[76] Mr Nunns discussed the matter with Messrs Anand and McLoughlin that evening and was instructed to amend the sale and purchase agreement accordingly on the basis, however, that they would give further consideration to the amount of the retention. Mr Nunns sent a copy of the revised agreement to Messrs Anand and McLoughlin at 7.51 am on 8 August 2012, copying in other members of the purchaser group. His email relevantly stated:

> As discussed last night, we have amended the SPA to provide for a second escrow dealing with the adjustment amount and apportionments. Neil is preparing the accompanying escrow deed.
>
> The vendors are willing to accept an escrow on the basis that it is set at $250K. Their view is that the historical fluctuation amount is c. $150K. The escrow of $250K does not limit Horizon's entitlement to be paid the full amount of the adjustment, although before agreeing to the escrow Horizon will want to be comfortable that $250K leave[s] enough headroom to cover the anticipated adjustment.
> ...
>
> If you are happy with these amendments and the $250K size of the escrow, we will get this across to Neil.

[77] Mr Anand promptly advised Mr Nunns that he was happy for the revised agreement to be sent to Minter Ellison. He said that he would review it in detail within the hour. Mr Nunns then sent the revised agreement to Minter Ellison:

> Attached is the SPA that Matt sent across last night with changes accepted and amendments marked.
>
> We have left the 250K highlighted for confirmation as PWC is checking historical levels, but we wanted to get you the draft now so we can discuss any legal issues.
>
> We have used the Adjustment Escrow terminology as suggested.

[78] Mr Millar responded 10 minutes later saying that he was happy with the amendments and asked "can you please work on agreeing the number". Later that morning, at 11.45 am, Mr Nunns sent a further email to Minter Ellison confirming "250K for the Adjustment Escrow Amount is agreed".

[79] That afternoon, Minter Ellison sent execution copies of the sale and purchase agreement to Messrs De Bernardo and Grenfell with instructions on how these should be signed. Minter Ellison advised that the agreement should not be signed until after the shareholder resolutions approving the transaction were signed by Mr Grenfell on behalf of Hastie Holdings. Mr Grenfell responded to the group, including Mr De Bernardo, with the following suggestion to expedite the process:

> Can I suggest that to keep things moving Paul sign and return with instructions for it to be held in escrow subject to receipt of the shareholder resolution.

[80] Mr De Bernardo agreed with this suggestion. He responded by email to the group saying "will do". The agreement for sale and purchase agreement was signed by all parties later that evening.

Analysis

[81] AIL and HNZ were profitable businesses with well-established positions in the market. However, once Hastie Holdings was placed in receivership, it was inevitable that new owners would have to be found for them. This would involve either an assets sale or a share sale. If the former, any sale agreement would have to be signed by Mr De Bernardo as the sole director of the companies. If the latter, the agreement would need to be signed by Messrs Grenfell and Black as the receivers of Hastie Holdings. Either way, consent would be required from the security trustee to release the assets from the charge. Any sale of assets by the companies would also require consent from Messrs Grenfell and Black, as receivers of Hastie Holdings, because it would be a major transaction requiring shareholder approval.

[82] Mr De Bernardo was an experienced director and would have understood all of this. Given his long personal and family association with the companies, Mr De Bernardo was naturally keen to ensure that a good owner for the businesses was found and that existing staff and customer relationships were maintained. He decided to remain as a director to see the sale through. He was comfortable that the companies could continue to trade pending completion of the sale, because they were trading profitably and had access to sufficient cash reserves to meet their obligations in a timely fashion.

[83] Mr Grenfell took care to ensure that Mr De Bernardo understood their respective roles and in particular that Mr De Bernardo remained responsible for all AIL and HNZ board decisions. He told Mr De Bernardo that he should seek independent advice if he considered this necessary, which he subsequently did.

[84] It is correct that it was Mr Grenfell who suggested that Grant Samuel be engaged to manage the sale process. However, Mr De Bernardo was comfortable with this appointment and he signed the engagement letter which summarised the sale process proposed by Grant Samuel. Mr Grenfell also suggested that Minter Ellison be engaged to provide legal advice and carry out the necessary legal work. Mr De Bernardo was also content with Minter Ellison's engagement. The engagement letter was addressed to him as director of AIL and HNZ and he understood that Minter Ellison was acting for these companies.

[85] Grant Samuel managed the sale process, as it was instructed to do. Mr Grenfell did not give any directions or instructions to Mr De Bernardo regarding the sale process. Mr De Bernardo approved the final form of the information memorandum which detailed the sale process and timetable. He also approved Grant Samuel's subsequent modifications to the sale process, including the modification to accommodate Horizon's request for an extension of time to complete its due diligence.

[86] There was no debate about which of the two main bids should be preferred; Horizon was clearly the front runner. The fact that Horizon achieved this status in the sale process was not the result of any direction or instruction by Mr Grenfell to Mr De Bernardo.

[87] Grant Samuel and Minter Ellison took the lead throughout the sale process, which was conducted in a tightly condensed timeframe. Mr De Bernardo and Mr Grenfell were kept fully informed of all material developments throughout and independently provided input as necessary. There is no evidence indicating that either misunderstood their respective roles and responsibilities in this process. Given the compressed timetable, it made sense for Mr Grenfell to be included as part of the vendor group. He had to consent to the transaction on behalf of the

shareholder. Further, he had to advise the security trustee on whether the sale process was appropriate and likely to have achieved the best price reasonably obtainable for the assets. The security trustee required this advice to determine whether to consent to the assets being released from its charge to enable the sale to proceed.

[88] The amount of $250,000, to be held for the purpose of paying any shortfall in working capital or for outgoings, was suggested by Grant Samuel on the basis of financial information it had access to in the due diligence data room which it managed. No one on the vendors' side questioned the appropriateness of this figure. Neither Mr De Bernardo nor Mr Grenfell made any comment about it. They were apparently content with Mr Cotter's analysis. There can be no suggestion that Mr De Bernardo acted under any form of direction or instruction from Mr Grenfell in agreeing to this provision in the agreement. Mr Grenfell preferred the matter to be dealt with in the agreement itself, rather than in a side letter. However, that had nothing to do with the amount to be held, which is the critical issue in this case.

[89] Mr Grenfell did not instruct Mr De Bernardo to sign the agreement. He suggested that, because of the time pressure, Mr De Bernardo could proceed to sign the agreement before he received the signed resolution from the shareholder approving the transaction so long as the agreement was held in escrow pending receipt of the resolution. However, this recommendation simply related to the timing of execution, not whether it was appropriate for Mr De Bernardo to sign. That was a decision Mr De Bernardo made, exercising his own independent skill and judgement, without any influence from Mr Grenfell.

[90] The plaintiff's claim is that after Hastie Holdings was placed in receivership, Mr De Bernardo was required or accustomed to act in accordance with the directions or instructions of Mr Grenfell, in particular because:

(a) Mr Grenfell initiated, organised and oversaw the process leading to the sale of Assets of HNZ and AIL;

(b) although the SPA was signed on behalf of HNZ and AIL, Mr Grenfell was the ultimate decision-maker for HNZ and AIL in respect of the terms of the SPA, the price the assets were sold for and the final decision to agree to the SPA.

[91] A close examination of the facts set out in this judgment shows that this claim cannot be supported. Mr Grenfell did not involve himself in the corporate governance of AIL and HNZ. He was not the locus of effective decision making for those companies with respect to the sale; Mr De Bernardo undertook this role. The fact that Mr Grenfell had to approve the transaction, as the receiver of the sole shareholder, does not alter this. He did not give directions or instructions to Mr De Bernardo in relation to the sale process or the agreement for sale and purchase. Indeed, there was very little direct communication between them.

[92] It follows that the plaintiff's claim that Mr Grenfell was a shadow director or a deemed director of AIL and HNZ cannot succeed. In these circumstances, it is neither necessary nor appropriate for me to consider the remaining issues because these are all contingent on a finding that Mr Grenfell owed duties as a director of these companies. For the reasons given, I have concluded that he did not.

Result

[93] The plaintiff's claim is dismissed.

[94] If the question of costs cannot be resolved, memoranda should be filed. Any party seeking costs should file and serve a memorandum within 21 days of the date of this judgment. Any memorandum in response should be filed and served within 14 days thereafter.

M A Gilbert J