IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2014-441-38
[2015] NZHC 1680

UNDER	Part 18 of the High Court Rules, the Declaratory Judgments Act 1908 and the Companies Act 1993
BETWEEN	PUBLIC TRUST Plaintiff
AND	SILVERFERN VINEYARDS LIMITED Defendant

CIV-2014-441-39

UNDER	The Companies Act 1993
IN THE MATTER OF	an application under s 232 of the Companies Act 1993 for order declaring creditors' compromise not binding on plaintiff
BETWEEN	SOUTHLAND BUILDING SOCIETY Plaintiff
AND	SILVERFERN VINEYARDS LIMITED Defendant

Hearing: 10 July 2015

Counsel: M K Prendergast for Public Trust
S M Dwight for Southland Building Society
D A C Bullock for Silverfern Vineyards Limited

Judgment: 20 July 2015

JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] The plaintiffs each apply under rr 8.36 and 8.40 of the High Court Rules for orders that they are not required to answer certain interrogatories served on them by the defendant (Silverfern). The proceedings concern challenges made by the

plaintiffs to a compromise which Silverfern put to its creditors in February 2014, which was subsequently approved by the creditors.

[2] Southland Building Society (SBS) and Public Trust are creditors who voted against the proposal. They issued the present court proceedings shortly after the proposal was approved by the creditors. Among other allegations, they say that the compromise was not a valid compromise under the definition of "compromise" set out in p 14 of the Companies Act 1993 (the Act). They also contend that there were material irregularities in Silverfern obtaining approval of the compromise by the creditors, and that the compromise is unfairly prejudicial to them. They ask for declarations that the compromise is not in fact a compromise for the purposes of p 14 of the Act, and is accordingly void. They also seek orders that they (and other creditors within the same class) are not bound by the compromise.

[3] The proceedings are now set down for a two day trial commencing on 21 October 2015. Affidavits in the substantive proceedings have been filed on both sides, including affidavits for SBS and Public Trust in reply.

[4] On 9 June 2015, after the plaintiffs' reply affidavits were served, Silverfern served the interrogatories which are the subject of the present applications.

Background

[5] As at February 2014, Silverfern owed SBS the sum of $446,572.89, being the balance owing under a loan agreement entered into in December 2007. Public Trust was also a creditor of Silverfern in February 2014. It had lent Silverfern $1,800,000 in December 2007. By February 2014, that debt had been reduced to $1,090,417.

[6] The advances made by Public Trust and SBS to Silverfern were guaranteed by John Michael O'Connor and Rosemary Margaret O'Connor, the directors and shareholders of Silverfern.

[7] Prior to February 2014, Public Trust and SBS had both demanded payment of their debts. Public Trust had issued proceedings and obtained judgment for a sum of approximately $1,000,000, and had issued bankruptcy proceedings against

Mr and Mrs O'Connor. Those bankruptcy proceedings have been stayed pending the outcome of the present court proceedings.

[8] On 28 February 2014 Silverfern's board proposed a compromise to its creditors under p 14 of the Act. A meeting of creditors was called, with voting to be by postal ballot.

[9] The proposal divided Silverfern's creditors into two separate classes. Class one was described as "creditors holding personal guarantees from John/Rosemary O'Connor". There were six creditors in this class. The largest of them was Crown Asset Management (CAM). The next largest were Public Trust and SBS. The three remaining creditors in the class were professional firms owed relatively small amounts by Silverfern.

[10] The class two creditors were described as "other creditors". There were only two of them, both trusts with which Mr and/or Mrs O'Connor had an association.

[11] The class one creditors, excluding CAM, were to have their debts paid at the rate of 1.455 cents in the dollar. CAM was not to receive any payment, and nor were the class two creditors. The guarantees given by Mr and Mrs O'Connor to the class one creditors were to be released, with no further consideration or payment to be provided by them.

[12] A background letter was sent to creditors with the compromise proposal. Among other things, the letter asserted that bankrupting Mr and Mrs O'Connor would result in a zero return for the creditors. The background letter also advised creditors that CAM was not to be paid under the proposal because an arrangement had been made for a trust associated with Mr John O'Connor (the Myoak Trust) to purchase the CAM debt and release the O'Connors' guarantees.

[13] The plaintiffs say that the Myoak Trust is under the control of Mr O'Connor, and that it is the party providing funding to Silverfern to make the distribution to creditors. It was not only the purchaser of the CAM debt, but also a class two creditor in its own right.

[14] As noted above, Public Trust and SBS both voted against the compromise proposal. Two of the three professional firms voted in favour; the other did not vote. The Myoak Trust exercised CAM's vote as a class one creditor, voting in favour of the proposal. The Myoak Trust's vote was determinative, as without it the compromise would not have been carried by the necessary majority in number and three quarters in value of creditors voting on the proposal.[1]

The claims by Public Trust and SBS

[15] Public Trust and SBS each plead three causes of action. SBS pleads first that the provision in the compromise purporting to release the O'Connors unconditionally from all present and future obligations owed by them under their guarantees was invalid, as a compromise is required by s 227 of the Act to be made between the company and its creditors.[2] SBS says that a compromise under the Act cannot purport to release the obligations of third parties such as the O'Connors. It contends that the purported compromise is severely prejudicial to it, and amounts to a confiscation of its rights against the O'Connors.

[16] Public Trust's causes of action are similar. It asks for a declaration that the compromise does not qualify as such under p 14 of the Act and is accordingly void. In support of that claim, it first contends that the liability of Mr and Mrs O'Connor to Public Trust under the loan agreement was not in the nature of a personal guarantee and/or indemnity covered by the compromise. As a second string to its bow, Public Trust relies on the judgment it has obtained against Mr and Mrs O'Connor, contending that Mr and Mrs O'Connor's liability to it has merged in the judgment,

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1 Companies Act 1993, s 230(1) and schedule 5, cl 5(2).

2 Section 227 of the Act materially provides:

In this Part, unless the context otherwise requires, -

…

compromise means a compromise between a company and its creditors, including a compromise –

(a) cancelling all or part of a debt of the company; or
(b) varying the rights of its creditors or the terms of a debt; or
(c) relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt

creditor includes –

(a) a person who, in a liquidation, would be entitled to claim in accordance with section 303 that a debt is owing to that person by the company; and
(b) a secured creditor

…

and is accordingly not caught by the compromise provision which purports to release Mr and Mrs O'Connor "under all personal guarantees or indemnities". Public Trust seeks a declaration that Mr and Mrs O'Connor remain liable to it under the judgment, notwithstanding the compromise made between Silverfern and a majority of its creditors.

[17] SBS and Public Trust each make alternative claims under s 232(3) of the Act. They claim that there were material irregularities in obtaining approval of the compromise, and that the compromise is unfairly prejudicial to them and to other class one creditors.

[18] It is not necessary for the purposes of this judgment to refer to the various bases on which the plaintiffs contend that there were material irregularities in the creditors' approval of the compromise. Silverfern's interrogatories are directed only to the issue of whether the compromise is unfairly prejudicial to Public Trust, SBS, and the other class one creditors.

[19] The "unfair prejudice" claim is made under the following provisions of the Act:

> **232 Powers of court**
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> …
>
> (3) If the court is satisfied, on the application of a creditor of a company who was entitled to vote on a compromise that—
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> …
>
> (c) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs,—
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> the court may order that the creditor is not bound by the compromise or make such other order as it thinks fit.
>
> …

Silverfern's position

[20] Silverfern denies liability, and says essentially that the proposal is not unfairly prejudicial to Public Trust or SBS, because they would have done no better

if Silverfern had been put into liquidation and Mr and Mrs O'Connor bankrupted. It says that every creditor's compromise may be said to prejudice creditors to some extent, in that if the compromise is approved, the creditors are prevented from pursuing recovery of their debts from the company. The critical issue in Silverfern's submission is whether the prejudice to creditors has been *unfair*.

[21] In assessing whether any prejudice to Public Trust or SBS can be regarded as unfair prejudice, Silverfern says that it is relevant to consider what Public Trust and SBS *expected* to recover from Silverfern and Mr and Mrs O'Connor before the compromise proposal was put to the creditors and approved. It contends that a creditor's own (subjective) pre-compromise assessment of what it could recover from the debtor is relevant to the issue of whether any prejudice to that creditor arising out of the compromise can be said to be unfair.

[22] Silverfern's interrogatories are all directed to that general topic. The questions are broadly directed to what Public Trust and SBS thought they could recover from Silverfern and the O'Connors, at various dates from 2007 to the present, and from what sources. Silverfern says that the answers to its questions will or may tend to show that, immediately before the compromise, neither Public Trust nor SBS had or could have had any expectation that they would be able to recover from Silverfern and the O'Connors any more than the compromise gives them. It says that all that is required is that the answers should have a tendency to support its case or damage the plaintiffs' cases, and that the answers are accordingly relevant and should "go into the mix" when the Court comes to decide whether any prejudice suffered by Public Trust or SBS can be said to be unfair.[3]

Silverfern's interrogatories

[23] There are five questions:

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[3] All counsel referred to s 7(3) of the Evidence Act 2006, which provides:
"(3) evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding". Section 7(3) was held to be applicable to the relevance of interrogatories under the High Court Rules in the judgment of Associate Judge Bell in *Thurlow v Clements* HC Auckland CIV-2009-404-2849, 13 May 2011 at [15].

(1) When assessing Silverfern's application for finance, or for alterations of credit terms or settlement of debt for payment of a lesser sum than what was owed, at each time what was their assessment (formal or informal), or expectation, of their likely financial recovery from [Silverfern] and (separately) under guarantees given by John and Rosemary O'Connor? What likelihood did they place on recovering that sum or less and why?

(2) From what assets did they believe that this recovery could be made?

(3) At the time the plaintiffs voted against the compromise proposal, what was their assessment (formal or informal), or expectation, of their likely financial recovery from the liquidation of [Silverfern] and the bankruptcies of John and Rosemary O'Connor? What probability did they place on recovering that sum or less and why?

(4) From what assets did they believe that this recovery could be made?

(5) What is the plaintiffs' present assessment (formal or informal), or expectation, of their likely financial recovery from the liquidation of [Silverfern] and the bankruptcies of John and Rosemary O'Connor? What probability did they place on recovering that sum or less and why?

Interrogatories – relevant rules and principles

[24] Rules 8.36 and 8.40 of the High Court Rules materially provide:

8.36 Limitation of interrogatories by notice

(1) A Judge may, on the application of a party required to answer interrogatories, order that answers to interrogatories under rule 8.34 by that party—

(a) are not required; or

(b) need to be given only to specified interrogatories or classes of interrogatories or to specified matters that are in question in the proceeding.

…

(3) In determining the application, the Judge must make any orders required to prevent unnecessary or oppressive interrogatories or unnecessary answers to interrogatories.

8.40 Objection to answer

(1) A party may object to answer an interrogatory on the following grounds only:

(a) that the interrogatory does not relate to a matter in question between the parties involved in the interrogatories:

(b) that the interrogatory is vexatious or oppressive:

(c) that the information sought is privileged:

(d) that the sole object of the interrogatory is to ascertain the names of witnesses.

(2) It is not a sufficient objection that the answer to an interrogatory will determine a substantial issue in the proceeding.

(3) On an application under rule 8.36 in respect of an interrogatory, a Judge may—

(a) require the applicant to specify on what grounds the applicant objects to answer that interrogatory; and

(b) determine the sufficiency of the objection.

(4) If the Judge determines that the objection is not sufficient, the application is not entitled to object to answer the interrogatory.

[25] On the question of whether an interrogatory is relevant (that is, relates to a matter in question between the parties) I have referred above to s 7(3) of the Evidence Act and to the judgment of Associate Judge Bell in *Thurlow v Clements*.[4] In that case, the Associate Judge referred[5] to the commentary on s 7(3) in Mahoney McDonald Optican & Tinsley,[6] where the authors state:

> The test of relevance under s 7(3) contains two prongs: materiality and probativeness. Materiality asks whether the evidence is offered about a matter or fact at issue in the case ("of consequence to the determination of the proceeding"). Probativeness asks whether the evidence has a logical "tendency to prove or disprove" the material proposition on which it is offered. Both prongs must be satisfied to pass the s 7(3) relevance test. Evidence will be irrelevant if it is not offered about a material issue in the proceeding or has no tendency to prove or disprove anything about a material point in the case…Questions of materiality and probativeness can therefore be assessed only within the concrete circumstances of a particular proceeding.
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> …

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4 Above n 3.

5 At [16].

6 Mahoney and others, *Evidence Act 2006: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2010) at [7.02], [7.06].

> To satisfy the test of relevance, s 7(3) requires only that the evidence have a "tendency" to prove or disprove a material proposition in the proceeding, not prove or disprove it absolutely…the links in the chain of reasoning need not be unassailable or ironclad.

[26] In *Shore v Thomas*, Gresson J considered that it was not necessary that the answers to interrogatories should be conclusive of the questions at issue: it is enough that they should have some bearing on the question and that they might have a tendency to establish, or form a step in establishing, the allegations made.[7] In *Todd Pohokura Limited v Shell Exploration NZ Limited & OMV New Zealand Limited*, the Court of Appeal noted that an interrogatory must be directed towards advancing one side's case or damaging the other side's case, and must accordingly be relevant to an issue on the pleadings or a fact in dispute for determination.[8]

[27] The Court of Appeal also stated in *Todd Pohokura* that an interrogatory must also, like a question in cross-examination, be precise and unequivocal, and amenable to a direct and meaningful answer from information within the knowledge of, or reasonably available to, the person required to answer.[9] The interrogatory must not place unnecessary or burdensome obligations on the interrogated party or be prolix. Its purpose must not be to search or probe on a speculative basis that an answer may prove relevant (colloquially known as fishing). A question which offends those elements will fall within the general category of oppressiveness.[10]

[28] As an interrogatory is an exception to the settled manner of adducing evidence (and in particular to a defendant's right not to call evidence at trial), the Court must also be satisfied in cases where the interrogatory is opposed that the interrogatory is necessary. It will be rejected if it exceeds the legitimate requirements of the particular occasion.[11] A material consideration is whether briefs of evidence will be given by the party to be interrogated.[12]

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7 *Shore v Thomas* [1949] NZLR 690 at 695.

8 *Todd Pohokura Limited v Shell Exploration NZ Limited & OV New Zealand Limited* [2009] NZCA 561 at [14].

9 One of the interrogatories which was in issue was objectionable because it was open-ended and rolled up multiple subjects into one omnibus question. It was unlimited as to time, place and circumstances, and was not amenable to one answer. At best it would require multiple layers or stages.

10 Above n 7 at [15].

11 *White & Co v The Credit Reform Association* [1905] 1 KB 653.

12 *Todd Pohokura*, above n 7, at [16].

[29] An interrogatory may be rejected as imposing an unfair burden on the party who would be required to answer, if it has been served at a late stage in the preparation for trial and the party required to answer would have to make extensive enquiries covering an indeterminate period and an unlimited number of individuals, in an attempt to answer it.[13]

[30] On the question of legal privilege as the basis for an objection, counsel referred to the judgment of Master Towle in *Pearson v New Zealand Van Lines Limited*, in support of the proposition that a party should not be required to answer interrogatories where it had only obtained the ability to answer the questions from a privileged brief prepared by the party's solicitor.[14] On the facts of the case, the learned Master noted that the answering party is not required to answer if he swears that he has no information or belief except that derived from privileged sources.[15] The Master concluded that the right approach is that the defendant must disclose such information as he has of his own, or has acquired through his own, resources in response to a question of this nature.[16]

SBS' and Public Trust's objections

[31] Both Public Trust and SBS say that the interrogatories are irrelevant, in that they do not relate to any matter in question in the proceedings. They also contend that the interrogatories are oppressive and/or vexatious and seek information which includes privileged information. In addition, they say that the Court should exercise its discretion against allowing the interrogatories on the grounds of delay by Silverfern in serving them, and/or that Silverfern should have (but has not) sought discovery of documents before serving the interrogatories.

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13 *Todd Pohokura*, above n 8, at [22]-[23].

14 *Pearson v New Zealand Van Lines Limited* (1988) 4 PRNZ 698.

15 At 701.

16 *Pearson* was concerned with the cause of a fire, and Master Towle observed that:

> …But unless as a result of that knowledge or information [the answering party] can form his own opinion as to the cause of the fire, and if he could only form such an opinion as a result of reading reports which have been accepted as privileged, it would be illogical to deny the extension of the privilege and require a deponent to be more forthcoming. (at 701).

Issues

[32] The following issues fall to be determined:

(1) Does each of the interrogatories relate to a matter which is in question in the proceedings?

(2) Are any of the interrogatories oppressive?

(3) Are any of the interrogatories vexatious?

(4) Should the plaintiffs be excused from answering any of the interrogatories on the grounds that the information sought includes privileged information?

(5) Should the Court direct that the plaintiffs are not required to answer the interrogatories because of lateness by Silverfern in serving them, or because Silverfern has not sought discovery?

Issue (1) – Does each of the interrogatories relate to a matter which is in question in the proceedings?

[33] If they are relevant at all, the interrogatories can only relate to the plaintiffs' causes of action under s 232(3) of the Act, in which they plead that the compromise was unfairly prejudicial to them and to other members of the class one group of creditors. There is an allegation that the background letter was misleading in that it incorrectly stated that the alternative to accepting the proposal was the liquidation of Silverfern and the bankruptcy of the O'Connors (which would result in a zero return to creditors), but I do not think there could be any basis for argument that the plaintiffs' subjective assessments of their likely recoveries might tend to prove or disprove any fact relevant to the issue of whether the background letter was or was not misleading at the time that it was sent in February 2014.

[34] The particulars provided by the plaintiffs of their respective allegations that the compromise was unfairly prejudicial to them and other class one creditors, are

substantially the same. Taking Public Trust's amended statement of claim, those particulars are:

(1) the compromise purports to release John O'Connor and Rosemary O'Connor unconditionally from all present and future obligations owed by them jointly or severally under all personal guarantees or indemnities given in favour of any and all creditors in the class, or arising out of or in connection with such guarantees, which is unlawful and of no effect in the case of a creditor voting against the compromise proposal;

(2) as at 14 March 2014, John O'Connor and Rosemary O'Connor were indebted to [Public Trust] for the sum of $1,094,634.62 pursuant to the order for summary judgment;

(3) in return for the release of [Public Trust's] rights against [Silverfern], John O'Connor and Rosemary O'Connor, [Public Trust] will be paid under the compromise to a maximum amount of $15,865.57;

(4) that payment to the Class 1 creditors under the compromise may not have been made and may never be made prior to the release of John O'Connor and/or Rosemary O'Connor's guarantees;

(5) the compromise serves no legitimate commercial interest of [Silverfern] nor the creditors of [Silverfern] and its sole purpose is to secure the release of the guarantees of John O'Connor and Rosemary O'Connor to [Public Trust] and SBS;

(6) the proposal was proffered on the basis that John O'Connor and Rosemary O'Connor had no assets or capital and that bankruptcy would result in a zero return to creditors (so that nothing would be lost in voting in favour of the release of the guarantees). The O'Connors have extensive business interests as creditors, shareholders and directors of registered companies and trustees and creditors and

beneficiaries of trusts from which they may have access to funds to pay [Public Trust] and other Class 1 creditors;

(7) the affairs of [Silverfern] should properly be subject to investigation in liquidation; and

(8) the compromise is severely prejudicial to [Public Trust] and amounts to a confiscation of its rights.[17]

[35] Clearly interrogatories directed to the plaintiffs' assessments or expectations of likely recoveries from Silverfern or the O'Connors cannot advance matters either way on the matters pleaded in any of subparas (1)-(4) of these pleadings. What the compromise does or does not purport to do, what Mr and Mrs O'Connor did or did not owe to the plaintiffs, and whether the release of the O'Connors' guarantees will occur before or after the dividends are paid to creditors, are clearly not matters on which the plaintiffs' assessments or expectations of likely recoveries could be relevant.

[36] Nor in my view is any issue arising out of particular (7) likely to be informed by knowledge of the plaintiffs' subjective assessments or expectations of the likely recoveries at any given time.

[37] The plaintiffs' subjective assessments or expectations of likely recoveries will not affect the (subpara 8) question of whether there has or has not been a "confiscation of rights", and the rest of that subparagraph does not identify any new or different kind of alleged prejudice.

[38] The possibly relevant particulars, then, are those at subparas (5) and (6).

[39] As for the particulars at subpara (5), the subjective expectations or assessments of the plaintiffs as to likely recoveries will clearly have no relevance to the pleading that the sole purpose of the compromise was to secure the release of the guarantees given by Mr and Mrs O'Connor.

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[17] Public Trust's amended statement of claim, dated 30 July 2014 at para 34.

[40] Is the question of whether any legitimate commercial interests of the creditors is served by the compromise (raised by subpara (5) of the particulars) a question which could or might be informed by knowledge of the plaintiffs' subjective assessments or expectations as to likely recoveries? In my view it is not. Whether the compromise serves a legitimate commercial interest of Silverfern or its creditors is essentially a matter of fact, and in my view the question is to be assessed objectively at the time the compromise proposal was put to the creditors and voted on. A creditor's (pre-compromise) belief as to its likely recovery in a liquidation of Silverfern and/or bankruptcy of Mr and Mrs O'Connor may have been well wide of the mark, and in that circumstance I do not think the belief (or the reasons for the belief) could have any bearing on an objective assessment of whether the compromise did or did not serve a legitimate commercial interest of that creditor. And even if the creditor's (pre-compromise) belief proved to be accurate in every detail, I cannot see that the belief itself would be either probative or admissible – a creditor's belief that a compromise was in its legitimate commercial interests could not make it so. If the test is an objective one, it will be the underlying facts that matter.

[41] The decision of Winkelmann J in *The Bank of Tokyo-Mitsubishi UFJ Limited v Solid Energy New Zealand Limited & Ors*[18] supports the view that the issue of "unfair prejudice" in s 232(3) is to be assessed objectively. Her Honour noted that the substantive merits of a proposed compromise is an issue for the creditors, and the "unfairly prejudicial" limb is intended to provide the Court with a residual power to prevent abuse of the procedure. "The Court's role does not involve substituting its views of the compromise for that of the required majority of creditors. Nor does it involve the Court in second-guessing the wisdom or sense of fairness of creditors in voting by the required majorities in favour of the proposal".[19]

[42] Winkelmann J noted that the Law Commission had suggested that there would be unfair prejudice where there had been an abuse of process. In her Honour's view, that was too narrow a formulation. Winkelmann J went on to refer to

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[18] *The Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy New Zealand Ltd & Ors* [2013] NZHC 3458 at [182]-[185].

[19] At [182], citing *Morris Contractors Ltd (in receivership) v Matai Mining Ltd* HC Christchurch CIV-2010-409-724, 7 September 2011.

the test for unfair prejudice which had been suggested in *Re Portsmouth City Football Club Ltd*,[20] in which the Court considered it relevant to make both a "vertical" comparison and a "horizontal" comparison in considering whether unfair prejudice has been caused by a voluntary arrangement. A vertical comparison requires the Court to compare the position a creditor would occupy and the benefits it would enjoy in a hypothetical liquidation, with the position of the creditor under the compromise. Winkelmann J noted in *The Bank of Tokyo-Mitsubishi UFJ Ltd* that it has been suggested that this analysis identifies the "irreducible minimum below which the return in the voluntary arrangement cannot go".[21]

[43] A horizontal comparison compares the positions as between the creditors in a given class. The plaintiffs have not put their cases for "unfair prejudice" on the basis of any comparison of their positions with the positions of other creditors. There is accordingly no need to consider any "horizontal" comparison. The relevance of the interrogatories, if they are relevant at all, can only be to the "vertical" comparison, under which the plaintiffs' positions under the compromise are to be compared with the positions they would enjoy in a hypothetical liquidation and/or bankruptcy of the O'Connors.

[44] What the plaintiffs may or may not have expected in terms of likely recoveries from Silverfern and/or the O'Connors could not tend to prove or disprove any fact relevant to the "vertical comparison" referred to by Winkelmann J in *The Bank of Tokyo-Mitsubishi UFJ Ltd*. If the reality is that a creditor would have been no better off if the compromise had not been approved, that reality will not be changed by the fact (if it is a fact) that the creditor believed otherwise. Similarly, if a creditor believed that a proposal would put it in a better position than it would have been in if the proposal had not been approved, that state of belief could not inform the decision as to whether the compromise in fact places the creditor in a better position. Regardless of what the creditor may have believed, it will be an objective question for the Court, applying the "vertical comparison" test, whether in fact the creditor will be better off (or at least as well off) under the compromise.

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[20] *Re Portsmouth City Football Club Ltd (in administration)* [2010] EWHC 2013, [2011] BCC 149 (Ch).

[21] Above n 18 at [185].

[45] The particulars pleaded at subpara (6) in para [34] do not provide any stronger basis for Silverfern's contention that the interrogatories relate to a matter which is in question in the proceedings. First, the plaintiffs do not plead that the alleged unfair prejudice arises because they *will* be worse off under the compromise than if Silverfern were liquidated and Mr and Mrs O'Connor bankrupted: they plead only that the O'Connors have extensive business interests from which they *may* have access to funds to pay the plaintiffs and other class one creditors. As Ms Dwight and Mr Prendergast made clear at the hearing, what is said to have been lost is the ability to have the O'Connors' financial affairs properly investigated. That issue is pleaded expressly in the next subparagraph of the particulars, in which Public Trust pleads that the affairs of Silverfern should properly be subject to investigation in a liquidation.[22]

[46] Secondly, I repeat my view that what Public Trust or SBS may have believed (or may now believe) about their ability to recover from Silverfern and/or the O'Connors cannot go to the question of whether, as a matter of objective fact, they are worse off under the compromise than they would be if it had not been approved.

[47] Interrogatories (1) and (2) relate to the pre-compromise period going back to the dates of the advances made by Public Trust, and SBS. On the view to which I have come, these interrogatories do not relate to any matter that is in question in the proceedings. I make an order that Public Trust and SBS are not required to answer them.

[48] The same result must follow in respect of interrogatories (3)-(5). The plaintiffs' subjective assessments, or expectations, of their likely financial recovery from the liquidation of Silverfern and/or the bankruptcies of the O'Connors as at the dates they voted against the compromise and as at the present time, cannot in my view inform the objective assessment which is to be made under the "vertical comparison" test. And the plaintiffs' case as pleaded (and advanced in the submissions made at the hearing) appears to be put no higher than that the O'Connors *might* have other assets which could produce a better result for the

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[22] Public Trust's amended statement of claim, paras 34(f) and (g); SBS' second amended statement of claim paras 26.7 and 26.8.

plaintiffs than the compromise, and that that possibility should be the subject of an investigation in a liquidation and/or bankruptcy of the O'Connors.

[49] I accordingly conclude that interrogatories (3)-(5) do not relate to any matter in question in the proceeding, and that Public Trust and SBS should not be required to answer them.

[50] It follows that I do not consider that the interrogatories are necessary, in the sense discussed by the Court in *Todd Pohokura*.[23] Silverfern clearly knows what recoveries were and are possible from its own assets, and it presumably knows (or can ascertain easily enough) what recoveries would have been (and are) likely from Mr and Mrs O'Connor. And it now has the plaintiffs' briefs of evidence in the substantive proceedings.

Issues (2)-(5) - Are any of the interrogatories oppressive? Are any of the interrogatories vexatious? Should the plaintiffs be excused from answering any of the interrogatories on the grounds that the information sought includes privileged information? Should the Court direct that the plaintiffs are not required to answer the interrogatories because of lateness by Silverfern in serving them, or because Silverfern has not sought discovery?

[51] In the light of the orders I have made on issue (1), there is no need for me to consider the plaintiffs' objections based on alleged delay, failure to seek discovery, oppression, privilege, or that the interrogatories are vexatious. On those issues, I note only that, had it been necessary, I would have held that the plaintiffs did not make out their cases based on (i) oppression and (ii) that answering the interrogatories would have required them to have recourse to (and thereby disclose) privileged communications. The plaintiffs did not produce sufficient evidence to provide a foundation for any finding of oppression. There was no evidence, for example, of how many files the plaintiffs hold relating to the affairs of Silverfern and the O'Connors, or how much time would have been required to work through those files, and to locate and confer with any relevant employees or ex-employees. Nor was there an adequate basis in the evidence for a finding that the plaintiffs would not have been able to answer the questions without recourse to privileged communications.

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[23] Above n 8.

Result

[52] I direct that the plaintiffs are not required to answer any of the interrogatories. In the ordinary course, the plaintiffs would be entitled to costs, but I did not hear detailed argument from counsel on costs, and in particular the possible effect a costs order might have on Silverfern and the compromise itself (in the event of Silverfern succeeding in the substantive litigation). As a hearing date has now been allocated for the substantive proceedings, I think the better course is to reserve costs on the application. Costs are reserved accordingly.

Associate Judge Smith

Solicitors:
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Cavell Leitch, Christchurch for Southland Building Society
Lee Salmon Long, Auckland for Silverfern Vineyards Limited