**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA476/2016**
**[2017] NZCA 496**

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| BETWEEN | PEREGRINE ESTATE LIMITED<br>Appellant |
| AND | GREGORY JAMES HAY AND KIM EDWARD HOLLOWS AS TRUSTEES OF THE GREG HAY FAMILY TRUST<br>Respondents |

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| Hearing: | 10 October 2017 |
| Court: | Gilbert, Venning and Wylie JJ |
| Counsel: | D J Goddard QC for Appellant<br>N H Soper for Respondents |
| Judgment: | 1 November 2017 at 3.00 pm |

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**JUDGMENT OF THE COURT**

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**A The application for leave to adduce further evidence in support of the appeal is granted to the extent set out in [16] of the judgment.**

**B The appeal is dismissed.**

**C The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.**

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## REASONS OF THE COURT

(Given by Gilbert J)

### Introduction

[1] The issue arising on this appeal is whether the parties are bound by an expert's independent assessment of fair value for the purposes of a transfer of shares in exercise of pre-emptive rights in accordance with the company's constitution. This largely depends on whether the expert's assessment complied with the mandate in the constitution.

### Background

[2] The appellant, Peregrine Estate Ltd (Peregrine), held 74.86 per cent of the shares in Peregrine Wines Ltd (the Company). The respondents held the balance as trustees of the Greg Hay Family Trust (the Trustees). The Trustees wished to sell their shares so they issued a transfer notice in March 2015. Peregrine wished to purchase, but not at the price specified by the Trustees of $3.25 million. It had previously offered $1.414 million, in March 2013.

[3] In accordance with the Company's constitution, an independent expert was duly appointed to "fix" the "fair value" of the shares for the purposes of any transfer. The fair value fixed by the expert, Julie Millar of BDO Christchurch Ltd, was $2.62 million as at 30 June 2015. Although this was less than the sum the Trustees had sought, they chose not to withdraw their transfer notice. In the normal course, Peregrine would have been required under the constitution to tender payment of the purchase price in accordance with the fair value as fixed within a stipulated 14-day period. However, it did not do so because it considered that Ms Millar's assessment was excessive.

[4] Peregrine consulted John Hagen, another expert valuer. Mr Hagen subsequently reported that in his opinion the fair value of the shares at 30 June 2015 was $1.275 million, roughly half of Ms Millar's assessment.

[5] Mr Hagen concurred with Ms Millar that any assessment based on future maintainable earnings would be significantly lower than the underlying value of the Company's assets and it was therefore appropriate to place primary reliance on an asset-based assessment. He observed that it is not uncommon for agricultural and horticultural ventures to achieve relatively low earnings compared with the value of the assets employed.

[6] However, Mr Hagen disagreed with Ms Millar's assessment in two key respects. First and foremost, Mr Hagen considered that the assessment must be undertaken on the basis of a notional liquidation of the Company. Assuming a sale of the assets by a liquidator, Mr Hagen considered that the plant and equipment would realise book value. This reduced Ms Millar's assessment of the value of plant and equipment of $8.762 million by $851,000. The reduction to the value of inventory based on a notional liquidation was much greater. Mr Hagen arrived at a figure of $5.872 million on that basis, compared with Ms Millar's assessment of $8.762 million (the carrying value in the Company's accounts was $7.734 million). Mr Hagen then deducted the costs of the notional liquidation.

[7] The notional liquidation approach largely explains the difference between Mr Hagen's figure at this stage of the analysis of $1.72 million for the shares and Ms Millar's final assessment of $2.62 million.

[8] The second key difference in approach is that Mr Hagen considered a minority discount of 20 per cent was required, particularly because the shareholders' agreement provides that the shareholders' percentage shareholding shall be rounded to the nearest whole number for all purposes, including voting and dividends. This means that although the Trustees held fractionally more than 25 per cent of the shares in the Company, they could not defeat a special resolution proposed by Peregrine. Because Peregrine already has control, the acquisition of the Trustee's shares did not confer any strategic advantage. This minority discount reduced Mr Hagen's provisional assessment from $1.72 million to $1.376 million.

[9] Mr Hagen applied a further discount to allow for the lack of marketability of the Trustees' shares and the fact that the Trustees could not access the asset-based

value of the Company without the assistance of Peregrine. Absent a sale or a liquidation, the Trustees' only source of return on their investment for the foreseeable future would have been from the comparatively low future earnings expected to be generated by the Company. Applying this further discount, Mr Hagen arrived at his final assessment of $1.275 million as being the fair value of the shares.

[10] In the light of Mr Hagen's advice, Peregrine argues that the assessment carried out by Ms Millar was fundamentally flawed, contrary to established legal principles and not in accordance with the Company's constitution.

**High Court judgment**

[11] The Trustees applied for summary judgment for $2.62 million being the fair value of the shares fixed by Ms Millar. Associate Judge Matthews found that Peregrine had no arguable defence and was bound by Ms Millar's determination. He accordingly granted summary judgment on 5 September 2016.[1]

**Grounds of appeal**

[12] Peregrine appeals. First, it claims to have an arguable defence that Ms Millar did not "validly" determine the fair value of the shares in terms of the Company's constitution. Second, it claims that she arguably failed to exercise her own judgment about whether a minority discount should be applied and instead delegated this aspect of the determination to her solicitors. Third, Peregrine contends that it is at least arguable that Ms Millar's valuation did not conclusively determine fair value for the purposes of s 149 of the Companies Act 1993 (the Act), which prevents directors from disposing of their shares in a company for more than fair value. Accordingly, Peregrine claims to be entitled to set off any differential between the "fair value" fixed by the expert and the "fair value" that may be determined by the Court pursuant to s 149 of the Act.

[13] After summary judgment was entered, Peregrine issued proceedings against the Trustees seeking a declaration that Ms Millar's valuation is not a valid and

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1 *Hay v Peregrine Estate Ltd* [2016] NZHC 2097 [High Court judgment].

binding determination of the fair value of the shares for the purposes of the Company's constitution and seeking the appointment of another expert to undertake the exercise. Peregrine also claims that Ms Millar did not validly or correctly determine the fair value of the shares and the Court must now determine that issue for the purposes of s 149 of the Act. Peregrine seeks judgment in the new proceedings against the Trustees, or against Gregory Hay as a director of the Company, for the amount by which $2.62 million exceeds the fair value of the shares as assessed by the Court.

**The issues**

[14] The issues are whether any of the following defences are arguable:

(a) Ms Millar's determination was invalid and therefore not binding.

(b) Ms Millar wrongly delegated to her solicitors her duty to determine whether a minority discount should be applied.

(c) Ms Millar's determination did not conclusively determine fair value for the purposes of s 149 of the Act and Peregrine has a right of set-off for the amount by which the Court's assessment of fair value under s 149 exceeds that of the expert.

**Application to adduce further evidence**

[15] Peregrine applies for leave to admit further evidence in support of its appeal, being an affidavit from Lindsay McLachlan, the sole director of Peregrine, and a further affidavit from Mr Hagen.

[16] Mr McLachlan's affidavit updates the Court on the present position following the entry of summary judgment. All it does is attach the statement of claim that was filed by Peregrine against the Trustees and Mr Hay. We have already referred to this. The statement of claim is a matter of court record and we are prepared to receive it.

[17] However, we are not able to admit Mr Hagen's further affidavit because it is neither fresh nor cogent.[2]

[18] With reasonable diligence the evidence could have been obtained for the summary judgment hearing. Mr Hagen provided an affidavit for the purposes of that hearing and the further affidavit does not rely on any new information. The evidence is clearly not fresh.

[19] Nor is the evidence cogent. Mr Goddard QC for Peregrine accepted at the hearing that the evidence provided to the High Court, including Mr Hagen's first affidavit, is sufficient to found the arguable defences he contends for. Further, Mr Hagen's new affidavit is substantially in the nature of a submission directed to the legal issues identified by Mr Goddard (who was not counsel in the High Court). Indeed, Mr Goddard invited the Court to treat Mr Hagen's further affidavit as forming part of his submissions if it is not accepted as evidence.

**Was the expert's determination arguably invalid?**

[20] Mr Goddard contends that Ms Millar's valuation assessment is the product of errors that are so fundamental that it cannot be regarded as a valuation of the shares. Where, as in this case, the valuation is based on the value of the net tangible assets rather than future maintainable earnings, he argues that the expert was required as a matter of law to conduct the assessment on the basis of a notional liquidation of the company. This is because that is the only way a shareholder can access a company's assets. In failing to adopt this approach, Mr Goddard argues that Ms Millar substantially overstated the value of the Company's assets, particularly inventory, by basing the assessment on projected sales in the normal course of business over a three-year period. Moreover, he claims that the expert disregarded the costs of making such sales in the normal course of business over that period. He submits that the result is that Ms Millar valued some "hypothetical company that did not exist" that differed from the Company in fundamental and commercially unachievable respects. Mr Goddard says that Ms Millar's approach was therefore not only wrong in law, it was inherently illogical, internally inconsistent and did not represent a

[2] *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

valuation of the shares in the Company; in short, it was not merely negligent, it was irrational.

[21] Mr Soper for the Trustees acknowledged at the hearing that, in addition to the express terms set out in the constitution, terms must be implied that the valuation is to be carried out in good faith, honestly and impartially. However, there is no suggestion that Ms Millar acted other than in this manner. He submits that Ms Millar has done precisely what she was required to do — assess the fair value of the shares by applying her independent skill and judgment and acting in good faith, honestly and impartially. Mr Soper rejects the suggestion that the valuation must be carried out in accordance with any particular valuation principles or that it be "rational". In any event, Mr Soper submits that Ms Millar's valuation is entirely rational, was within the terms of the constitution, and is final and binding on the parties.

[22] The question as to whether Ms Millar's assessment of fair value is final and binding on the parties depends on whether she carried out the valuation exercise dictated by the constitution. We therefore start by examining the express terms of the constitution and then consider whether any other terms should be implied. Finally, we consider whether it is arguable that Ms Millar's valuation complied with the terms of the constitution.

*Express terms in the constitution*

[23] The constitution contains the following relevant provisions:

> **11. RESTRICTION UPON TRANSFER OF SHARES**
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> **Objects of clause**
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> 11.1. (1) Clauses 11.1 to 11.11 govern the sale of shares by and between shareholders of the company.
>
> (2) Clauses 11.1 to 11.11 must be given a fair, large, and liberal interpretation so as to best attain the following objects—
>
> (a) If any shareholder … desires to sell … any of the shares which are held by him or her, then he or she must first offer them for sale to the existing

shareholders in accordance with clauses 11.1 to 11.11; and

(b) Any shares offered in accordance with paragraph (a) must be sold—

(i) At the price fixed by the seller in accordance with clause 11.2(2)(a); or

(ii) At the "fair value" of the shares as fixed by the expert in accordance with clause 11.4; and

(c) Any offer to sell made as provided in this clause may be withdrawn by the seller if the "fair value" as fixed by the expert in accordance with clause 11.4 is not acceptable to the seller.

…

**Fixing of "fair value"**

11.4. (1) … if … there is a shareholder who is prepared to purchase the shares … at a lesser figure than the asking price, then the fair value must be fixed on the application of either party —

(a) By a person ("the expert") to be nominated by the President of the New Zealand Institute of Accountants.

…

(2) The expert (when nominated and in certifying the sum which in the expert's opinion is the fair value of the shares) is an expert and not an arbitrator.

(3) Accordingly the Arbitration Act 1996 does not apply.

(4) The value fixed by the expert is the "fair value".

…

**Seller can withdraw**

11.6. (1) If the fair value fixed by the expert in accordance with clause 11.4 is less than the sum specified by the proposing transferor in his or her transfer notice as the sum which he or she considers to be the value of the shares, then the proposing transferor may (at any time before the expiration of 14 days after the date on which the proposing transferor received notice of the fair value fixed by the expert) revoke the transfer notice which was given by him or her.

…

> (4) If the fair value fixed by the expert is higher than the asking price specified by the proposing transferor in his or her transfer notice, then the proposing transferee is bound to purchase the shares … at the asking price specified by the proposing transferor.
>
> *Settlement*
>
> (5) … within 14 days after the expiry of the period within which the proposing transferor may revoke the transfer notice (if at the fair value fixed by the expert) …
>
> (a) The purchasers must tender the price of the shares to the proposing transferor; and
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> (b) The proposing transferor must tender in return to the purchaser the signed share transfer and the relative share certificate.

[24] It can be seen that the constitution provides for a detailed and highly prescriptive process that is intended to facilitate the exercise of pre-emptive rights in the event of a shareholder wishing to sell his or her shares. One of the objects is to ensure that any sale by one shareholder to another shareholder will be at the price fixed by the intending seller in a transfer notice or at the lesser sum fixed by an independent expert as the fair value of the shares. There is a mechanism to ensure that an appropriately qualified independent expert can be appointed even if the parties cannot agree on one.

[25] The process for fixing fair value if an expert is appointed is intended to be expeditious, final and binding. Unlike an arbitration, there is no right of recourse to the court for error of law in the event that either party is dissatisfied with the price fixed by the expert. However, because the expert undertakes his or her task as an expert, not as an arbitrator, he or she is not immune from suit for negligence. The plain intention is that the parties will be bound by the price fixed by the expert as the fair value of the shares for the purposes of the sale. However, a purchasing shareholder may then pursue the expert for loss if he or she considers the amount fixed is unjustifiably high as a consequence of negligent error or omission by the expert.

*Implied terms*

[26] In reliance on this Court's decision in *Boat Park Ltd v Hutchinson*, Mr Goddard contends that "fair value" in cl 11 of the constitution must be interpreted to mean fair value assessed in accordance with basic valuation principles.[3] Further, he submits that it was an implied term that the expert would act in good faith and not arbitrarily, capriciously or irrationally in fixing the fair value of the shares.

[27] Mr Goddard argues that to come within the mandate in the constitution the valuation would need to be rational, in the sense of being internally consistent, and logical, such that a valuer properly addressing the enquiry required by the constitution could arrive at the assessed value. Mr Goddard acknowledges that "rationality" in this context means more than "not negligent" because the authorities are clear that mere negligence is not sufficient to take an expert's assessment outside his or her mandate. He submits that there is clear daylight between these two concepts; for example, a valuer could act rationally in arriving at a particular valuation but nevertheless be negligent for failing to follow up on relevant lines of enquiry.

[28] In *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*, McHugh JA considered the terms that could be implied in this context:[4]

> … it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. … While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value.

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3 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 82–83.

4 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (NSWCA) at 335–336.

[29] While endorsing this analysis, Mason P explained in *Holt v Cox* that there are limits to the types of error which will be overlooked by the courts — "there are mistakes and mistakes".[5] He emphasised that the ultimate issue is always whether the valuation was in accordance with the terms of the contract. Mason P considered that a useful analogy could be drawn with administrative law where "the decision maker has an area within which he or she may make mistakes, even mistakes of relevance or law, without failure to exercise the jurisdiction conferred, or exposing the decision to quashing".[6] On the other hand, "those mistakes which involve a failure to address something which the statute requires to be taken into account … will expose the decision to judicial review on jurisdictional grounds".[7]

[30] In his dissenting judgment in *Mercury Communications Ltd v Director General of Telecommunications*, Hoffman LJ explained the important distinction between mistakes on matters that have been entrusted to the decision-maker and those falling outside the scope of that jurisdiction.[8] If the expert is required by the terms of the mandate to make a determination in accordance with prescribed principles, he or she must do so. Although the expert must decide what those prescribed principles mean, an error in interpreting them is likely to invalidate the resulting determination. This is because it is ultimately for the Court to determine what the terms of the mandate are and therefore the scope of the expert's jurisdiction. If the expert misinterprets the prescribed principles, he or she will not do what has been asked.

[31] Hoffman LJ's analysis in *Mercury Communications* was endorsed by the Court of Appeal of England and Wales in *Barclays Bank plc v Nylon Capital LLP*.[9] The Court considered that in the absence of any direction to the contrary in the mandate, an instruction to an expert to determine the value of specified shares in a company would require a valuation based on the legal rights and obligations attaching to those shares. If the valuation was not carried out on that basis because

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5 *Holt v Cox* (1997) 23 ACSR 590 (NSWCA) at 596–597.
6 At 597.
7 At 597.
8 *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125 (EWCA) at 1140.
9 *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2012] Bus LR 542 at [33].

the expert made an error of law concerning those legal rights and obligations, it could be vulnerable to attack. Lord Neuberger said:[10]

> Of course, it is very dangerous to generalise, as the extent of the expert's mandate in any case must depend on the words of the particular contractual provision and the documentary, factual and commercial matrix of that provision. None the less, in the absence of any other direction or indication, it seems to me that a contractual provision which simply required an expert to value specified shares in a company may well not mean that his determination was immune from attack if it could be shown that, as a matter of law, he had valued the shares on the wrong basis. His contractually agreed instructions could, (I emphasise again) in the absence of a provision or indication to the contrary, be said to be to value the shares in accordance with the legal rights and obligations they carry with them. To value shares on the assumption that they could not be freely sold, when, as a matter of law, they could be, would not, it can be said with force, result in a valuation of the shares according to the contractual arrangement between the parties.

[32] It is clear from these authorities that the critical question is always whether the valuation has been carried out in accordance with the terms of the particular contract. Errors on the part of the expert in carrying out the valuation assessment will not invalidate the determination unless the error was one the expert was not entrusted to make. Examples are where the expert has valued shares in the wrong company, valued the wrong number of shares, misunderstood the class of shares being valued or the legal rights attaching to them, valued the shares as at the incorrect date, or assessed the market value of the shares when the mandate was to assess their fair value. In mandating an expert to assess the fair value of specified shares, the expert is not authorised to: value shares in some other company; value a different number of shares; value shares in another class or having different legal rights; or assess the market value of the shares. That is not because there is an implied term that the expert must act rationally; it is because of the specification in the mandate of the property to be valued and the stipulated basis on which the valuation is to be conducted.

[33] We decline Mr Goddard's invitation to apply by analogy an English line of authority to the effect that a rationality requirement can be implied to constrain the exercise of a power by one party to a contract to make a decision affecting both

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10 At [65].

parties to it.[11] No reliance was placed on these authorities in the High Court. Mr Goddard did not refer to them in his written submissions and he did not foreshadow his reliance on them until after the respondents had filed their submissions. As a result, we did not have the benefit of full argument as to whether it would be appropriate to apply the principles established by those authorities in a case such as this.

[34] In any event, we are not presently convinced that those authorities are apposite. As Lord Steyn said in *Equitable Life Assurance Society v Hyman*, a rationality constraint could only be implied if it was strictly necessary in the circumstances. He observed that the "principle is sparingly and cautiously used" and emphasised that the "legal test for the implication of such a term is a standard of strict necessity".[12]

[35] In *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd*, an implied term of rationality was found to be necessary to address the concern that a contractual power of decision vested in one party might otherwise be abused. Rix LJ, who gave the principal judgment, stated:[13]

> It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused.

[36] The justification for an implied constraint on a contractual power of decision was also explained by Baroness Hale in *Braganza v BP Shipping Ltd*.[14] She considered that such terms were necessary to address conflict of interest, power imbalance and to ensure that contractual powers are not abused:[15]

> Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still

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11 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL); *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304; *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

12 *Equitable Life Assurance Society v Hyman*, above n 11, at 459.

13 *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd*, above n 11, at [66].

14 *Braganza v BP Shipping Ltd*, above n 11.

15 At [18].

> less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.

[37] Where an independent expert has been appointed by the parties to make a decision which binds them both, there is no conflict of interest and no question of power imbalance arises. There is no need for concern that the decision-making power will be abused.

[38] The parties made it clear in cl 11.4(4) of the constitution that "[t]he value fixed by the expert *is* the 'fair value'". It would be contrary to that express term for the court to imply a different term to the effect that "the value fixed by the expert is the fair value *only if the court considers this to be rational*". The parties agreed to be bound by the independent expert's assessment, not that of the court.

[39] The implied term contended for would not only be contrary to the express terms of the mandate in the constitution, it could not be justified as a necessary implication. It would defeat the expedition and finality intended by the expert determination process. It would leave considerable scope for any shareholder disappointed with the expert's determination to delay the share transfer for a lengthy period while the court conducts an independent review of the valuation and tests it for rationality.

[40] We do not consider that *Boat Park* assists Peregrine because that case turned on the proper construction of the particular contractual provision at issue.[16] *Boat Park* concerned an agreement for sale and purchase of land with part of the purchase price being secured by a second mortgage in favour of the vendor. The purchaser was permitted to borrow further money on the security of a first mortgage so long as the total borrowing on the first and second mortgages did "not exceed the nett sum of 75% of a registered valuer's valuation of the property". The purpose of

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16 *Boat Park Ltd v Hutchinson*, above n 3.

the clause was to ensure that the vendor retained adequate security for its loan. Understood against that background, the Court found that the term should be interpreted as requiring a current market valuation carried out in accordance with basic valuation principles and methods.[17] Different considerations apply here.

[41] In the present case the expert's mandate under the constitution was to fix fair value as between the shareholders, not fair market value or current market value. No particular valuation approach was prescribed. Nor were any particular valuation principles specified. The only requirement in the mandate was for the expert to assess the fair value of the particular shares. The parties entrusted the expert to carry out the valuation and agreed to be bound for the purposes of the share transfer by the fair value assessed in the exercise of the expert's independent skill and judgment, acting honestly and in good faith. If the valuation was carried out incompetently, the affected party would have a remedy against the expert but no right to resist the share transfer at the price fixed.[18]

*Did Ms Millar exceed her mandate under the constitution?*

[42] Mr Goddard submits that as a matter of law, any valuation of the shares based on the underlying value of the Company's assets had to assume a liquidation. He relies on *New Zealand Insurance Co Ltd v Commissioner of Inland Revenue*, a case in which the Commissioner had valued shares in a farming company for death duty purposes based on the value of the company's assets.[19] Cooke J stated that "underlying the assets-value method is always a notional liquidation, and that, in principle, the assets-value method is directed to the ascertainment of what would be the net result to the shareholder if liquidation were carried out".[20]

[43] Next, Mr Goddard refers to this Court's decision in *Hatrick v Commissioner of Inland Revenue*, another case where the Court was required to consider the reasonableness of the Commissioner's assessment of the value of shares for death

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17 At 82–83.

18 The appointment was confirmed in a letter of engagement which was on BDO Christchurch Ltd's standard terms and conditions. The shareholders accepted these terms which limited BDO's liability for negligence to four times the fee. This limitation clause likely explains why the present proceedings have been pursued.

19 *New Zealand Insurance Co Ltd v Commissioner of Inland Revenue* [1956] NZLR 501 (SC).

20 At 503.

duty and stamp duty purposes.[21] North J emphasised the importance of distinguishing between the value of the assets of a company and the value of a particular shareholding:[22]

> On other occasions the Court has thought it more realistic to fix the value of the shares by examining the nature and value of the assets of the business from which it may be determined what sum would be received by a shareholder on a notional liquidation. … But if the assets-value method was adopted then it was always recognised that the Court was asked to value, not the assets of the company, but shares owned by the vendor or the deceased person as the case may be, and therefore, … the Court having valued the assets must go on and endeavour to ascertain "the mind of a potential purchaser of those shares".

[44] The Judge went on to say that if the Commissioner had regard to the assets-value method as the more appropriate approach, "he was then required to go on and ask himself what sum would a purchaser have had to pay for those shares, and this at once involved an inquiry into all the circumstances both favourable and unfavourable likely to influence a vendor and purchaser in their friendly negotiations to fix a fair price".[23]

[45] It is important to bear in mind that the Commissioner's assessments in *New Zealand Insurance* and *Hatrick* were subject to review by the Court on appeal. The Court was required to consider whether the Commissioner's discretion had been soundly exercised in substance.[24] That is not the case here. It was entirely up to Ms Millar to determine the fair value of the shares, not the Court. Ms Millar correctly identified the shares to be valued and applied the "fair value" approach. She made no error in observing that this required consideration of what the buyer gains and what the seller gives up, with an equitable sharing of gains and losses to both parties.

[46] Peregrine may have grounds to disagree with Ms Millar's analysis and conclusion for the reasons advanced by Mr Goddard and supported by Mr Hagen's evidence. It is not necessary for us to express any views about that. We are satisfied

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21 *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641 (CA).
22 At 654.
23 At 660.
24 At 653–654.

that those criticisms, whether founded or not, cannot support a contention that Ms Millar stepped outside her mandate under the constitution.

**Is it arguable that the expert delegated her responsibility to determine whether a minority discount should be applied?**

[47] During the valuation process Mr McLachlan made it clear to Ms Millar that he considered a minority discount should be applied when assessing the fair value of the shares. In an email sent on 21 October 2015, Mr McLachlan was informed that Ms Millar took a different view for reasons that were given. Mr McLachlan responded on 12 November 2015 stating:

> … I have aired the circumstances of the Peregrine share valuation with a QC who, after due consideration, has informally advised that such circumstances would require a minority discount be applied and not to do so would be wrong at law. I will now arrange for the informal advice to be documented and will forward as a submission for your consideration prior to the end of next week.

[48] Mr McLachlan was referring to an opinion given by Trevor Shiels QC, who was counsel for Peregrine in the High Court. Mr Shiels formalised his advice in a written opinion dated 23 November 2015 and this was forwarded to Ms Millar. She decided that she should take legal advice from Chapman Tripp in the light of this opinion. Chapman Tripp advised on 17 December 2015 that they disagreed with Mr Shiels' view that a minority discount was required as a matter of law. Chapman Tripp considered that it all depended on the circumstances, as confirmed by the Supreme Court in *Fong v Wong*.[25]

[49] Ms Millar was clearly entitled to take legal advice on the issue and it is not surprising that she did so when confronted with an assertion from senior counsel that she was required as a matter of law to apply a minority discount when fixing the fair value of the shares. Chapman Tripp was able to assure Ms Millar that there was no such legal requirement and that she needed to consider all relevant circumstances in deciding whether such a discount was appropriate. In her final valuation, Ms Millar adhered to her earlier view that a minority discount should not be applied in the particular circumstances of this case. Although her reasons largely coincided with

[25] *Fong v Wong* [2010] NZSC 152, (2010) 20 PRNZ 250 at [6].

those identified by Chapman Tripp, we reject Peregrine's submission that this means that Ms Millar wrongly delegated this aspect of her assessment. Her assessment on this issue was consistent throughout. The decision she ultimately arrived at not to apply a minority discount was plainly hers.

**Does Peregrine have an arguable defence in reliance on s 149 of the Act?**

[50] Section 149 of the Act reads:

> **149 Restrictions on share dealing by directors**
>
> (1) If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other financial products issued by the company or a related company, the director may acquire or dispose of those shares or financial products only if,—
>
> (a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or financial products; or
>
> (b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or financial products.
>
> (2) For the purposes of subsection (1), the fair value of shares or financial products is to be determined on the basis of all information known to the director or publicly available at the time.
>
> (3) Subsection (1) does not apply in relation to a share or financial product that is acquired or disposed of by a director only as a nominee for the company or a related company.
>
> (4) Where a director acquires shares or financial products in contravention of subsection (1)(a), the director is liable to the person from whom the shares or financial products were acquired for the amount by which the fair value of the shares or financial products exceeds the amount paid by the director.
>
> (5) Where a director disposes of shares or financial products in contravention of subsection (1)(b), the director is liable to the person to whom the shares or financial products were disposed of for the amount by which the consideration received by the director exceeds the fair value of the shares or financial products.
>
> (6) Nothing in this section applies to financial products that are quoted on a licensed market.

[51] In *Thexton v Thexton* this Court concluded that it would be no answer to a claim under s 149 that the director had disclosed the information to another party or that the other party had access to that information.[26] Agreement of the other party would also not avoid the consequences of the section.[27] Nevertheless, the Court concluded that if an independent valuer certified that the price was fair having been provided with all material information known to the director or publicly available "it would be difficult subsequently for the other party to impeach the resulting transaction".[28]

[52] Mr Hay was a director of the Company at the relevant time but there is no suggestion that he withheld from Ms Millar any information that could be relevant to the assessment of fair value. Indeed, it appears that Mr McLachlan took responsibility for ensuring that all such information was provided to her. In these circumstances, Peregrine is likely to face real difficulty in seeking to make out its claim under s 149(5) that the shares were disposed of for other than fair value.

[53] Nevertheless, while it is clear from *Thexton* that a fair value assessment by a properly informed independent valuer will usually provide an answer to a claim made under s 149, this may not always be the case. The Associate Judge's conclusion that Ms Millar's valuation fixed fair value for both the purposes of the constitution and s 149 therefore may not be correct.[29] That issue should be left for determination in the separate proceedings Peregrine has issued. Nevertheless, for the reasons that follow, we are satisfied that those proceedings cannot provide a defence to the Trustees' claim in the present proceedings and it is therefore not necessary for us to determine whether it is arguable that Ms Millar overstated the fair value of the shares.

[54] The first difficulty with the set-off argument is that the claims involve different parties. The only available claim under s 149 is against Mr Hay as the director, not against the Trustees as the holders of the shares. Section 149 may not apply at all. Even if it does, the claim would be against Mr Hay in his capacity as a

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26 *Thexton v Thexton* [2002] 1 NZLR 780 (CA) at [14].
27 At [16].
28 At [21].
29 High Court judgment, above n 1, at [86].

director and could not be set-off against the claim he and Mr Hollows pursue in their capacities as the Trustees. Second, a claim under s 149 cannot give rise to an equitable set-off in any event because it does not impeach the claim for the price of the shares.[30] There is no claimed defect in the shares which have been duly conveyed free of encumbrances in accordance with the Company's constitution. Nor is there any right of set-off at law because the claim under s 149 has not been determined and is not liquidated. It follows that Peregrine has no arguable right of set-off against the Trustees based on s 149.

[55] We conclude that the fresh proceedings commenced by Peregrine in the High Court do not assist it in seeking to make out an arguable defence to the present claim. The first cause of action seeking a declaration that Ms Millar's valuation is not valid and binding for the purposes of the constitution is an abuse of process. That issue has been determined against Peregrine in these proceedings. The second cause of action based on s 149, at best, could afford a possible claim against Mr Hay in his capacity as a director of the Company. We express no view about the merits of that claim. However, it cannot give rise to a legal or equitable set-off against the Trustees' claim for the purchase price of the shares.

[56] Associate Judge Matthews was therefore correct to find that Peregrine has no arguable defence to the Trustees' claim. The appeal must accordingly be dismissed.

**Result**

[57] The application for leave to adduce further evidence in support of the appeal is granted to the extent set out in [16] of the judgment.

[58] The appeal is dismissed.

[59] The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Wellington for Appellant
Mike Garnham, Wellington for Respondent

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30 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA).