Wilding v Te Mania Livestock Ltd — [2018] NZCCLR 3

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CIV-2014-409-899; [2017] NZHC 717

21, 22, 23, 24, 27, 28, 29, 30 June; 1, 4, 6, 7, 8 July; 7, 8, 9, 10, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30 November; 1, 2 December 2016; 1–31 January; 1–28 February; 1–31 March; 12 April 2017

Davidson J

Headnotes

Companies — Enforcement — Personal actions by shareholders — Prejudiced shareholders — Liquidation on grounds of oppression, unfair discrimination or unfair prejudice — Jurisdiction of Court to order liquidation — Irretrievable breakdown in relationship between shareholders — One shareholder sought option to purchase others' shareholding in lieu of liquidation — One other shareholder insisted upon liquidation — Evaluation of conduct of putative purchaser — Conditions placed upon putative purchaser's option to purchase shares — Principles applicable to valuation of shareholding — Companies Act 1993, s 174.

The first plaintiff was the descendant of the founder of the Te Mania Aberdeen Angus Stud (the Stud), which was established in 1928. The first plaintiff's son, William Wilding, was the current manager of the Stud. In 1997, the Stud business was sold to the first defendant. Through the first plaintiff, the Wilding family held a 40 per cent shareholding in the first defendant. The other defendants owned the remaining shares. There had been an irretrievable breakdown of the relationship between the Wilding family and the other shareholders, except Mr Hong Weiguo (Mr Hong), the sixth defendant. The plaintiffs instituted proceedings in the High Court claiming relief under s 174 of the Companies Act 1993 (the Act) on the grounds that the Shareholders' Agreement had been breached. The first plaintiff sought the opportunity to purchase the other shareholders' shares in the first defendant at a value fixed by the Court. The third defendant, Mr John Harrington (Mr Harrington), wanted the opportunity to buy Mr Wilding's shares (and those of any other willing shareholders), but abandoned that position at the end of the trial and sought liquidation of the first defendant, unless the Court fixed the purchase price for his shares by Mr Wilding. Relevantly at issue was whether the first defendant should be put into liquidation, or whether the first plaintiff should have the opportunity to purchase the shares of the shareholders who wish to exit their investment (and, if so, at what price).

Held: (finding in favour of the plaintiffs)

(1) As the first plaintiff was the only shareholder who sought the opportunity to acquire the defendants' shares, his conduct in particular was for consideration, but it was also necessary to have regard to the conduct of other defendants, including Mr Harrington, who was the sole party opposing the first plaintiff having that opportunity (see [446]).

(2) Section 174 of the Act is broad in its scope, and may be invoked not just because of conduct that has already occurred, but that which is likely to occur (see [453]).

(3) The first plaintiff on the one hand, and the natural person defendants on the other (bar Mr Hong), were incapable of conducting the affairs of the first defendant in a way that was not unfairly prejudicial, unfairly discriminatory or oppressive to the others, such that it was not just likely, but certain, that the affairs of the first defendant would be conducted by all parties in a way which would fall within the ambit of s 174 (see [453]).

(4) There was no default by the first plaintiff relevant to the state of the first defendant or its shareholding that should count against him having the opportunity to buy the natural person defendants' shares (see [454]).

(5) Although the first plaintiff allowed the Wilding personal affairs to intermingle with those of the first defendant in a way which fully justified intervention, and put his family interests first without any reference to the concern of others or effect that may have had on the first defendant, so as to show disregard for the first defendant and its shareholders, such conduct was not disqualifying (see [455]).

(6) On the other hand, the first plaintiff fought for the very survival of the first defendant against a determined attempt by Mr Harrington, supported by other defendants, to liquidate the company, when that was not an appropriate course for them to take, such that had it not been for him the first defendant would have passed into liquidation with all the adverse publicity and uncertainties associated with that (see [458]).

(7) The first plaintiff's conduct in being a party to the hacking of Mr Harrington's email address was unlawful and a breach of trust, and was the most concerning of his conduct, but balanced against the other considerations which dictate whether the first defendant should be liquidated or not, such participation should not result in his disqualification from purchasing the shares (see [457], [458]).

(8) The first plaintiff would not be given the opportunity to purchase the shares in the first defendant without giving the Court an assurance that he would be able to find the money required to complete a share purchase and promptly (see [460]).

(9) While Mr Harrington's attempted liquidation was an understandable, if provocative, action, there was no evidence that demanded liquidation take place to protect the assets and there was no knowing what that would mean for the shareholders (see [463], [464]).

(10) In order to bring finality to the dispute, it should be a condition of the opportunity given to the first plaintiff to acquire the natural person defendants' shares that he undertake not to issue further proceedings in the name of the first defendant (see [466], [467]).

(11) The shares should be valued adopting a notional liquidation approach, insofar as the first defendant had seldom made a profit and had not generated enough earnings to justify an earnings-based valuation (see [472]).

(12) In valuing the shares, the Court retains an element of discretion to ensure that a fair value is reached, and the judgment should be remedial, to fit the circumstances of the case, such that the Court can fashion the remedy (see [474]).

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Sturgess v Dunphy [2014] NZCA 266.

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Willers v Joyce [2016] UKSC 43, [2016] 3 WLR 477.

Williams v Spautz [1992] HCA 34, (1992) 174 CLR 509.

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Interim judgment

This was an interim judgment in disposition of an application to wind up a company on the just and equitable ground.

PJ Dale and *VE Fletcher* for the first and second plaintiffs.

TJ Mackenzie for the first defendant.

BM Russell and *RJ Hopkins* for the second, fourth and fifth defendants.

IG Hunt and *C Light* for the third defendant.

DAVIDSON J.

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A. Introduction

[1] These are the Reasons for Interim Judgment delivered on 5 April 2017.

The Te Mania Aberdeen Angus Stud

[2] Te Mania Aberdeen Angus Stud is a renowned stud cattle breeder, which farms land north and south of the Conway River along the coast of North Canterbury. It is well known for an on-farm sale of two year old bulls in June each year, and the sale of yearling bulls in Spring.

[3] The stud was established in 1928 by Edwin Wilding, and the Wilding family has been involved since that time. The third generation is represented by the first plaintiff, Timothy Wilding (Mr Wilding) and his son William (William Wilding), who is the current manager.

[4] In 1997 the stud business was sold into a company called Te Mania Livestock Ltd (TML). The Wilding family for the first time had to work with shareholders outside the family. They include overseas and New Zealand interests and have evolved to the point that the Wilding family holds a minority interest.

[5] What had been a workable association has now reached an unhappy end. The future of the company and the Te Mania stud has been at issue, and all parties hope the Interim Judgment and these Reasons represent the last rites of severely fractured corporate and personal relationships. The principal issue for the Court was whether TML should be put into liquidation or whether Mr Wilding should have the opportunity to purchase the shares of other shareholders who wish to exit their investment, and if so at what price. The Interim Judgment answers that question and Mr Wilding has that opportunity on strict terms, explained further in these Reasons.

[6] Along the way a commercial approach to resolution was lost. These Reasons address multiple allegations and counter allegations played out over 32 days of hearing, with prior and subsequent litigation attendances, more than 1,300 pages of evidential transcript, and several thousand documentary exhibits. The value of the shares in dispute is out of all proportion to the costs of this litigation, which has unfolded with excruciating detail and contest on every conceivable issue.

[7] The scale of this litigation was such that it is not viable to refer to each witness and their evidence, however judgment is reached on all the evidence.

Te Mania Livestock Ltd (TML)

[8] The Te Mania stud is owned and operated by TML in which the Wilding family now holds a 40 per cent shareholding through Mr Wilding. The second, third, fifth and sixth defendants own the remaining shares.

[9] There has been an irretrievable breakdown in relationships between members of the Wilding family and the other shareholders, except the sixth defendant, Hong Weiguo (Mr Hong). TML continues to farm, but in an atmosphere of elevated distrust and recrimination which was on display throughout this long trial. TML cannot go on under its present structure, and all parties seek an end to that. It is only through the good offices of Simon Wing (Mr Wing) of BDO, as the Chair of an Oversight Committee put in place to manage TML through to judgment, the stock work undertaken on the farm, and the support of Heartland Bank, that TML and the shareholding have been preserved to be amenable to judgment. This was a near run thing.

[10] Until the end of the trial in December 2016, the third defendant, John Harrington (Mr Harrington), wanted the opportunity to buy Mr Wilding's shares and those of the other defendants who wish to sell. He abandoned that position and sought liquidation of TML, but otherwise asks the Court to fix the price which he says Mr Wilding should pay for his shares. Mr Harrington's position changed in part because he identified the deterioration in TML's equity over time. He saw further conflict and litigation and, like other defendants, he was concerned that if Mr Wilding gained control of TML there would be further litigation. The Court would not countenance that as an outcome and this judgment ensures that, bar the prospect of appeal. Mr Hong took no part in the litigation. The other defendant shareholders do not want the company liquidated, other than as a last resort in the event they are not able to sell their shares to Mr Wilding at a value fixed by the Court.

TML shareholding

[11] Over time the shareholding of TML has changed. TML has 675,400 shares on issue: Mr Wilding 273,990 (40.6

per cent), WH Holdings Ltd (WHHL) 170,470 (25.25 per cent), Mr Harrington 64,815 (9.6 per cent), Chun Win Wong (Mr Wong) 64,815 (9.6 per cent), and Weiguo Hong (Mr Hong) 101,310 (14.96 per cent).

[12] The five directors of TML are: Timothy Wilding (first plaintiff); John Harrington (third defendant); Hoong Bee Teck (Bee Teck) of Singapore (fourth defendant) and his alternate, Sarah Adams (Ms Adams); Wong Chun Win (Mr Wong) of Singapore (fifth defendant) and his alternate, Ms Adams, and Hong Weiguo of China (sixth defendant), and his alternate Ian MacDonald (Mr MacDonald).

[13] Bee Teck and Mr Wong are shareholders of WHHL and are broadly aligned with Mr Harrington in this litigation. I refer to Mr Hoong as "Bee Teck" and to Mr Wong as such because they were so described in much of the evidence. Bee Teck and Mr Wong are from Singapore. Mr Hong is from China and retains some connection with the Wilding family.

Land leased by TML

[14] TML over time has farmed leased properties including Te Mania, Wadi (Mt Admiral) and Rafa, owned by the second plaintiff, Te Mania Properties Ltd (TMPL), a Wilding family company. It has leased land nearby, including Lagoon Flat, owned by the second defendant, WHHL, which some of the defendants own. It has leased other properties, including Wenlock, Lansdowne and Kirriemuir (Ashburton), and has held rights to graze land administered by the Department of Conservation (DOC).

Te Mania Properties Ltd (TMPL)

[15] A striking feature of the case is the informality of TML's tenure of the properties owned by TMPL, in particular Wadi and Rafa, in respect of which no formal leases were ever entered. Their tenure was not formalised by the TML or TMPL directors as any orthodox and prudent board would have done. Lagoon Flat and Te Mania were owned by WHHL and TMPL respectively. Both were leased to TML under Agreements dated 28 January 2005 on similar terms. It is remarkable that these formal leases came to the end of their initial five-year term and to a disputed renewal term of five years without prior resolution by the TML directors of future tenure. After all, apart from the people involved, the lifeblood of TML was made up of the cattle and the lands on which they were farmed.

[16] Although Rafa and Wadi are not held by TML under a formal lease, for the purposes of judgment Mr Mackenzie, representing TML, properly acknowledged that by necessary implication, they are held on terms similar to the formal leases governing Te Mania and Lagoon Flat. That does not mean they were held for the same five plus five-year terms, as there was no term agreed, but the primary obligations of TML as lessee, and TMPL as lessor, are otherwise the same and thus relevant to the TMPL claim for compensation or damages for alleged breaches of lease by TML.

[17] The informality and insecurity of TML tenure was reflected in 2012–2014. There were many points of conflict between the shareholders and directors. At one stage Mr Wilding contemplated sale of those properties, and thus withdrawal of TMPL farms from TML use, because of financial pressure on the Wilding interests. No sale eventuated, and Mr Wilding says this was just a testing of the waters. The evidence indicates otherwise. Clearly, the loss of these leased lands would have destabilised TML. In 2014 Lagoon Flat was leased by WHHL to a neighbouring farming company, Terra Firma Land Co Ltd (Terra Firma). This is said by Mr Wilding to have been in breach of contract with TML, or otherwise in breach of obligations held by the defendants as directors of TML, given his contention that TML purportedly had the right of first refusal should WHHL have decided to lease Lagoon Flat after TML's lease came to an end, and the importance of Lagoon Flat to TML. The possibility of losing the lease of Lagoon Flat was addressed in a very casual way by the directors before becoming a sore issue, which remains the case for judgment.

Development of relationships

[18] Mr Harrington has worked in the rural sector for about 30 years, in New Zealand and Australia. On the evidence, including that of Mr Wilding, he is an experienced and skilled livestock manager, well versed in stock selection, breeding management, and genetics. He is of the school of management that grew up shepherding after leaving school at the age of 16. He came to Te Mania in February 1999.

[19] Over the next 13 years, the Te Mania stud business grew, first on three leased properties, Te Mania and Rafa owned by TMPL, and Lagoon Flat owned by WHHL. The area farmed grew from 750 ha to about 1,800 ha with the leases of Lansdowne in 2001, Wenlock in 2002, and Wadi in about 2006. Wadi had been owned by Mr Wilding's uncle.

[20] The shared aim for TML was to improve the genetic quality and predictability of the bulls, to secure higher stock prices based on their genetics. The plan included increasing the female mating herd from approximately 300 to more than 1,000, which would allow greater stock selection. As Mr Harrington described it, the larger cow herd acted as a "bigger filter" of the inferior animals. More bulls were bred, and sales increased from 140 in 2004, to 272 in 2012. Mr Harrington says that the genetic quality improved, evidenced by record bull sales and reflected in the Agri Breedplan, a genetic evaluation software programme, and one of the largest performance beef recording systems in the world. Te Mania is now one of the largest Angus genetic suppliers in New Zealand.

[21] After they met Mr Wilding, Bee Teck and Mr Wong invested in the New Zealand operation. Mr Wilding was involved in their decision to invest, and the necessary approvals. They acquired Lagoon Flat in the name of WHHL and took an assignment of a licence to occupy 17.4 ha (the DOC land) from a neighbouring farmer. WHHL acquired a shareholding in TML. Te Mania's Aberdeen Angus herd was sold into TML and thus the Wilding family held their interest in the stud through TML, with others. Mr Harrington later put a proposal to Mr Wilding and his wife, Katie Wilding (Mrs Wilding), that he with WHHL would inject funds into TML. He acquired 9.6 per cent of the shares, paying $3.60 per share. Mr Wong became a shareholder in his own name, and WHHL increased its shareholding. Later Mr Hong became a shareholder.

[22] A Shareholders' Agreement of 28 January 2005 allowed each shareholder to appoint a director, and Bee Teck became the director for WHHL. The management team included Bee Teck, but he lives in Singapore, so on the ground it comprised Mr Harrington, Lindsay Smith (Mr Smith) as an independent director, David Stone (Mr Stone) the then TML accountant, and "in practice", Mr Wilding.

Why has TML come to this pass?

[23] Put simply, TML is ungovernable under its present structure, and has been for several years. There has been no common purpose since 2013. There is entrenched and palpable personal enmity between the principal protagonists, Mr Harrington and Mr Wilding, and it extends to Mr Harrington's partner, Ms Adams. Where it began is uncertain, as there was once a close bond and mutual respect between Mr Harrington and the Wilding family. They shared working and personal lives, and that bond was evident when Mr Harrington suffered personal loss. When William Wilding gave evidence, that respect and bond of earlier times was abundantly clear.

[24] Mr Smith was in a good position as an independent director of TML to observe the breakdown in the relationships between the shareholders. Despite his association with the Wilding family, I found his evidence balanced, and his straightforward and perceptive observations are a useful filter for the animosity between the parties. Mr Smith's view was that the TML stud business grew faster than it should have done, and some shortcuts were taken, but if the parties dwelt on peripheral issues, they would not move forward. He was proved correct. He thought that the underlying problem was that Mr Harrington was the general manager of TML but Mr Wilding was seen as intrusive, and Mrs Wilding's involvement with the accounts was a problem for Mr Harrington. Mr Smith said Mrs Wilding gave "110 per cent plus" to the company, so it was not for lack of effort on her part that conflict developed. Correspondence between Mrs Wilding, Mr Harrington and Ms Adams was at times acerbic, in particular about Wilding accounts that should not have been paid by TML. A particular sore was TML money being used to help a young New Zealand rower, and another that TML paid Wilding family costs associated with protecting water rights.

[25] With the financial position of TML at best holding, but personal relationships worsening, the history of Te Mania in the period 2012 to 2014, and through to 2017 is studded with incident and acrimony. That it has come to this, a trial of such length, such division, and such cost, is summed up by Mr Smith saying "I can't believe it".

[26] The following narrative identifies the principal issues for separate determination.

2012

[27] The evidence shows how payments made by TML for the benefit of the Wilding family, or without Mr Harrington's authorisation, outraged him. This was elevated by Bee Teck to a statement that, if proven, such payments amounted to a "criminal breach of trust". This was never the case, and I make that finding now, given its reputational import. This was some two years before events culminated in mid 2014 with an allegation by Mr Wilding of serious herd mismanagement by Mr Harrington, including the deliberate starving of young bulls (also described as bull calves), and Mr Harrington soon after leaving his management position at Te Mania. In fairness I make my finding equally clear, that there was no deliberate starvation of the young bulls.

[28] Mr Wilding wrote a fulsome apology on 20 August 2012 addressed to "Johnny" (Mr Harrington) saying that he was "upset and apologetic" that his actions had caused such a rift, and that he was "mostly to blame". He asked that Mr Harrington not take out his frustrations on Mrs Wilding and said that his personal financial position had not allowed him to support TML as he wished. He suggested changes to financial and management strategy and asked Mr Harrington to accept his apology, and that they "at least communicate on a personal basis".

[29] Mr Smith said he thought that Mr Wilding may have "stepped over the line occasionally" and treated the company as if it was his own, but communication lines were poor, and the company was growing. He did not think "for one minute" that there was any malice in what Mr Wilding was trying to do, as it was always for the betterment of the company. There were differing "drivers", and some investors wanted a swift return on their investment and thought that return was not made quickly enough. Mr Smith described the parties' behaviour as "living in the past". No matter what TML achieved, and there were real successes, the trust and common cause between the shareholders were steadily eroded. As the relationships worsened, TML was exposed to more and more risk.

2013

[30] The lack of formal agreements about important contractual elements between the parties was reflected in January 2013 when Mr Wilding suggested that he (on behalf of TMPL) would invoice TML for grazing on Wadi over the previous six years, but adjust for $30,000 spent by TML on the Rafa house owned by TMPL. The idea that TMPL was owed unpaid rent for the past six years did not sit well with Mr Smith, and certainly not with Bee Teck.

[31] About this time Mr Wong and Bee Teck decided that they wanted to exit TML, but in an orderly way. In February 2013, they suggested downsizing TML so it might be sold to Mr Wilding, or that it should be sold as a whole. The status quo was not acceptable to Bee Teck as he thought it was unsustainable. Mr Smith too recognised something had to be done.

[32] From Bee Teck's perspective, at a meeting on 21 February 2013 it was agreed that an arrangement whereby TML paid for capital development on Wadi in lieu of rent was not working, and from 1 August 2012 annual rent of $30,000 would be paid, as it was the final issue to be resolved under a new management structure. Bee Teck and the other defendants resist the claim that TMPL is owed $90,000 rent for Wadi. TML funding then included a fixed loan of $1,000,000 from PGG Wrightson (PGGW) and an overdraft, and drought conditions were a challenge. Bee Teck wanted to sell stock to repay PGGW as much as possible. He did not like the idea of WHHL being asked to provide further security to refinance TML on an open-ended basis, which did not have an equivalent input from other shareholders.

[33] On 22 May 2013, Mr Wilding wrote to Mr Wong, Bee Teck and Mr Hong to tell them he was under financial pressure. TMPL receivership was in prospect unless he could sell assets, such as Wadi, which he had been trying to do. The farming business of a close friend had been put into receivership and it had shaken everyone.

[34] Paradoxically, relationships worsened further at a time when Mr Smith said that the company was in good heart, with the target of 1,000 breeding cows reached, and strong demand for Te Mania bulls. On 5 July 2013, the Minutes record the June sale of 150 two-year-old bulls exceeding expectations. Only two bulls were passed in, but sold after the auction. The Minutes record congratulations to all those involved. The account with Heartland Bank was in credit. A dividend would not be paid as the general feeling was not to pay dividends by resorting to overdraft. Mr Wilding offered to buy the shares he did not hold in TML, and WHHL land, but it was recorded that "no party wished to sell their shares".

[35] An "angel investor" came to light, possibly to purchase shares from WHHL, Mr Wong and Mr Hong, and who would want to lease Lagoon Flat with a right to purchase. Mr Harrington said that he had not been asked about this and would not stay at Te Mania if it transpired. The potential investor would want Mr Harrington to stay on. There were obstacles to this idea including price, and that Mr Harrington was not offered an exit. It came to nothing.

[36] Mr Wilding's position as of July 2013 was that he would not agree to sell TML unless they could achieve the "$8,000,000 plus" valuation that Mr Wong put on the company. Bee Teck had suggested a sale of shares, based on a lesser figure.

[37] The second to fifth defendants (generally "the defendants" and excluding Mr Hong) then made a proposal which became a running sore to Mr Wilding, and a central part of his case to which further reference is made. It was tabled by Mr Harrington, supported by Bee Teck and Mr Wong, that the shareholders split the TML assets according to their shareholding and a new entity take over the leased properties of Lansdowne, Lagoon Flat and

Kirriemuir. Mr Wilding would retain the TMPL properties, and the TML brand. This would split the stud operation and the parties would go their separate ways. Mr Smith sought advice from Mr Stock, solicitor. The outcomes contemplated were the status quo, a 60:40 split, or total sale of the stock. Mr Smith said the company was at a stalemate, but there was no conduct on Mr Wilding's part which he thought justified splitting the company. He remembers that Mr and Mrs Wilding were taken aback, and he was surprised that it came so soon after TML had taken up a new lease of Kirriemuir in Ashburton. In April 2013, Mr Harrington had promoted the Kirriemuir lease, yet two months later in July, he was discussing breaking up the company and his taking over Kirriemuir with others.

[38] The idea of splitting the company was scotched by Mr Stock's legal advice that 75 per cent of the voting shares had to be exercised in favour of transactions recorded in cl 9.1 of the Shareholders' Agreement, which covered such a proposal. An email from Bee Teck then referred to potential liquidation of the company, and Mr Smith said he would tender his resignation as an independent director of TML if this occurred. Bee Teck says the split was his idea. He was not aware of any plan by Mr Harrington to run a rival business to TML, but simply thought his idea was a pragmatic solution.

[39] In the last part of 2013 relations were "very strained" according to Bee Teck. It was at this point Mr Wilding put the TMPL land leased by TML on the market as a result of pressure from his bank, but he did not tell the other directors what that meant for TML. Aside from pressure on Mr Wilding, TML had its own bank debt to deal with, and agreement was needed on a method of selling down cows to reduce debt. Mr Wong, Bee Teck and Mr Harrington wanted to call in all current account debts, but resistance was raised by Mr Wilding. This took a long time to resolve, and was a further corrosive element affecting relationships.

[40] Bee Teck said that there was little goodwill left between the shareholders, and while strongly in favour of the 60:40 split of the company's assets, he otherwise supported a dissolution of the company. Mr Smith contemplated Lagoon Flat being sold by WHHL, and another company being formed with investors such as Mr Hong and Mr Harrington, and Mr Smith might join them. He said a decision "appeared to be coming" to downscale the TML operation.

[41] Mr Wilding thought that TML could have paid a dividend until the company "over exposed itself" with the Ashburton lease (email of 4 September 2013) and said "the lease of 100 hectares at Ashburton is a very bad replacement of Wenlock's 375 hectares!!". Mr Harrington under cross-examination agreed that by late 2013 trust was broken, and should a break up of TML not be achieved, or a share sale not be effected, TML would simply have to carry on, and he says that is what happened. There was a lack of trust arising from company funds being used to meet Wilding family liabilities, so Mr Harrington saw no long term future for the relationship. He agreed the 2013 June bull sale was a good one, but that "one swallow does not a summer make". Mr Dale put to him that the 1,000 cow herd milestone had been reached, but Mr Harrington said TML never had 1,000 cows, as he defined that. The financial statements reflect the number of cows mated, indeed more, but after dry cows were taken out, and then calves sold, most years ended with about 800 cows on hand. He said that by late 2013 the company was not in good heart and he rejected the idea that it was in a "sweet spot" for several reasons, including debt risk. Mr Dale put it to him that he was determined to paint a negative picture of the company, which he rejected.

[42] For Mr Wilding, Mr Dale put it that the strategy of Mr Harrington, supported by some of the other WHHL defendants, was to disadvantage TMPL while advantaging properties not leased from TMPL, including Kirriemuir at Ashburton. Mr Dale submitted this was intended to adversely affect TML, to force a severance of shareholder interests.

2014

[43] By 2014, the need for the parties to go their separate ways was, in my view, crystal clear, but there was no workable solution on the table. Mr Wilding wanted to carry on. The defendants did not. Something had to give. Mr Harrington expressed dissatisfaction but Mr Wilding said that had nothing to do with what was in the best interests of the shareholders in TML. Mr Harrington's email to Bee Teck of 13 January 2014 says it all, from his perspective:

> I agree with you, that the present situation is untenable and I guess with all equity partnerships, which can be in the form of a variety of business structures… inevitably they all come to an end! This can be for any number of reasons… the only certainty in life is change… when this happens, it is time for the parties to go their separate ways. In my opinion, this is where TML has got to.
>
> I don't think there is any point in discussing at a meeting how to continue TML under its present structure, as in my view, it has got past the point of no return. I have no desire to continue to be involved in a business with Tim and Katie. So, I agree

with Bee Teck, if a special meeting is required it should have clear agenda, which needs to be sent to all shareholders well prior to the meeting, as per Bee Teck's recommendation. If a meeting is to take place—the priority up for discussion, in my view, should be around how we implement shareholders who want to exit the current structure or/how the company is liquidated as a whole.

With the above response, I'm sure this gives you and the other shareholders my perspective of the current untenable situation of the company.

Regards

Johnny

[44] Bee Teck suggested a paper go to the TML Board, with Mr Harrington's proposal for a resolution given the "current untenable situation of the company". TML could not sustain its operations given the high fixed term loan from PGGW of $1,000,000, plus the $600,000 overdraft, which was at its limit. The overdraft was lower than the $1,000,000 which had been available in the past. He referred to the expense of leasing land, the personnel required for the level of operations, money owed to TML by Mr Wilding, and trade debtors. The shareholders were unwilling, or unable, to guarantee credit lines from the bank, resulting in high interest costs. Bee Teck said all shareholder loans should be repaid and the shareholders make loans to TML in proportion to their shareholding. There should be a reduction in the herd size, and a reduction in the land area leased.

[45] Ms Adams told Mr Harrington that equity partnerships do come to an end with changes in relationships, and when something harmonious and constructive becomes something else, people should face up to it. Ms Adams said that should be addressed at a meeting which should be limited to how the parties might exit, or how the company might be liquidated. In this Ms Adams was giving orthodox and prudent advice given the different aspirations, the personal antipathies, and the recurrent points of difference between the parties.

[46] Mr Harrington set out for the Board the financial position of TML and market conditions, and proposed five steps. Debts owed to TML would be called, there would be a sale of 300–500 cows in April, the area leased would be reduced, expenses addressed for efficiencies, and wages reviewed. A budget for the remainder of 2014 would be prepared and circulated to shareholders by 10 February 2014.

[47] Mr Smith stepped down, by email of 31 January 2014, ostensibly because his work with ASB was taking too much of his time. Mr Wilding thanked him and referred to Mr Harrington and others "trying to divide the company for personal gain and with blatant disregard for the interests of all shareholders". Bee Teck responded on 3 February 2014. He qualified Mr Wilding's reference to a proposal made by Mr Smith which would, as Mr Wilding said, have saved interest costs, but which would have required a mortgage over the Lagoon Flat property owned by WHHL with the burden of guarantee on Mr Wong and Bee Teck. Bee Teck was frank that dissolution of TML was not just Mr Harrington's proposal in his own interests, but a joint position taken with Bee Teck, Mr Wong and Mr Hong. They had confidence in Mr Harrington and his analysis of the problems facing TML, in particular the high debt and high expenses, which had been the case for years "with no end in sight". So they looked to Mr Wilding "to amicably dissolve TML or [agree to] a proposal to resolve the present stalemate".

[48] Yet TML ran on, against what I consider were impossible odds, without structural change. The possible termination of the Kirriemuir lease was discussed, although a three year lease had just been taken up. The merits of that lease were debatable, but it was a commercial decision and I find it was not a strategy on the part of Mr Harrington and others to somehow unseat TML or advantage themselves in this regard. The June 2013 bull sale had been a success and the question properly turned to why Kirriemuir should be let go. Mr Harrington said it suited TML to give it up, in the context of pressure from the Bank. Mr Glubb, of Heartland Bank, had told him in vivid terms (for a banker) that he would be "riding TML like a pony with spurs on". Mr Dale pressed Mr Harrington at length that at this stage things had not changed for the worse, but rather the better. However, Mr Harrington was adamant that something had to give to reduce the substantial debt. Mr Wilding had not by this stage paid the $310,000 off his current account which, after exhaustive enquiry, was eventually paid. There was more angst when Mr Harrington told Mrs Wilding that an "independent audit is to be carried out on the TML accounts", and set out an extensive request for information back to 1 August 2006. He said her answer should be ready within two days. This was provocative, nevertheless his underlying purpose was justified, as it turns out.

[49] Mr Wilding reacted in an email of 20 February 2014, by saying that Mr Harrington was out of line and full Board approval was required for an inquiry into debts owed to TML, and the TML accounts. Mr Harrington was to

produce a budget, and Mr Wilding asked him to focus his efforts on that, and the Board needed to give him a clear mandate as to what he could and could not do as managing director. Mr Harrington replied the same day answering each point. He then found out that the TMPL properties were on the market, and was concerned about the effect that might have on TML. He inquired of Mr Wilding who told him it was "none of [your] business".

[50] Despite this, Mr Dale put to Mr Harrington that Mr Wilding was trying hard to have the shareholders and directors move forward. There was agreement about herd reduction. Mr Wilding had proposed that the breeding herd be reduced from 1,000 to 500 in May/April 2014, setting out criteria for culling. Mr Lindsay Haugh was to be involved as an independent genetic adviser, with Mr Harrington. Mr Sidey, a livestock genetics representative with PGGW, wrote to Mr Harrington about a "reduction sale".

[51] On 21 March 2014 Mr Glubb wrote to Mr Harrington referring to TML's term loan of $1,000,000 and overdraft of $664,632 (limit $600,000), and said:

> As discussed on previous occasions, TML needs to provide Heartland with a debt reduction proposal that ensures that TML has a sustainable and financially viable future. We are both aware that Heartland's security for the above facilities is predominantly secured by livestock only and that TML has made no headway in recent years at reducing debt.
>
> I look forward to receiving TML's debt reduction proposal in due course.

[52] The Board met on 21 March 2014. Mr Wilding had met Mr Glubb that morning, who indicated he might extend the overdraft to $900,000. Mr Wilding acknowledged that this was a band-aid. By the June bull sale Mr Harrington said the company would owe nearly $2 million which was unsustainable, particularly if the bull sale did not meet budget. Bee Teck was concerned with the cash position of TML through to the sale, and said Mr Harrington should call in money owed to the company. Debt reduction was supported by Mr Wilding, but he wanted a "fair and reasonable process".

[53] The directors agreed to sell cows, but disagreed as to the process. Mr Harrington said the older age groups should be sold, but Mr Wilding opposed that because that would be selling the "top intellectual property" in the company, and the value lay in the genetics. Mr Harrington said the younger cows would be genetically superior. No motion was put to the vote. Mr Wilding said that decisions should not be "railroaded" because of Bank pressure as the Bank had agreed to extend the overdraft to $900,000 and Mr Hong said he would top up the facility. Mr Wilding said that because Wadi and other TMPL property might be sold, TML should maintain the lease of Kirriemuir or go back to the purchaser and see if a payment out of the lease could be negotiated.

[54] On 24 March 2014, Mr Wilding wrote to the directors thanking them for the "timely and constructive" meeting, and Mr Hong for offering to support the company with bridging finance. There would be no need for a "fire-sale" of TML assets. He said Mr Smith should negotiate an exit of the Kirriemuir lease, but if a "fair settlement" could not be reached, then other options should be looked at including sub leasing. Mr Harrington disagreed as to how the Minutes should be read, which for Mr Wilding was further evidence of "the corrosive environment and dysfunctional working relationship between [them]". Mr Wilding thought Mr Harrington might be conflicted in the selection process for selling cows off. If sold to established breeders, there would be implications for his future employment. Mr Harrington thinks that about this time Mr Wilding was trying to get rid of him, which Mr Dale rhetorically put to him made no business sense, given his importance to TML.

[55] The hostilities escalated. On 25 March 2014, Mr Harrington wrote to Mr Glubb at Heartland Bank and said he had been trying to get across to the directors the financial predicament of the company. This letter was highly critical of Mr Wilding and this can only be explained in the context of the fractured personal relationships, but it hardly assisted TML or Wilding interests generally.

[56] Thus, by the end of March 2014, it was agreed TML would undertake a cow reduction sale, the Kirriemuir lease would be relinquished by negotiation, and debts would be called up. These plans were set against a simmering backdrop: intense resentment and distrust on the part of the defendants towards Mr Wilding, a reciprocal grievance that the defendants would not support TML as he thought they should, but were actively trying to break it up or sell it down, in the midst of considerable pressure on the Wilding family's finances.

[57] Mr Wilding wrote to Bee Teck on 30 March 2014, expressing concern about the sale of stud cows to competitors. He seemed to resile from the idea of a short term profit from sale of the cows, particularly if Mr Hong was prepared to lend money against the overdraft with Heartland Bank, giving TML breathing room. Yet the day

before, Mr Wilding had written to the directors saying he unreservedly supported the sell down of the herd, and that time was of the essence. His view was that selling the cows to one or two large farming operations which would undertake to run the animals as commercial cows would be the best option, so they would not be sold or marketed as having TML genetics.

[58] Bee Teck replied that there had to be asset sales to pay Heartland Bank. Mr Wilding was selling TMPL properties so this was another reason to downsize the TML herd. TML would retain 500 cows with the best genetics so there should be no great fear of competition. Speaking for Mr Wong as well, Bee Teck said: "We have no wish to continue with TML in its present mode, saddled with large, high interest borrowing and lack of trust and goodwill amongst shareholders."

[59] On 31 March 2014, Mr Orr, who is vastly experienced in the stud stock industry, wrote to Mr Wilding saying that the number of bulls sold, and the average prices expected in the June sale, would not in his view maintain the good trend of the last five years. There were market constraints on cow numbers, and the number of bulls which could be sold. He thought the sale of stud cows would have a negative effect on TML, particularly at auction where the vendor has no control over the purchaser and what becomes of the cows, and he referred to the conjecture and gossip in the farming community about the sale of TMPL land.

[60] On 3 April 2014, Bee Teck wrote to Mr Wilding and said "at this critical stage of TML's financial crisis, our first concern must be with the *here and the now;* otherwise, there is no long term future to talk about".

[61] Mr Peachey of PGGW, expressed a view similar to Mr Orr's. He said the selection of cows to be retained at Te Mania should be based on strong visual considerations, to breed solid high country bulls with good bone, depth and head. The rest of the cows should be sold as a commercial line, putting aside the possibility of their being used as pedigree producers. The debate continued into June 2014. Mr Wilding took strong issue with Mr Harrington's ideas because he thought Mr Harrington wanted TML to be liquidated, and was not acting in the best interests of the company. He thought there was a risk of losing a sale of cows to Rimanui Farm. Mr Harrington remains very critical that the sale of cows to Rimanui Farm went ahead.

[62] Mr Wilding's distrust of the defendants, which has led to the allegation of a concerted and improper strategy against the interests of TML, is reflected in his email of 6 April 2014 to Bee Teck where he said:

> I am determined to protect the value of TML for all shareholders and do what is best for the company so if you are insistent in supporting Johnny when he is refusing to answer simple questions to provide comfort to the board as to what his true intentions are then you will leave me no choice but to also seek legal advice as to what remedies the majority of shareholders have at their disposal to protect the best interests of the company.

[63] Through April 2014 the correspondence between shareholders reflects other ways in which the assets might have been realised, including the sale of TML in its entirety rather than being broken up. Mr Wilding said TML's position would not be known until closer to the June bull sale and the outcome of land sales by TMPL, and was keen to defer relinquishment of the Kirriemuir lease. Mr Smith wrote on 6 April 2014, wondering why his input had been sought to extricate TML from the lease when legal advice was contemplated, and relinquishment of the lease would not be known until closer to the bull sale. He said it had been a waste of his time, as he had entered into discussions in good faith for TML to relinquish the lease early, following what he thought had been agreement in March.

The entry of the lawyers

[64] The correspondence between lawyers began in earnest with a letter sent from Ewart & Ewart for Mr Wilding and Mr Hong to Young Hunter, on 15 April 2014. Mr Ewart said TML's financial position must be secured. A re-think by Mr Wilding and Mr Hong about reducing the herd size was explained, given the risk of losing Te Mania's competitive advantage if new owners of the cows could breed from them. There was said to be no immediate need to sell the breeding stock as the Bank was comfortable, and short term funding was available from Mr Hong. Underlining this was a concern about Mr Harrington's motives. Mr Harrington had not provided a reassurance that he would have no interest in the ultimate owner of the cattle. He had been corresponding with Mr Glubb at Heartland Bank, but he would not release that correspondence because it might put him in an "invidious position". Mr Wilding and Mr Hong sought Mr Harrington's undertaking not to speak with the Bank without prior consent of the Board, and to stand aside from his roles as employee and director so the value of his shares could be assessed for sale to the other shareholders. They alleged that Mr Harrington's conduct was in breach of the Shareholders'

Agreement so that it was likely the majority shareholders would call a meeting to remove him from the Board, and consider his future employment.

[65] Mr Harrington said that between March and the end of May 2014, he was substantially occupied in preparing cattle for the June bull sale. This was a very wet period. The bull walk undertaken before the June sale is on the last Friday in May and there was a lot of pressure on feed. 270 in-calf females from Kirriemuir had arrived back at Te Mania, and about 400 cows were sold in June 2014. The June bull sale went ahead as usual and a large sum was banked from the sale proceeds.

[66] On 8 July 2014, Young Hunter wrote to Mr Dale to say that Mr Wilding and/or TMPL owed about $480,000 to TML. An audit was called for. Mr Wilding admitted some of the debts, but made some counterclaims against TML, including unpaid rent for the TML leasing of TMPL land, which Bee Teck says was designed to create a set-off.

The condition of the young bulls

[67] The June 2014 bull sale came and went, but not without controversy. There followed a dramatic and hotly disputed allegation by Mr Wilding against Mr Harrington. The evidence that young bulls were found to be starved, and in very poor condition at the end of July 2014, is conflicting. There is dispute as to their condition and the cause. There is a further dispute as to whether TML suffered any loss as the result of their condition, and whether as Mr Wilding says, TML suffered loss when directors other than Mr Harrington failed to raise the allegation of mistreatment against Mr Harrington to offset his employment claim against TML.

[68] Bee Teck's view was that when the incident arose Mr Wilding did not seem focused on solving the problem, but rather was gathering evidence to build a case against Mr Harrington. He says that Mr Wilding later refused to provide the 600 day weights for these bulls, which made him suspicious there was no long term problem with them, whatever their earlier condition. The near immediate effect was that Mr Harrington resigned and left TML. The condition of these young bulls at that time, and the reason for their condition, remains an issue for determination.

Mediation

[69] A mediation conducted by senior counsel on 9 September 2014 was unsuccessful. This reinforced the view held by Bee Teck that the best interests of the company were that the shareholders separate their interests. Bee Teck correctly recognised that resolution of multiple claims and counterclaims would be relevant to any valuation of the shares, as otherwise there was little clarity as to the balance sheet of TML for the purpose of share valuation. Bee Teck made no secret of the fact that he told Mr MacDonald (Mr Hong's alternate) that he had wanted to de-couple Lagoon Flat from TML for a long time past. Mr Wilding, for his own reasons, had been quite prepared to de-couple the TMPL properties by sale which may, or may not, have resulted in a lease back to TML. Apart from de-coupling Lagoon Flat, Bee Teck said he was willing to sell his shares in TML. He did not see any prospect of TML's position improving in the near future given the acrimony that existed between the shareholders. No offer had been made to him by Mr Wilding to acquire his and, I infer, Mr Wong's shares. The angel investor had fallen away.

[70] In late September 2014, Mr MacDonald was working on an informal valuation of TML for Mr Hong, to make an offer to buy Mr Harrington's shares. Mr MacDonald wanted a statement of financial position for the financial year ended 31 July 2014. The accountants would not begin work for the 2014 year until the 2013 year accounts had been finalised. Here was another drag on resolution.

[71] By this time, the herd size had been reduced by about 40 per cent. However, Bee Teck wanted a further herd reduction in light of TML's debt. In the meantime, TML's lease commitments could be reduced. He did not think Mr Wilding would agree, so he told Mr Harrington that terminating the TML lease of Lagoon Flat was something that should be considered to put pressure on TML to downsize its herd further. This is a further plank of Mr Wilding's case, that WHHL and its directors improperly used termination of the Lagoon Flat lease in breach of an obligation to TML that it be offered first right of refusal of any further lease entered by WHHL, which Mr Wilding says it did, with Terra Firma.

[72] On 1 October 2014, Mr Harrington resigned from TML. On the same day, WHHL, through Bee Teck, gave one month's notice that TML leave Lagoon Flat, which was on a month-to-month holding. Bee Teck thought TML's financial position would not be impacted. Then Mr Wilding said that WHHL was contractually bound to offer Lagoon Flat back to TML under the 2005 lease, which provided:

> **3.3 Right of First Refusal**

> If the Lessor decides to offer the Land for lease from 1 August 2014 the Lessor shall give the Lessee the first right to lease the Land and shall not offer the Land to any other third party without giving the Lessee the first right to lease the Land on the same terms and conditions.

[73] Mr Wilding said the major land providers to TML needed to ensure that TML interests were properly protected which was why this condition was in the Te Mania lease, entered on the same date in 2005.

[74] Bee Teck did not have a signed copy of the Lagoon Flat lease, but had a copy of the signed Shareholders' Agreement which provided:

> **6. LEASES OF PROPERTIES**
>
> 6.1 TW agrees to cause Te Mania Properties Limited to enter into a lease of the property known as Te Mania in favour of TML for a term of five years together with a right of renewal for five years.
>
> 6.2 WHL will enter into a lease of the property known as Lagoon Flat in favour of TML for a term of five years together with a right of renewal for five years.
>
> 6.3 The terms and provisions of such leases in 6.1 and 6.2 above shall be in accordance with the leases attached as Appendix 1.

[75] Bee Teck also had a copy of the lease of Te Mania, but not Lagoon Flat. Wearing their WHHL hats, Bee Teck, with Mr Wong, withdrew Lagoon Flat from TML's use, with its irrigated land, and said that was entirely for them as, at that stage, they denied the very existence of the lease and thus the right of first refusal.

[76] In defence of WHHL's actions, including leasing Lagoon Flat to Terra Firma, Bee Teck places emphasis on two emails from Mr Wilding dated 2 October 2014 and sent within two hours of each other. In the first, Mr Wilding said that TML would have to sell animals to compensate for the loss of Lagoon Flat but it would allow reduction of bank debt, and he suggested that Lagoon Flat and WHHL shares in TML be sold to him as a package. However, in the second email he said:

> … if you are insistent on not wishing to re lease Lagoon Flat this does put TML in an awkward position as far as running the extra 500 calves the property can potentially carry. However after taking into account all the cattle we have recently sold and this year's calving results and doing a stock reconciliation you will be pleased to know that I have worked out we will in fact NOT need to sell any more cattle outside normal culling practices and can retain all the animals we have left by running them on our remaining lease properties as well as in the feedlot.
>
> I am sorry if my previous email was misleading, obviously it's not in the best interest for TML to have to down size any further given our current market share opportunities and I just wanted to clarify that we won't have to be selling down any more cattle although our operational costs may increase slightly if we need to plant more crop etc on our remaining lease properties.

[77] As he was contemplating the purchase of the interests of Bee Teck and Mr Wong, Mr Wilding asked for a copy of the Lagoon Flat lease, which Bee Teck did not have. Although he was a signatory to the lease, Bee Teck said there was no signed lease as he understood it, and that WHHL would not have given a right of first refusal of the sort that Mr Wilding asserted, but which it had obviously done. Mr Wilding said that given the dry season and the drought, the company should graze Lagoon Flat until other arrangements were made and all TML issues were sorted out. Mr Wilding said that it would be irresponsible and negligent for TML directors to let the Lagoon Flat lease go at that time. Mr Wilding's position now stands in contrast with his position of 2 October 2014, and his earlier preparedness to withdraw the TMPL properties from TML use.

Terra Firma

[78] On 24 October 2014, Lagoon Flat was leased to Terra Firma, owned by Mr and Mrs Luporini. Bee Teck explained he had told the Board that TML should reduce its herd size further and, as WHHL intended to sell Lagoon Flat, it was not in TML's best interests to hold Lagoon Flat under a short term lease, terminable at short notice when a buyer appeared. Mr Wilding says WHHL was in breach of the right of first refusal to offer TML a lease on the

same terms as Terra Firma, and that TML has suffered loss, which should be compensated. Bee Teck and the WHHL defendants say there was no obligation, contractual or otherwise to lease Lagoon Flat to TML, that they would not support TML taking a further lease, and otherwise no loss was suffered by TML that should sound in compensation.

DOC land

[79] Bee Teck said that TML livestock on the DOC land should be removed by 1 December 2014. Mr Wilding countered that Terra Firma cattle should be removed because the land was held under a new licence (in the names of Mr and Mrs Wilding) and was sown down in winter feed for TML. William Wilding took Terra Firma's stock off the DOC land and put them in the yards at Lagoon Flat. Bee Teck then found out that the new DOC grazing licence had been issued to Mr and Mrs Wilding. Bee Teck's position is that Mr Wilding used information available to him as agent since Lagoon Flat was purchased by WHHL in 1996, when WHHL took an assignment of the licence, and, knowing of the terms, was able to get the grazing licence for himself and Mrs Wilding. He says Mr and Mrs Wilding hold the licence for WHHL derived from Mr Wilding's role as agent when the licence was acquired, and asserts that Mr Wilding's fiduciary obligation to WHHL derived from his agency continued.

Mr Harrington's employment claim

[80] Following his resignation, Mr Harrington filed a claim with the Employment Relations Authority (ERA) which related to holiday pay and other employee entitlements, on 5 December 2014. Mr Wilding said TML should resist it based on his allegations of animal neglect. The directors did not agree. They took legal advice, and no defence or counterclaim was raised. Mr Wilding says this caused TML loss because there was a set off counterclaim available and it should have been used. Mr Harrington's claim settled, but it remained a live issue when Mr Harrington brought proceedings to liquidate TML, at first based on the debt created by settlement, which was in due course paid.

Derivative proceedings

[81] Mr Wilding did maintain an application for leave to bring derivative proceedings in the name of TML in the first Statement of Claim through to the Third Amended Statement of Claim, but did not pursue that further.

[82] On 17 February 2015, Lane Neave for the defendants wrote to Ewart & Ewart about the possible Lagoon Flat claim against WHHL which was part of the application for leave to bring derivative proceedings by Mr Wilding. The Board had decided not to bring a claim against WHHL, one way or another, and an application for derivative leave was said by the defendant directors to be premature. Mr Wilding also sought leave to bring derivative proceedings in relation to alleged stock neglect by Mr Harrington. These applications did not extend to breach of a director's duties. The application was in the end abandoned by Mr Wilding because of the potential delay which Mr Dale says meant such proceedings were impractical. The claims by Mr Wilding then found their way into these proceedings through the (abandoned) first cause of action and the claim for relief under s 174 of the Companies Act 1993 (the Act).

Application to remove Mr Harrington and Ms Adams as directors

[83] Mr Wilding's position that Mr Harrington and Ms Adams held conflicting interests and should not be directors came to a head when he applied for their removal from the Board. That application failed before Dunningham J, discussed under *Antecedent Litigation.*

Attempt by Mr Harrington to liquidate TML

[84] From July 2014 to the commencement of this trial other controversial events unfolded, including the attempt by Mr Harrington to liquidate TML, supported by the defendants other than Mr Hong, initially based on the sum owing to Mr Harrington for his successful ERA claim. This failed, but the attempt lingers as a claim for indemnity costs by Mr Wilding for defending the liquidation, and is part of his allegation that the defendants breached their obligations as directors to act in the best interests of TML.

Missing hay

[85] In June 2015 Mr Harrington was prosecuted for theft of TML hay to the extent he was charged and served before the Police dropped the prosecution. This gives rise to the claims in the torts of malicious prosecution and

abuse of process against Mr Wilding, discussed further in this judgment.

Hacking of emails

[86] Across the litigation lies the shadow of email hacking. Mr Heyward, Mrs Wilding's brother, gave evidence admitting that he hacked into Mr Harrington's email account before the server was changed. He had set up a cloud based email system for TML which could be remotely accessed, and he knew the password for Mr Harrington's email address. He noticed emails which reflected tension developing between Mr Harrington and Mr and Mrs Wilding, and which contained references to Ms Adams.

[87] Mr Heyward said that after his sister married Mr Wilding, he shared their excitement at the aspirational future for TML. He looked into Mr Harrington's emails when the personal and corporate relationships deteriorated so rapidly, and with such severity. He passed on emails which he thought Mr and Mrs Wilding would find useful, with limited, and often wry commentary. He made no bones about the fact that he should not have done this, but maintains he was driven by concern about his sister's distress at the animosity, and what was happening to TML generally.

[88] In due course, Mr Wilding's counsel, Mr Dale, found out about the hacking. He disclosed it, and contended that the emails did not appear particularly significant. For some time Mr and Mrs Wilding had access to the thoughts of Bee Teck, Mr Harrington, Ms Adams, and Mr Thwaites solicitor, regarding TML, the Board, and the shareholders' dispute. Mr and Mrs Wilding did not instigate the hacking but they should have put a stop to it. Mr Wilding asked Mr Heyward to stop, but he did not do so.

[89] The hacking involved documents which had references from 2010 until 23 September 2014, although the hacking occurred over a shorter period. Most emails sent on to Mr and Mrs Wilding were in 2013 and 2014 when there was severe conflict between the shareholders and directors. Emails in June 2013 included Mr Thwaites' advice sent to Mr Harrington before a Board meeting. There was correspondence with Mr Thwaites in 2014, as to how Mr Harrington and others might exit TML. The notion that Mr Wilding could read this advice is of course anathema to Mr Harrington and to the other defendants, and is very troubling to the Court. This was a very bitter and personal contest which involved strategic steps by the parties. Some of the hacked emails were, in my view, not associated with legal advice or otherwise confidential and were thus discoverable. Others were legally privileged. I am not prepared to read legally privileged emails which might have assisted Mr Wilding's case. This was a serious breach of privacy and confidentiality, and of itself, it engendered distrust that runs deep. It remains relevant to judgment whether Mr Wilding should have the opportunity to buy the defendants' shares.

Heartland Bank

[90] Both TML and TMPL have needed Heartland Bank's support. Heartland Bank specialises in rural and business lending. The extent of bank lending has long been an issue with some defendants, who take the view that increased borrowing has simply eroded TML equity. Mr Prain of Heartland Bank wrote on 26 January 2016 to say that should the Bank become concerned about the Bank's security or possible compromise of animal welfare, then it might have to appoint a receiver. That was no idle threat. TML's liquidity problems hung over it, and continue to do so through this litigation. The Bank was also concerned with the lack of unity and direction between the directors and signatories to the TML accounts. A letter reflecting these concerns was sent from Bee Teck to Mr Prain on 18 February 2016, which reads:

> Dear Ben
>
> You are correct that any increase in bank lending to TML will need formal approval of the TML board.
>
> At the current scale of TML operations, I am concerned that any debt increase, especially at the current high interest levels, is not sustainable. It will only erode shareholder value. In fact, at a recent TML board meeting it was decided that the fixed loan level be reduced. Furthermore, there is need to review the current rate of interest charged by HBL for TML's fixed loan. TML should also consider refinancing its debt.
>
> Any loan increase that you propose should state clearly the interest rate before the directors can consider your proposal.
>
> Thank you and regards

Bee Teck

[91] Mr Wilding wrote to Bee Teck regarding his concern about interest costs, and that he (Bee Teck) was not prepared to approve the overdraft. Mr Wilding said he would pay the "extra" interest up to the June bull sale. TML expenses were being kept to a minimum so far as Mr Wilding was concerned, but there were fixed operating costs which had to be met and had been agreed in the budget.

[92] My reading of the Heartland Bank documents indicates a knowledgeable and patient banker addressing a tricky situation with care and experience. The Bank's support of TML is one reason, already mentioned, that there is a judgment to deliver regarding the future of TML.

The valuation exercise

[93] The Interim Judgment already delivered determines that Mr Wilding should have the chance to buy the shares of the defendants, rather than TML being put into liquidation. The first course requires that a fair value of the shares be fixed by the Court. The principal item of value is the livestock. The trial began with evidence of several witnesses who were to be called for livestock and semen valuation. The livestock valuation should have been carried out without the Court's involvement, except to resolve any underlying factual or timing issue. Most farming valuations are conducted with the nomination of valuers by each party, and their appointment of an umpire.

[94] The breakdown of the parties' relationships was manifested in their approach to the valuation process. A striking example arose in the evidence of Mr Orr for Mr Wilding. Mr Orr gave valuation evidence, but not without objection on various grounds by the defendants. When the trial went into recess on 8 July 2016, having exhausted the allocated trial dates, the defendants sought an order that Mr Orr's evidence not be admitted on the basis that it was expressly not given as an expert, and that his relationship with the Wilding family was such as to disqualify him for bias. By the time this point crystallised, Mr Orr's evidence in chief had already been given. It was clear that he had extensive knowledge of the Te Mania operation and the stud stock industry in New Zealand. It was equally clear that he had a close relationship with the Wilding family, which will not always disqualify a witness, but which raises a question as to impartiality. As Mr Orr refused to give evidence as an expert, the admissibility and relevance of his evidence was at large. The Court ruled by a Minute of 21 October 2016, that Mr Orr's evidence was already on the record, and that it *may* be relevant to judgment. There then arose a challenge to the evidence of the valuer to be called for the defendants, Mr Simon Cox, and whether he should be heard, and if so, on what basis. The spectre of interminable factual and expert valuation evidence and contest about admissibility hung over the Court. Fortunately, the livestock valuation was largely resolved after intervention by the Court, and a valuation process was agreed upon and recorded by Minute of 10 November 2016 as follows:

> [2] …
>
> **Formal appointment of the Valuers and Umpire — on terms agreed by the parties**
>
> (i) ***I direct*** that Callum Stewart and Anthony Cox be appointed as the valuers for the nominating shareholders in Te Mania Limited.
>
> (ii) Mr Stewart is appointed by the Wilding interests and Mr Cox is appointed by the Harrington, Hoong Bee Tec and Wong interests.
>
> (iii) The terms of appointment of the two valuers are as follows:
>
> (a) the two valuers are required to read and confirm in writing that they will comply with the Code of Conduct for Expert Witnesses in this court;
>
> (b) the conduct of the valuation process is to be fully transparent. That means that any information provided by one side to either valuer must also be provided to the other side;
>
> (c) the two valuers have appointed Mr Geoff Wright of Hazlett Rural as umpire;
>
> (d) the intention is that the decision of the valuers and umpire is final, but leave is reserved for the valuers or the umpire to return to the court for any directions if required;

(e) each party will be responsible for their own valuer's costs, and the parties will share equally in the umpire's costs.

(iv) Because the herd currently contains approximately 496 calves, the defendants say that an issue in the proceeding is the value of those calves after weaning in approximately January 2017. Accordingly, ***I direct*** the valuers' opinion on both the value of the calves "at foot" at the date of inspection and the valuers' opinions and analysis of what the difference in the outcome would be if the stock valuation was undertaken immediately after the calves had been weaned.

(v) The date of valuation is ***23 November 2016*** **,** unless otherwise directed.

Semen valuations

[3] Evidence has already been given in this regard, and there is more to be given. Mr Donald will be giving evidence at a distance, by AVL, as he is unwell.

[4] Like the valuation of stock, all witnesses as to the valuation of semen are ***directed*** to confer. I leave this to counsel to organise. It will require them first to provide one to the other their valuation of the semen, and in this regard evidence already given would be referred to those intended valuers of the semen who have not been involved in the proceedings, or have not seen that evidence. The intention is simply to achieve a full exchange between the experts.

[5] As with the valuation of stock, if the parties have any information of their own to provide to the witnesses, just as they will for stock valuation, they should ensure that is provided to all the intended semen valuers.

[6] In short:

(i) all those witnesses who have or are to give evidence as to the value of semen are to be identified between counsel and advised to the court (an email from one counsel will suffice);

(ii) counsel should organise some form of conferral between those experts so that the position of each is understood, and the material upon which they base their opinion;

(iii) if the parties have information they consider is relevant to this valuation process, they should ensure it is sent to *all* of those witnesses involved in this valuation process;

(iv) the valuers should prepare a schedule which records any agreement (as between all of them) and if there is no such agreement, then the position taken by each valuer in respect of each element of dispute.

[7] Commonsense dictates there be no extended expert dispute over valuation of items of little consequence.

[95] The parties were free to put what they thought relevant before the valuers. Then the valuers, and the umpire if necessary, would determine relevance. The livestock inspection and valuation was undertaken and, shortly thereafter, the valuation was completed. The valuers, Mr Stewart and Mr Cox, were asked to express their opinion as to the value of the calves after weaning (see cl 2(iv) above), as opposed to the value ascribed the cows with calves at foot, as at 18 November 2016. They were reluctant, and would not express an opinion. They did not know if those calves would go into the production herd. They did not know how many would be on hand after weaning. This issue is addressed under the *valuation of shares* section of these Reasons.

[96] A similar approach to valuation of semen was directed, and those engaged in that exercise, including the umpire, reported to the Court. That did not satisfy Mr Wilding, which consequently did not satisfy the defendants, so this element of the valuation dispute remains, although I considered that it should not delay the Interim Judgment.

[97] The livestock valuation exercise agreed during the trial avoided the "litigate to the bitter end" approach adopted over the many days of sometimes turgid evidential contest and submissions. It represents one of the few co-operative outcomes of the litigation.

[98] The valuation of shares must reflect the liabilities and assets of TML, some of which are contingent on judgment in terms of the various claims and counterclaims, and the ultimate approach to valuation. There are other issues which do not sound in monetary claims but are said to be relevant to the overall outcome.

The Oversight Committee

[99] The first phase of this trial concluded after 13 days of hearing, between 21 June 2016 and 8 July 2016. The trial length was grossly underestimated. The trial resumed on 7 November 2016 when hearing dates became available and ran until 2 December 2016. It has remained on foot as further issues have been put before the Court.

[100] After the first phase, some workable arrangement had to be found to manage the day-to-day activity of TML to preserve the assets for all shareholders as best possible, to ensure the stock were properly cared for, and that cropping and grassing were undertaken. Heartland Bank was involved. There was no prospect of the shareholders contributing further capital or advances at that time, although near judgment Mr Wilding did advance further funding to TML.

[101] By direction of the Court given on 20 July 2016, an "Oversight Committee" (OC) was established, with Mr Harrington representing the defendants' interests and William Wilding those of the Wilding family. Simon Wing (Mr Wing) of BDO was appointed to chair the OC and resolve what were expected to be differences between Mr Harrington and William Wilding. This was successful only as to part. William Wilding as stock manager ran the day to day business of TML. The complete absence of a working relationship between Mr Harrington and the Wilding family was reflected in a report to the Court by Mr Mackenzie for TML. Mr Wing had an unenviable task, and should be recognised for his sterling work. There was disagreement on a continuing basis, most of which Mr Wing was able to handle. One of the principal tasks of the OC was to produce a budget for approval by the Board. That was a vexed process, but by 25 November 2016, the last full day of evidence, a draft budget was in evidence. Mr Wing had help from Mr Jansen Travis, which was of assistance to the court in explaining why certain expenditure had been incurred by TML, and the warrant for that.

A further perspective

[102] It is simplistic to simply look at the performance of TML with its constant internal carping and disagreement, and not look at the broader canvas. In this respect, I find Mr Girdlestone's evidence instructive. He acquired an interest in Mr Stone's farm accounting practice. Mr Stone was a farmer and long time TML accountant. While he recognised that the TML financial statements showed losses in many of the years during which he was involved, and indeed afterwards, Mr Girdlestone made the point that this sort of farming, while successful in the sense that Te Mania's stud is renowned in New Zealand and beyond, remains a risky business and in particular is affected by droughts. When drought strikes as often and deeply as it has in North Canterbury, then the impact is felt not just by TML itself, but by other farmers, many of whom have had to reduce, or in some cases, sell off all their capital stock. The present drought, which has lasted now for some three years, was preceded by other droughts. TML fortunately had the benefit of irrigated land necessary for the effective insurance of feed supply.

[103] There are some issues which were fractious but involved respectable differences of view and they must be recognised as such. Downsizing the cow herd is just one example.

Wadi

[104] The issue of the Wadi land was something of a sideshow in the case but it did not help relationships. It is not an issue pleaded for which relief is sought, but it was another running sore. Mr Wilding, through TMPL, purchased Wadi with some TML help with the idea that TML might own the land and there be development to yield some cash as a result of subdivision, so that could be employed within TML. However, the evidence is quite clear, in particular from Mr Girdlestone, that the Wadi development did not yield a profit and there was no money to put into TML. It was a good idea, but came to nought. I am satisfied that the defendants expected something from this and it further dented their confidence in Mr Wilding, but it is not otherwise relevant to this judgment.

Mr Haugh and Mr Hazlett

[105] Both Mr Haugh and Mr Hazlett have died. Mr Haugh swore an affidavit which refers to the condition of the stock and in particular, a discussion between Mr Harrington and Mr Haugh when that issue arose. I am asked by Mr Wilding to conclude from this that Mr Harrington deflected Mr Brooks, a Little River veterinarian engaged by TML, from seeing all the young bulls when concerns were raised about their condition. I do not consider Mr Brooks saw all of the animals, and I reach that conclusion based on his and all the other evidence. I prefer the evidence of the witnesses called for the plaintiff in this regard, but Mr Brooks gave fair and measured evidence to the extent that he had knowledge of the animals. I do not bring to account Mr Haugh's evidence as it was highly contentious and unable to be tested.

[106] Mr Hazlett's written statement referred to farm maintenance. It is not admitted for the same reasons, because it required testing under cross-examination to be useful to the Court. Mr Hazlett was very highly regarded and would likely have assisted the Court but for his tragic demise.

[107] With this narrative, the pleadings and the antecedent litigation may be better understood before this judgment turns to a consideration within *Issues*, of the matters which are relevant to disposition.

B. The pleadings

Mr Hong—Sixth defendant

[108] Mr Hong, as the sixth defendant, has taken no part in this litigation. Whether he aligns himself with Mr Wilding following judgment is for him.

Mr Wilding's amended pleading

[109] Very late in the hearing Mr Wilding abandoned his first pleaded cause of action, but his claims and the relief he sought are all mirrored in his various claims under s 174 of the Act, which all parties invoke. *All breaches* alleged have been brought to account under s 174 of the Act, whether the alleged breach of obligation is contractual, statutory or otherwise. For example, Mr Wilding says that WHHL was in breach of its obligations to TML by not offering it a right of first refusal to lease the Lagoon Flat property. If damages or compensation are payable to TML then that would become an asset of TML. If TML is liable to TMPL for breaches of its leasehold obligations that would become a liability of TML. If stock mismanagement alleged against Mr Harrington was such as to found liability of any of the defendants to TML that would become an asset of TML. These are but examples.

[110] Some allegations do not reflect in claims to damages or compensation but are relevant to judgment as to how s 174 should be applied, and whether Mr Wilding should have the chance to buy the defendants' shareholdings. All claims and counterclaims reflect in the Interim Judgment delivered.

Mr Wilding's first cause of action

[111] Mr Wilding's first cause of action involved alleged breaches of the Shareholders' Agreement, in that the second to fifth defendants were in breach of their obligations as directors of TML. He maintained this first cause of action until the very end of the 2016 part of the hearing.[1]

[112] First, the lease of Lagoon Flat by WHHL to Terra Firma, rather than TML, was pleaded to have caused TML loss, because Mr Wilding says TML was entitled to that same lease under a right of first refusal pursuant to its own Agreement to Lease, and otherwise it should have been made available to it by the defendants given their duty to act in the best interests of TML.

[113] Second, there was a claim against some of the defendant directors for failing to act on the allegation against Mr Harrington that he, deliberately or otherwise, ran down the condition of young bulls to the economic loss or disadvantage of TML. That failure is said to have resulted in the loss of a chance to negotiate or offset the claim by Mr Harrington for wages and entitlements owed him, settled at the door of the ERA.

[114] Third, Mr Wilding pleaded that the defendants, as directors, were in breach of the Shareholders' Agreement when they compelled him to repay his current account liability.

[115] Fourth, he pleaded that the defendants breached their obligations as directors in bringing or supporting winding up proceedings brought by Mr Harrington against TML when they and Mr Harrington both knew the company was not insolvent, and the litigation was against the interests of TML and its shareholders. No damages were sought, but indemnity costs were claimed for those incurred by Mr Wilding in successfully resisting liquidation.

[116] Finally, Mr Wilding pleaded that the defendants were in breach in respect of the DOC Grazing Licence near Lagoon Flat, by supporting Terra Firma and its principals, Mr and Mrs Luporini, as competitors of TML, in separate proceedings under *CIV-2015-409-232*, and by allowing Mr Harrington to remain a director of TML with access to company records including confidential information, despite his involvement with Terra Firma. He pleaded that TML has not been able to develop and use the DOC land to which it was entitled, which has caused TML wasted expenditure. He pleaded that WHHL was liable as a party to the various breaches of duty by the third to fifth

defendants.

The fate of the (abandoned) first cause of action

[117] This first cause of action was not in my view tenable as an attempted detour around the law. It was an attempt to circumvent the principle that these causes of action belong to TML, but Mr Dale for Mr Wilding said the same allegations find their way in the second cause of action, and by agreement of the parties that is the legal framework for determination of all issues between them. However, as the first cause of action was before the Court until the end of the trial I express my view in short form.

[118] Section 171 of the Act provides:

> **171 Personal actions by shareholders against company**
>
> A shareholder of a company may bring an action against the company for breach of a duty owed by the company to him or her as a shareholder.

[119] For a duty to be enforceable by a shareholder, whether pursuant to the constitution of the company or a shareholders' agreement, that duty must be created by agreement and owed *by the company*, not by the directors or management, to the shareholder in that capacity.

[120] The duties owed by a director to the company, and duties owed by directors to shareholders, are clearly delineated at law. Directors owe limited duties to shareholders which allow personal actions to be brought in the event of breach. They are restricted to the duties to supervise the share register, to disclose interests, and to disclose share dealings.

[121] The only available claim against the directors for breach of their obligations as directors of TML is under the Act, not under the Shareholders' Agreement, and only TML can make such a claim.[2] Directors owe most of their duties to the company, and not to the shareholders: the duty to act in good faith in the best interests of the company (s 131 of the Act); the duty to exercise powers for a proper purpose (s 133); the duty not to trade recklessly (s 135); the duty not to agree to certain obligations (s 136); the general duty of care (s 137); and duties in relation to use of company information (s 145).

[122] Section 169(2) of the Act provides that a shareholder cannot bring an action against a director:

> to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.

[123] The law also recognises the distinction between duties owed by a director which are fiduciary in nature, and business decisions within the province of the reasonable director. Self-interest may lead to a finding of breach of the fiduciary obligation of loyalty or fidelity, which constitutes acting in bad faith or contrary to the company's interests.[3] Otherwise, s 131(1) has a subjective element to it which reflects the principle that the Courts will not judicially review decisions made by directors.[4]

[124] Mr Hunt for the third defendant correctly submits that Mr Wilding largely relies on s 131 of the Act, that a director has a duty to act in good faith and *in the best interests of the company*, and that is the way the case has been put throughout by Mr Dale. The proper claimant is thus the company, but a shareholder may, with leave, bring a derivative action on behalf of the company to enforce obligations owed to it.[5] Mr Hunt cites the judgment of White J in *Morgenstern v Jeffreys*, where he said:[6]

> [55] There is no dispute that the duties imposed on directors by ss 131, 135 and 137 are owed to the company and require directors to act in the best interests of the company. A director must not put his or her personal interests ahead of those of the company. The duties arise regardless of the size of a director's shareholding and role in the company…

[125] Dunningham J, in antecedent litigation brought by Mr Wilding to remove Mr Harrington and Ms Adams as directors, addressed these principles.[7] For the reasons discussed, the first cause of action was misconceived in

law.

Mr Wilding's second cause of action

[126] Mr Wilding's second cause of action against the second, third and fifth defendants is brought under s 174 of the Act, repeating the allegations of breach of the Shareholders' Agreement, including directorial breach, in the abandoned first cause of action. He says he should be given the opportunity to purchase the defendants' shares in TML, at a value fixed by the Court.

[127] His second cause of action comprehends all pleaded allegations of breach by the defendants and the remedies sought in the abandoned first cause of action. He says the actions of the defendants have been, or are likely to be, conducted in ways that are oppressive, unfairly discriminatory or unlawfully prejudicial to him.

[128] He says that he incurred significant legal costs to protect TML and that in various ways the second, third and fifth defendants engaged wrongfully in a strategy to wind up TML, in order to commence a similar stud cattle business or to extract their investment. He seeks orders that the second, third and fifth defendants pay TML damages or compensation arising out of their alleged breaches of obligation to TML.

Mr Wilding's further (the fifth) cause of action

[129] Mr Wilding says he has spent $70,000 to construct cattle handling and sale facilities at the Te Mania property used by TML and for its benefit. That cost was at first incurred by TML, but Mr Wilding met that as part of his current account liability. He says that TML has had the benefit of those facilities without payment of rent for five years, and seeks reimbursement in the sum of $70,000.

Te Mania Properties Ltd—Third and fourth causes of action

[130] The third and fourth causes of action are brought by TMPL. It alleges breaches by TML of its leasehold obligations in respect of Te Mania, Wadi and Rafa. The claims relate to alleged deficiencies in the application of fertiliser, failure to pay rates, and failure to repair fencing and gateways, and carrying out general maintenance.

[131] TMPL says that TML occupied Wadi without a formal lease, and that TML agreed to pay development costs in lieu of rental until an agreement was reached at a Board meeting of 21 February 2013 whereby TML agreed to pay an annual rental of $30,000. The claimed difference between the sum TML paid for improvements, and rental from 1 July 2006 to 1 August 2012 is $15,000 plus GST per annum.

The first defendant—Te Mania Livestock Ltd

[132] TML denies any breach of the leases of TMPL land. It says that the properties were in poor condition when TML took occupation and that it spent $187,530 on repairs between 2005 and 2013.

[133] It says that a set off was agreed, that Mr Wilding would graze sheep on the leased land in lieu of TML paying rates. It says that TML paid development costs in lieu of rental on Wadi and that a debt of $52,021 owed to TML by Mr Wilding was forgiven in satisfaction of rent payable by TML to TMPL.

[134] It says that TMPL spent money to improve facilities on land leased by TML.

Third defendant—Mr Harrington

[135] Mr Harrington says that he cannot be liable as a director for failing to pursue a claim against himself for bringing proceedings to liquidate TML, and that he was entitled to bring those proceedings to recover the amount owing to him. He says the call made that Mr Wilding pay his current account was proper, and he denies any liability in respect of the DOC land, and for alleged stock mismanagement.

[136] He denies any breach of the Shareholders' Agreement and, relevant to s 174, denies that he, or any of the defendants, have acted contrary to their obligations to TML.

Counterclaims

[137] Mr Harrington's first counterclaim is for what he says was malicious prosecution by Mr Wilding, in respect of a complaint made to Police that resulted in Mr Harrington being charged with theft of hay belonging to TML.

Alternatively, he says that Mr Wilding took various steps in relation to the prosecution for collateral and improper purposes which have caused him damage.

[138] His second counterclaim is for an order under s 174 of the Act that the affairs of TML have been, or are likely to be, conducted in a manner oppressive, unfairly discriminatory or unfairly prejudicial to Mr Harrington in his capacity as a shareholder of TML. He lays that at Mr Wilding's door. Mr Harrington's position at trial is that he is entitled to relief by way of an order for the winding up of TML, or, only if that order is not made, that Mr Wilding be ordered to buy Mr Harrington's shares at a fair value fixed by the court.

Second, fourth and fifth defendants—WHHL, Bee Teck and Mr Wong

[139] These defendants deny any liability to Mr Wilding and by counterclaim seek relief under s 174 and/or s 241 of the Act. They allege that Mr Wilding has "continued to unilaterally involve himself" in TML's business and/or has incurred expenditure in the name of TML and has made unilateral decisions, either without consulting the Executive Committee (EXCO) or contrary to the decisions of EXCO, and has otherwise acted in a manner that is or is likely to be oppressive, unfairly discriminatory or unfairly prejudicial to WHHL, Bee Teck and Mr Wong. They seek an order that Mr Wilding buy their shares at the price fixed by the Court and otherwise that TML be liquidated.

The track of these Reasons for Interim Judgment

[140] Most of the issues determined in the Interim Judgment and reflected more fully in these Reasons, impact in some way on judgment as to the future of TML. One issue seems an outlier, namely Mr Harrington's claim that Mr Wilding is liable to him in damages for malicious prosecution, or abuse of process. A discrete award of damages was sought, in respect of that claim, but it is also said to be relevant to relief under s 174 of the Act.

[141] There are some issues which do not result in a damages or liability component, but are relevant to s 174 of the Act, in terms of the parties' conduct. For example, Mr Wilding says that the defendants have acted together to wrongly bring down TML, forcing it into liquidation. Another example is Mr Harrington's submission that Mr Wilding acted in various ways which showed a disregard for the interest of others in TML, and treated TML as a Wilding family company. The defendants also refer to the hacked emails. Whether or not they are associated with damages or compensation, these elements of conduct are all in the mix when it comes to judgment as to whether Mr Wilding should have the opportunity to purchase the shares in the company.

The Shareholders' Agreement

[142] For his s 174 cause of action Mr Wilding relies on the Shareholders' Agreement, with its express requirement that the directors act in the best interests of the company and not in the interests of the shareholder appointing that director (cl 8.2(c)). He also relies on the restriction on liquidation pursuant to cl 9.1(d), and the voting structure which has the effect that minority shareholders may dominate the majority. Clause 13.11 of TML's Constitution allows a director who has declared an interest to vote, but does not dilute the obligations of a director to act in the best interests of the company. That remains the overriding obligation of the director. Mr Dale says that the notion that a minority shareholder (Mr Harrington) should attempt to wind up a solvent company against the wishes of the majority, speaks for itself, and Mr Harrington was acting in the interests of himself and those aligned with him and contrary to the interests of the company as a whole.

Section 174 of the Companies Act 1993

[143] Section 174 of the Act provides:

> **174 Prejudiced Shareholders**
>
> (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the court for an order under this section.
>
> (2) If, on an application under this section, the court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order—
>
> (a) requiring the company or any other person to acquire the shareholder's shares; or
>
> (b) requiring the company or any other person to pay compensation to a person; or

(c) regulating the future conduct of the company's affairs; or

(d) altering or adding to the company's constitution; or

(e) appointing a receiver of the company; or

(f) directing the rectification of the records of the company; or

(g) putting the company into liquidation; or

(h) setting aside action taken by the company or the board in breach of this Act or the constitution of the company.

(3) No order may be made against the company or any other person under subsection (2) unless the company or that person is a party to the proceedings in which the application is made.

[144] Section 174 preserves and extends the remedy which was available under its predecessor, s 209 of the Companies Act 1955. Decisions in the United Kingdom are relevant because of similarities between s 994 of the Companies Act 2006 (UK) and s 174. The concept of "unfairly prejudicial" conduct is uniform across them, although the UK equivalent does not use the terms "oppressive" or "unfairly discriminatory". Section 174 may be invoked only where the allegedly prejudicial conduct/action is conduct/action *of* the company or relating to the affairs of the company.

[145] Section 174 has recently been considered by the Court of Appeal.[8] The Court identified principles which qualify the scope of s 174. The conduct alleged to be oppressive need not be unlawful, as one of the primary purposes of s 174 is to prevent, in the interests of justice, the exercise of a power which would otherwise be lawful.[9] Neither must it involve bad faith: the inquiry is to the *effect* of particular conduct, and not to the state of mind of the party behind it.[10] The corollary to that is that a course of action taken which the party responsible believed was in the best interests of the company does not preclude relief.[11] This is apposite to judgment in this case. The relative stake-holdings of the parties neither direct nor preclude its application.[12] The control which might permit oppressive conduct often goes hand-in-hand with a majority shareholding, but this need not be so. Oppressive conduct may be found in the actions of managers and others within the company, those responsible for the conducting the affairs of the company, so relief is not limited to actions taken by directors or shareholders.[13]

[146] The party seeking relief under s 174 is generally required to come to the Court with clean hands and, to that extent, equitable principles are relevant. A party who has acted improperly may not be entitled to relief, as the "just and equitable" requirement engages equities. The Court may: "subject the exercise of legal rights to equitable considerations; that is, of a personal character arising between one individual and another".[14] In this way, "wrong and remedy are closely linked".[15]

[147] In *Latimer Holdings Ltd v SEA Holdings NZ Ltd*, the Court of Appeal discussed the principles relevant to whether conduct is "oppressive, unfairly discriminatory, or unfairly prejudicial", and justifying relief.[16] Errors of judgment in the management of a company or poor business management, without some element of underhandedness or bad faith, are not "oppressive". A mere disagreement over potential company strategies is not sufficient to justify relief. In *Jordan v Chemical Specialties Ltd*, the Court confirmed the broad jurisdiction governing the construction of those terms.[17] The concept of "fairness" is not to be assessed in a vacuum from one party's perspective, devoid of reference to other interests or members' points of view. The reasonable expectations of shareholders, objectively assessed, are relevant, and include "formal" expectations derived from the articles and shareholder agreements, but also "informal" expectations which arise broadly from conduct which indicates powers would or would not be exercised in a certain way.[18]

[148] An application for liquidation of the company is usually brought under s 241 of the Act. In addition to specified circumstances where the Court may appoint a liquidator, the Court has a general discretion to do so if it is "just and equitable that the company be put into liquidation".[19] Where there are other options open to the Court, which are viable for the parties, an order putting the company into liquidation is often seen as a remedy of last resort.[20] The Court, in the exercise of its discretion, may order that the company be put into liquidation where there is a deadlock or impasse sufficient to disrupt the continued operation of the company. As the Court said in *Sea Management Singapore Pte Ltd v Professional Service Brokers Ltd*:[21]

> The essential basis for the court to give relief is frustration by internal discord. The court may order liquidation in its discretion if it is satisfied that there is no other way out of the impasse.

[149] In determining whether it is "just and equitable" to order winding up, the Court will examine the alleged deadlock for causes and effects.[22]

Liquidation under s 174(2)(g)

[150] The Court may order liquidation pursuant to s 174. Similar principles are applicable, as those for liquidation orders under the "just and equitable" provisions of s 241. This form of relief will be rare, and an order for liquidation will usually be the remedy of last resort, especially where the evidence is that the company is solvent and successful, and in those cases a "strong case" must be made for liquidation.[23] In general, what is required is a complete breakdown of relations, which may be the fault of one or a number of parties. In *Jenkins v Supscaf Ltd*[24] and *Strachan v Denbigh Property Ltd*,[25] applications by the plaintiffs for an order that the company/remaining shareholders buy their shares were refused. The companies were wound up in the exercise of the "just and equitable" provisions in s 241. Previous attempts between the parties to buy and sell shareholdings to resolve the problem had been to no avail. These cases demonstrate that where there is a viable buy-out the Court should be slow to order liquidation under s 174(2)(g) or s 241.

C. Antecedent litigation (before trial)

[151] The trial of this action was preceded by several rounds of litigation.

DOC grazing licence

[152] Gendall J delivered judgment on 28 May 2015, declining an application for an interim injunction sought by WHHL in relation to the grazing licence issued to Mr and Mrs Wilding for the 17 hectares of DOC land which WHHL once held under licence.[26] WHHL sought a declaration that Mr and Mrs Wilding held that licence in trust for WHHL, and sought an injunction to restrain them from exercising any rights under the licence or preventing WHHL farming under that licence. Gendall J concluded that damages were an adequate remedy. He brought to account that Mr and Mrs Wilding advised the Court that they held the licence on *behalf* of TML. Kale had been planted as winter feed for TML's stock. Gendall J considered that given the acrimony and scope of the dispute between the parties, all matters should be addressed at trial. He brought to account the impact on third parties. In particular, Terra Firma, as lessee of Lagoon Flat farm, was deprived of the use of the DOC land which it thought it had a right to farm when it took up the Lagoon Flat lease. The status quo principle applied so that crops could come to maturity and be grazed by TML stock.

Derivative proceedings and application for removal of directors

[153] Mr Wilding's abandoned attempt to bring a derivative action has been mentioned. Mr Wilding had sought leave to commence derivative proceedings in TML's name against WHHL "for failing to renew a lease of farm land to TML", being Lagoon Flat, and Mr Harrington for allegedly neglecting stock while an employee of TML.[27] The first allegation was based on the alleged failure to offer a right of first refusal to TML for the lease of Lagoon Flat land, instead entering into a lease with Terra Firma. The second was part of an application for an order to remove Mr Harrington as director, based on a conflict of interest. This extended to Ms Adams as an alternate director. Mr Wilding sought the appointment of independent directors. He would step aside as a director if that was the result.

[154] Dunningham J traced the relationship of the parties. WHHL disputed that an enforceable lease of Lagoon Flat to TML ever existed, but said that if it did, it did not contain a right of first refusal. WHHL argued that in any event, Mr Wilding could not show that TML would have taken up the lease if it had been made available.

[155] Mr Wilding said that Mr Harrington's involvement as manager of Terra Firma, the neighbouring and smaller but competitive stud business, put him in a position of conflict. Terra Firma had taken up the lease of Lagoon Flat and Mr Harrington and Ms Adams had visited the leased property Lansdowne at Easter 2015 with the directors of Terra Firma, knowing that the TML lease of Lansdowne expired at the end of 2015 and that it was an important part of TML's farming operations. Mr Wilding was concerned that Mr Harrington and one of Terra Firma's directors had been inspecting farms in Hawkes Bay where most of TML's clients are based, which might provide Terra Firma with a strategic advantage over TML. Terra Firma had moved its bull sale forward to the day before TML's sale, and was using the same genetics for mating the Terra Firma Angus herd as Mr Harrington had undertaken at TML.

[156] Mr Wilding also alleged that the Lagoon Flat and Lansdowne properties, leased by TML, had seven times the expenditure of fertilizer applied to them by Mr Harrington than was spent on the TMPL properties managed by Mr

Harrington for TML. In essence, Mr Wilding said that Mr Harrington was assisting a competitor of TML to the company's detriment, and it was untenable that he and Ms Adams should stay on the Board of TML.

[157] The application for removal of the directors was addressed under s 164 of the Act, whereby an application may be made to restrain a company or a director "who, proposes to engage in conduct that would contravene the constitution of the company or this Act from engaging in that conduct".

[158] Under s 164(2), the application may be made by the company, a director or shareholder, or an entitled person. An interim order may be made under s 164(5). Section 164 applies prospectively, and is directed to *restraint* of conduct, not to the power to remove a director altogether. To the extent that the application for interim relief relied on ss 131, 137 and 169(1) of the Act, there was no serious question to be tried because no duty was owed to Mr Wilding as a shareholder. There was no application for leave to bring derivative proceedings on behalf of TML for breach of directors' duties under s 131 or s 137. The applications related only to the Lagoon Flat lease and alleged stock neglect by Mr Harrington. Dunningham J held that there was no jurisdiction to grant an interim injunction of the type sought. There was no serious question to be tried and, even if there was a serious question to be tried, the balance of convenience would not justify the removal and replacement of the directors on an interim basis.

Liquidation proceedings against TML

[159] On 22 April 2016, Associate Judge Matthews issued judgment on Mr Harrington's application for an order placing TML into liquidation.[28]

[160] Mr Harrington initially sought liquidation of TML as a creditor based on the money owed him by his employment settlement. He then sought liquidation as a shareholder of TML, relying not just on a presumption of insolvency but on affidavits to prove TML could not pay its debts. This was pleaded after Mr Harrington was paid the sum owed him by TML.

[161] The directors decided not to defend Mr Harrington's application. WHHL supported Mr Harrington's position. Mr Wilding then applied for leave to file a defence, and for an order restraining publication. High Court Rule 31.16 allows a creditor or shareholder to file a statement of defence to a winding up proceeding, and Mr Wilding did not require leave. Mr Hunt submitted that Mr Wilding had an onus to show that TML was *not insolvent*. The Judge disagreed as Mr Wilding might establish an arguable case that TML was solvent and that there was a serious question to be tried. The Judge inferred (as it turns out correctly) that those directors who did not oppose thought that the company should be placed in liquidation on the ground pleaded and that the company was unable to pay its debts, although he did not, on the evidence, reach that conclusion. It was obvious to the Judge that the point had been reached where the relationships between the shareholders and directors were such that liquidation was sought as an end in itself. The Judge said it was not the function of the court to determine who was correct, but if the company did not want to assert its solvency and defend the liquidation then the shareholder with the most at stake should be able to do so. The 2015 accounts for TML, which were accepted by resolution of the directors, showed net assets of $1,221,287. A trading loss was forecast, but TML would make an overall profit, despite the large payment to Mr Harrington in respect of his employment entitlements.

[162] His Honour tracked the statutory demand made by Mr Harrington. Heartland Bank advised TML that it could not meet the demand as it had insufficient funds to do so as of 5 October 2015, but to this point Mr Wilding had not repaid his current account debt, and when required he paid $310,000 on 16 November 2015. Mr Harrington was not paid by TML immediately. A Board meeting on 25 November 2015, Mr Wilding proposed a staged payment, and Bee Teck made a similar proposal. On 27 November 2015, Mr Harrington commenced the winding up proceedings. On 30 November 2015, the Board voted unanimously to pay Mr Harrington, and he was paid on 2 December 2015. The Judge said that payment was relevant to whether the presumption that the company was unable to pay its debts had been rebutted. He said that it was strongly arguable the payment did rebut the presumption, and he referred to authority that a temporary lack of liquidity may not equate to insolvency if a debtor can realise assets or borrow funds within a relatively short timeframe to meet liabilities as they fall due. The Judge cited the Court of Appeal, which in turn cited a passage from Barwick CJ in the High Court of Australia:[29]

> … the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time—relative to the nature and amount of the debts and to the circumstances, including the nature of the business of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such

> cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

[163] The Judge regarded TML as suffering from a temporary lack of liquidity, but well able to pay its debt to Mr Harrington by calling in the greater sum owed by Mr Wilding. Together with Heartland's support, that rebutted the presumption of insolvency. Despite this seemingly obvious point, Mr Harrington had pressed on with his proceeding and the Judge recorded:

> [21] Notwithstanding the fact that this conclusion would have been open to Mr Harrington on sufficient analysis at the time that payment was made to him, he elected to press on with this proceeding. Faced with the fact that once paid he was no longer a creditor he filed an amended statement of claim as a shareholder in order to continue to assert that TML is unable to pay its debts …
>
> [22] … Part of his evidence is directed at what he sees as the overall financial position of TML by reference, amongst other matters, to its reduced assets in the form of stock, and its debt level.

[164] Mr Harrington asserted TML would face difficulties in achieving income to match its proposed budget, the receipts expected from bull sales are optimistic compared with actual results in the previous two years, and other elements. He referred to the overdraft limit, and factors which he said would take TML beyond that limit. Mr Wilding deposed that invoices payable in March would leave the company within the overdraft limit, and further income was budgeted. Ms Adams deposed as to the position expected by the end of April that an overdraft of more than the $600,000 limit would be required, so unless the bank was amenable, or funding was obtained from another source, the payments required could not be made. There was contest between Ms Adams and Mr Wilding as to the proceeds of sale of culled cattle. Heartland Bank had approved an extension of TML's overdraft to $800,000, but the required resolution had not been passed, as Mr Harrington, Bee Teck and Ms Adams, for Mr Wong, refused to do so. Mr Wilding supported an increase in the overdraft, believing the June bull sales would yield enough to clear the overdraft, as in former years.

[165] Increasing the overdraft would not increase the company's overall debt, but replace debts to trade creditors. The Judge referred to the prolonged drought conditions and the unbudgeted debt to Mr Harrington, who did not have to assist the liquidity of the company by accepting staged payments, although that would have helped. Mr Hagen gave expert evidence for Mr Wilding that the company was not insolvent. The Judge said:[30]

> If the directors choose not to avail themselves of that facility, it is that decision which may put it in a position of having to defer payments to creditors for a comparatively brief period, as I have discussed.

[166] Thus, the Judge concluded that it was strongly arguable that TML could pay its debts. He addressed a restraint on advertising and said that creating uncertainty or doubt in the commercial community about the financial viability of TML just when it was on the cusp of a crucial period of trading was highly undesirable in the interests of the company. He said:[31]

> Indeed, it is surprising that the majority of the directors who have decided not to oppose this proceeding, and who thus seem content to have this application advertised, do not see this as being contrary to the interests of the company.

[167] Leave was granted to Mr Wilding to defend the proceeding, advertising was restrained and the proceedings stayed until further order of the Court. The attempt to wind up TML by Mr Harrington, supported by the WHHL defendants, is reflected in the *Issues* section of these Reasons.

D. Issues

(1) The conduct of the parties

[168] The Introduction to these Reasons for Interim Judgment charts the narrative history of TML to identify the issues for determination. The parties, in particular Mr Harrington and Mr Wilding, allege fault against one another, and the reasons for their terminal falling out must be explored. Judgment on all the issues is required before the overall assessment required for the purposes of s 174 of the Act.

[169] The falling out between two factions of the shareholders seems to have begun with Mr Wilding and Mr Harrington. Mr Harrington worked for TML for 15 years. He became a director and shareholder in 2005 and was general manager, then managing director from September 2012, until he resigned in October 2014. He was highly regarded for his professional skills. He was regarded fondly and with respect by William Wilding who saw him as a mentor, and part of the family. Mr and Mrs Wilding did so too in happier times.

[170] As traversed, Mr Harrington, supported in particular by Bee Teck, says that in 2012 other shareholders came to think that Mr Wilding treated TML as if it was his own. Other shareholders thought TML was being used as a bank for Wilding interests. This was a very sore point, as was Mr Wilding authorising payments by TML through Mrs Wilding which Mr Harrington had not approved.

The TML accounts

[171] From July 2012, correspondence between Mrs Wilding and Mr Harrington addressed TML accounts, and what should have been routine matters. The tone reflects the tensions. Mrs Wilding concluded an email of 20 August 2012 by asking Mr Harrington to explain his comment regarding:

> … your concern/disappointment of my handling of the financial affairs of the company in recent months.
>
> What else have I done wrong now?

[172] This correspondence became more pointed when Mr Harrington wrote to say that Mr Wilding did not own the company outright. Mr Harrington's position was that Mr Wilding had an obligation to *all* the shareholders "to see the company is run well/fairly!" In a highly critical email of 14 August 2012, Mr Harrington had said:

> Once again Tim gets his own way without having to pay for it! He is great at spending other people's money, namely the companies! (sic) … Katie and Tim have had little disregard for the procedures that the company and directors have agreed on". (sic)

[173] The email concluded by saying unless Mr and Mrs Wilding:

> … both want to make major changes in the way the company's financial affairs are handled, I have no alternative but to hand in my resignation as General Manager of Te Mania Livestock ltd as I cannot/will not carry on with the blatant waste and poor management of company funds. … I have no desire to work with another new shareholder as Tim is proposing at the present time. I have commitment as General manager, to make sure the company is run with the utmost integrity for all the shareholders, BUT under the current circumstances this isn't possible.

[174] This produced the conciliatory response from Mr Wilding of 20 August 2012 to which I have referred. He apologised, and said "I accept the fact that I am mostly to blame", and that "[my] own personal financial position has not been helpful in allowing me to support you [Mr Harrington] and TML as I would ideally like" and Mr Harrington was right. He said there were some misunderstandings and "very obviously things need to change Johnny". No TML accounts would be paid unless authorised by Mr Harrington in writing, lease agreements would be updated for all properties, and a management contract entered with Mr Harrington. Mr Wilding asked Mr Harrington to accept his apology, and make a fresh start. As was abundantly clear in evidence, Mr Harrington took this and other proposals with a pinch of salt. He thought that Mr Wilding simply said one thing and did another.

[175] In September 2012, Mr Harrington wrote a long email to his shareholders and directors. He challenged Mr Wilding over several matters and looked back to measures which had been agreed but which he said had not come to anything. A specific concern was that "Katie had no authority to pay out over $80K in July while [Mr Harrington] was away", in the United States. TML sponsored a young New Zealand rower to the tune of $10,000. Mr Harrington was dead set against this. He agreed that TML contribute one third of the proceeds of the $10,000 from the sale of a bull dedicated to this sponsorship. He referred to TML's payment of $61,000 for Mr Wilding's share of costs associated with securing water rights. He referred to Wadi and said that when TMPL purchased that property in 2007, a lease with TML was agreed. Wadi was very run down, and TML contributed to development costs which Mr Harrington thought amounted to more than any rent that might be paid. He concluded by saying that he was "not slightly interested in staying in the position of General Manager" without resolution of the multiple issues, but in

particular that "TML cease as a bank for Tim immediately without exception, Tim and Katie to have no further input into the financial running of the company".

[176] Mr Dale tested Mr Harrington closely that whatever the antecedent difficulties between the directors, Mr Wilding recognised that he had to leave TML management to Mr Harrington, and not interfere. Mr Dale's thesis was that Mr Harrington failed to play his part for TML to move on in a unified way but with the WHHL defendants sought to bring TML to its knees, so they could exit their investment. Mr Wilding's position was that he always acted in the interests of TML, but Mr Harrington and other defendants did the opposite, and did all they could simply to get out of their investment. The defendants for their part say Mr Wilding was determined to get his own way, did what suited the Wilding family contrary to the interests of TML, and drove Mr Harrington out of TML with allegations of stock mismanagement, and the complaint of theft.

Underlying pressures and resentment

[177] The Wilding interests were under financial pressure from time to time, yet on 12 June 2012 Mr Wilding wrote to Bee Teck and copied Mr Harrington to say that TML should own land, or it would be vulnerable to the dictates of lessors. The irony of this is palpable given the neglect by all parties to carefully address TML's security of tenure under leases and licence, and when Mr Wilding was quite prepared to sell the TMPL lands from under TML, but later allege that WHHL did not properly consider TML's interests when it withdrew Lagoon Flat.

[178] Bee Teck's evidence is that Mr Wilding reneged on a profit sharing agreement with TML in respect of the Wadi property. I have mentioned my conclusion that there was no profit in this development and while it caused considerable disappointment, it should not be regarded as a breach of any obligation by Mr Wilding, nor was it dishonourable or unfair to TML shareholders. Mr Girdlestone's evidence made it plain that there was no profit but it left the defendants with a sense of having been let down.

Personalities

[179] Mr Wilding is a strong personality, reflected in correspondence and his evidence. Mr Wilding wrongly thought that Mr Wong had agreed to buy the leased property Wenlock "behind his back". He expressed himself very forcefully, then when he found out he was wrong he backed off and apologised, graciously. He is a man of black and white perspectives, and this was a feature of his evidence over many days in the witness box. He saw things his way and compromise was not his strongest suit, although he called for the shareholders to work together on several occasions.

[180] The sadness of the collapse in the relationships was reflected when Mr Wilding, even at a time of discord, spoke glowingly of Mr Harrington, acknowledging he had done a "magnificent job" improving the genetic base of the herd. He said:

> We have had two record sales in succession for New Zealand and everybody thinks that Johnny is marvellous and I agree he has done an outstanding job, but he has also had a huge amount of support behind the scenes that goes mostly unrecognised.

[181] The same sadness is reflected by Mrs Wilding and William Wilding as a young man and a fourth generation Wilding family member. He had no success in gaining employment with TML while Mr Harrington was the manager, although he had by then spent some years away learning the stockman's role, at Mount Nicholas and The Muller high country stations. He was asked about his relationship with Mr Harrington. Mr Harrington had been part of the Wilding family household, indeed spending Christmas in that household. William Wilding described him as a sort of uncle to him, who taught him fly fishing. He clearly respected him and learned a great deal from him. Mr Harrington for his part expressed reservations about William Wilding's work ethic in earlier years, in part to explain why he did not employ him later. Nothing can take away the historical relationships, but whatever the ignition for the discord which developed, it has proved terminal. From the Wilding perspective, Mr Harrington's partner Ms Adams has had a lot to do with this.

A "hidden agenda" or "strategy" on the part of the defendants?

[182] As it is such a focus of Mr Wilding's case, I refer in more detail to a meeting of watershed importance on 5 July 2013, after the June bull sale. The Minutes record:

> Minutes of Meeting held at Kaiapoi Breeding Centre for Te Mania Livestock Ltd Friday 5th July 2013.

Present:—Lindsay Smith, John Harrington, Tim Wilding, Katie Wilding, Bee Teck

Apology:—Weiguo

1. Sale result 150 bull sold average price $6836. Exceeded expectations with only 2 bulls passed which were sold after the sale. Congratulations extended to all those involved.
2. Account with Heartland in credit with Bull sale proceeds into account yesterday. Stock numbers will close at just over 1700 head a lift of 150. Costs to setup Ashburton has impacted on result with plant, feed and lease being upfront cost before a return. Result suggests no dividend will be paid as general feeling cannot pay dividends out of overdraft.
3. Discussion centred on Tim Wilding's offer to purchase shares in Te Mania and also WHH land being Lagoon Flat. Outcome declared that no party wished to sell their shares.

Tabled that shareholders split ownership of TML as to their shareholding.

New entity to take Lansdowne, Lagoon Flat and Ashburton

Tim Wilding retains the balance. The name and brand to stay with Tim Wilding.

Request to table a resolution as to shareholding split

Decision:—Lindsay Smith to seek advice from solicitor David Stock as to Shareholders' Agreement.

Outcome and any plan implemented by 31st July 2013.

Options

a) Status quo

b) 60:40 split

c) Market and sell all stock.

Meeting closed with above tasks, and to report back as soon as possible.

Minutes taken by

Lindsay Smith.

[183] It was a fateful meeting. Mr Wilding's perspective is reflected in an email sent on 8 July 2013. He said he had been "totally taken aback" that Bee Teck was not interested in selling to the prospective investor, and with the proposal tabled to split the company. He did not see that as being in the best interests of the company. If he had known that Bee Teck did not want to sell he would not have wasted everyone's time pursuing the prospect. He called this a "hidden agenda" orchestrated by Mr Harrington, and the meeting broke up when he left. This refrain rang throughout the whole trial.

[184] Events leading up to the Board meeting on 5 July 2013, and afterwards, are central to the submission for Mr Wilding that the defendants bar Mr Hong have acted "in concert", as a strategy to bring TML as a functioning company to an end. The agenda of the defendants was not in my view "hidden" and I make this finding. How they went about achieving their stated aim of exiting TML, one way or another, is another matter.

[185] On 11 July 2013, Mr Wilding wrote to Mr Smith and copied in Mr Harrington and Bee Teck. The sale of TML was not supported by the shareholders, and splitting the company assets would not occur. Mr Wilding said that was a good thing "as at least it's out in the open and our focus can now collectively go towards supporting the company to achieve maximum shareholder returns". He struck an optimistic note and referred to the investment in water and

other infrastructure as a long term position to support TML, and that the record bull sales over the past few years were attributable to the buy-in and support of the Te Mania breeding programme by clients, and the positive "population pressure" which TML could apply to breeding animals due to the large genetic base.

[186] The defendants saw things very differently. Bee Teck wrote from Singapore having spoken with Mr Wong. He referred to bank pressure on Mr Wilding, and the possibility of the sale of shares in TML and Lagoon Flat to an angel investor. He had asked Mr Harrington about the angel investor and was told he had never been asked his thoughts about a new company, and categorically would not stay on with a new structure. Bee Teck rejected any suggestion of conspiracy or a "hidden agenda" by Mr Harrington, Bee Teck and Mr Hong. He said that he, Mr Hong and Mr Wong would not remain shareholders in TML if Mr Harrington quit. He referred to the risks of a fire sale. He said:

> I feel there is little goodwill left amongst shareholders of TML. It is hard and unproductive to proceed further with so called open and transparent discussions. The 60/40 split would absolve us the difficult task of the valuation of TML. If you are not agreeable to a 60/40 split, please let me know your alternative by the end July as agreed at the Board meeting. Otherwise we will have to consult with our bank on outstanding loans and guarantees, and then seek a legal remedy to the dissolution of the company.

[187] Bee Teck's stance could not have been clearer. Mr Smith wrote with concern about reference to a "legal remedy for the dissolution of the company", and if that happened he would tender his resignation as an independent director. He was independent and had no financial stake in TML, so would not be drawn into a legal battle. Mr Hong accepted the advice of Mr Stock and said Mr Wilding's co-operation was needed in order to come to an amicable settlement. He looked forward to some "concrete proposals". Mr Wong had suggested that Mr Wilding buy the defendants' shares, or vice versa, or that everyone sell to a third party. Mr Hong was not prepared to put in $1 million cash to secure TML credit lines, so a better rate was needed from another bank.

[188] These were reasonable perspectives held, and clearly the defendants wanted to go their separate ways. Mr Wilding's email of 28 July 2013 to Bee Teck squarely stated his position that he thought there was a "(concerted) effort driven by management to gain control of the company by whatever means possible". He was taking aim at Mr Harrington. The defendants say it was Mr Wilding who later took such steps, by supporting the prosecution of Mr Harrington for alleged theft, and alleging wrongly his deliberate mistreatment of the young bulls.

[189] The evidence demonstrates a genuine attempt by the defendants bar Mr Hong to extricate themselves from their association with Mr Wilding. To them TML had not been successful, and would not be. The comprehensive breakdown in relationships and disagreement as to how TML should operate were overarching realities. Mr Wilding thinks the strategy of Mr Harrington, Bee Teck and Mr Wong was to wind up TML so they could start a similar business, as pleaded in the Fourth Amended Statement of Claim (4ASOC), which that was not in the best interests of TML. He thinks that was their ulterior motive. I do not consider that was their purpose as such although it was one idea.

[190] I conclude that severance was inevitable, whatever Mr Wilding hoped. That does not mean that the defendants acted to impact negatively on TML's business, nor in a way which attracts any liability. Mr Hunt put it that it would have been foolish for them to have acted in such a self-destructive way given their financial interest in TML, in the case of Bee Teck through WHHL not making Lagoon Flat available to TML, and in the case of Mr Harrington by stock mismanagement. The defendants say that the attempt to wind up TML was one way to end the unworkable relationships when no other path seemed available. It would unlock the value of its assets and bring the loss making to an end. They saw "business as usual" as simply eroding equity in the company, and subsequent events have proved this right. However, winding up would not have been a clean exit strategy because it would not have resolved the disputes between the parties and their claims and counterclaims, and potential claims and defences of a liquidator.

Allegation of disloyalty and breach of fiduciary duty

[191] At its highest, Mr Wilding alleges serious disloyalty by Mr Harrington. A breach of fiduciary obligation connotes disloyalty or infidelity and in particular Mr Wilding refers to deliberate stock mismanagement and the attempt to wind up TML. Millett LJ drew a distinction between disloyalty and performance when he said "a servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty".[32]

[192] Mr Wilding alleges animal neglect was a failure on Mr Harrington's part, or a deliberate act based on a warped self-interest, or as part of the alleged strategy. I have stated, for reasons set out further, that Mr Harrington did not act in such a deliberate and destructive way.

[193] I have referred to Mr Harrington's attempt to liquidate TML. Mr Dale emphasises that Mr Harrington and the directors voted against the company even being represented in the liquidation proceedings, so had Mr Wilding not intervened, advertising followed by winding up was inevitable. The directors were prepared to outvote Mr Wilding at a directors meeting in November 2015. Item 6 of the Minutes records the discussion on a resolution to seek legal advice regarding the liquidation proceedings and only Mr Wilding voted in favour of a short term resolution to which Mr Harrington abstained, and the other directors either voted against or with what the majority of directors wanted. The long term resolution was that Mr Mackenzie be instructed to provide advice to the company to which Bee Teck and Mr Hong (via Mr MacDonald), Mr Wilding and Ms Adams voted in favour. Bee Teck's position was to file an appearance supporting the application, Mr Hong's position to file a defence, Mr Wilding's position to file a defence, and Mr Wong and Ms Adams' position to file an appearance supporting the application. Mr Harrington was the party bringing the litigation. Mr Mackenzie did not have instructions and TML did not take part in the proceedings.

[194] There is no preclusion on the right of a shareholder to seek an order putting the company into liquidation.[33] Clause 9.1(d) of the Shareholders' Agreement purports to restrict the statutory right to apply to put TML into liquidation. The Court understands that has not been applied in New Zealand, but there is well respected authority. The authors of *Morison's Company Law* put it that it is consistent with s 31(1),[34] which provides that the constitution has no effect to the extent that it contravenes, or is inconsistent with, the Act.[35]

[195] *Re Peveril Goldmines Ltd* has been applied in the United Kingdom and in the High Court of Australia. Clause 9.1(d) does not restrict a shareholder's right to apply to the court, but that requires a 75 per cent majority under s 106(1)(d) of the Act 1993. Mr Harrington was clearly entitled to bring liquidation proceedings to recover the money agreed owing to him.[36] No damages are sought against the WHHL defendants but rather, this attempt to liquidate TML is said to be relevant to overall disposition under s 174, and indemnity costs.

[196] The defendants took the position that the expired statutory demand by Mr Harrington was sufficient proof of insolvency and that the company would not be able to pay its creditors in December or January, as explained by Lane Neave in a letter of 11 December 2015. While the Bank would increase the overdraft to get through to the June 2016 bull sale, Bee Teck's position was that he wanted TML to reduce its debt and become more profitable. Mr Russell and Ms Hopkins submit that if a properly-convened Board meeting had decided not to accept an offer to extend the company's debt facilities and such would result in a cash shortfall, then TML would be insolvent or likely to become so.

[197] For shareholders and directors to indicate they would not support an extension of overdraft, when such was approved by Heartland Bank, was to create a position of alleged insolvency on the company for reasons which were at that time in the self-interest of those directors. It was not in my view a reasonable stance for the WHHL defendants and Mr Harrington to take. There is no good evidence that the directors looked at the outcome of the liquidation so as to analyse the benefits of that course, rather than continuing in business. They simply wanted out. I conclude that Bee Teck and Mr Wong as shareholders, and Mr Harrington, wanted to find a resolution within TML if they could, but they were forced to address other outcomes when Mr Wilding was prepared to simply box on. TML was under financial pressure, but retained Heartland Bank's support. As Mr Girdlestone said, the real problem lay in the intractable differences between the factions of shareholders and directors.

[198] Liquidation may be the best way to realise the assets of a company, where there is no other viable means of resolution. The proposition for Mr Wilding, and his own view, is that the defendants, other than Mr Hong, went about their work as a deliberate and wrongful strategy to achieve a liquidation outcome. They did nothing to prevent the company being wound up, when it was clear that there was no such prospect on the grounds alleged. I consider Mr Harrington was wrong in the way he pushed for liquidation on the grounds of insolvency, after he was paid the money owed to him. The threat of adverse publicity on TML was ignored. In the end he attempted to argue that the company was insolvent, when there was no proof of that as Associate Judge Matthews held. This was, in my view, an action which Mr Wilding can properly criticise. In the end, I conclude that the defendants, bar Mr Hong, wrongly endeavoured to put pressure on Mr Wilding and TML by liquidation of the company based on an unsustainable allegation of insolvency, when the true alternative would have been to seek relief from the Court based on the ungovernable nature of the company.

Intermingling of Wilding family finances with TML

[199] I reject any suggestion Wilding interests were using TML in a way which constituted a "criminal breach of trust" as contemplated by Bee Teck and it was not in the end, alleged against Mr Wilding at trial. I regard this position and submission by Mr Russell and Ms Hopkins as responsible.

The Kirriemuir lease

[200] Mr Dale submits Mr Harrington simply wanted to set up his own business, encouraged by Ms Adams and assisted by WHHL, and that is why the Ashburton lease was entered. I reject that proposition. It is true that Mr Harrington wanted out, and he wanted to split the company, as did Mr Wong and Bee Teck. They would have gone their own way and may have included Kirriemuir in that exit, maybe not. It was a properly reasoned, but short lived decision to lease Kirriemuir.

Lagoon Flat

[201] For reasons developed under Issue 2, I conclude that WHHL and its shareholders and directors were looking to their own interests by decoupling Lagoon Flat, and selling it, rather than deliberately trying to bring TML to an economic watershed. They wanted to sell Lagoon Flat. There were reasons not to offer a further lease to TML given stock downsizing and prospective sale, and reasons for TML not to take it up.

The counterfactual

[202] The WWHL defendants, being the company, Bee Teck and Mr Wong, acknowledge with Mr Harrington they wanted to exit TML by 2013 and that was made clear. The idea that they would attempt to reduce the value of their equity by causing loss to TML is submitted by counsel to be nonsensical, because they were trying to protect their equity, prevent ongoing losses, and reduce or control the level of TML's debt. They submit, through counsel Mr Russell and Ms Hopkins with Mr Harrington's support, that they were acting in the best interests of the shareholders as whole, and that was in the context of an irretrievable breakdown in their relationship with the Wilding family.

Overview of the falling out

[203] I conclude that Mr Wilding found it very hard to work with the other shareholders and directors. He did not separate with clarity Wilding interests from TML. His admirable and at first shared vision for TML would require patience and further funding. The patience of the defendants ran out, and the prospect of sustainable dividends was unlikely. Mr Harrington is very able but his animosity to Mr Wilding is real, and partly arose because of the way Mr Wilding cut across Mr Harrington's management. There is more to it I believe, but somewhere along the way there grew dislike, then a deep loss of trust. From that point, there was no way to repair the damage, and the discovery of hacked emails simply confirmed for the defendants what they already felt. The defendants in various ways were involved in actions which reflected their understandable desire to exit TML and align themselves to this end, and they took steps to do so. Mr Wilding never got to grips with the fact TML could not go on as it was.

[204] It is sufficient to record my finding that while Mr Wilding wanted TML to continue, making such board and management decisions as would best serve TML, the ability of the shareholders and directors to work together, essential to any good outcome, was long spent. This was so at least after Mr Smith stepped down, and probably before then, even if the fundamental reason breakdown for the breakdown of relationships between Mr Wilding and Mr Harrington cannot be pinpointed. Having observed them through a long trial, and able to consider the contemporaneous record against what they now say, it is clear that their personalities, which once meshed, ended up antagonistic towards one another, which the civilised conduct of the trial did not disguise.

[205] Mr Wilding, in my view, never understood the extent to which the current account liability of the Wilding interests so incensed Mr Harrington and annoyed other shareholders and directors. I conclude that he was never fully able to accept the entry into the company of non-Wilding interests, eventually culminating in his minority stake albeit with Mr Hong's support. He exhibited a readiness to act in Wilding interests by the sale of TMPL land, without much or any thought for the impact on TML, and was dismissive of that when questioned. In his aspirations for Te Mania generally, he cannot be faulted and his ideas were those which led to the introduction of the other shareholders, and the grand vision for Te Mania.

[206] Bee Teck and Mr Wong were at a real disadvantage, not being farmers, and at a distance, but over time they aligned with Mr Harrington who had so much to offer TML. The evidence shows they considered options short of winding up, but the point was reached when they had no faith in the future of the company. They were dissatisfied with its performance, the infighting, and what they thought was Mr Wilding's inability to treat TML as other than a

Wilding company. So they wanted out, as Mr Harrington does too. He has given up on his claim to the right to purchase Mr Wilding's shares.

[207] I return to the conduct of the parties after addressing other issues.

(2) Are WHHL or the defendants liable to TML by refusing to give it, or to pursue, the right of first refusal to lease Lagoon Flat in 2014?

Lagoon Flat

[208] Lagoon Flat was leased by WHHL to TML by Deed dated 28 January 2005. Mr Wilding, Bee Teck, Mr Harrington and Mr Wong were signatories.

[209] The lease had retrospective application to a commencement date of 1 July 2004. It contained the following relevant terms:

> **3.1 Initial Term**
>
> The lease will commence on 1 July 2004 (*the Commencement Date*) and terminate on 30 June 2009 (*the Expiry Date*) unless extended as set out hereunder.
>
> **3.2 Right of Renewal**
>
> The Lessee shall have one right of renewal of five years exercisable by the Lessee giving notice to the Lessor at least three months prior to the expiry of the initial term.
>
> **3.3 Right of First Refusal**
>
> If the Lessor decides to offer the Land for lease from 1 July 2014 the Lessor shall give the Lessee the first right to lease the Land and shall not offer the Land for lease to any other third party without giving the Lessee the first right to lease the Land on the same terms and conditions.
>
> **3.4 Extension of Term**
>
> The term of the lease may be extended for such other period and at such rental and on such conditions as the parties agree in writing.
>
> …
>
> **18 MISCELLANEOUS**
>
> 18.1 **Notices**
>
> (a) Any notice or other communication to be given to the Lessor or the Lessee under this lease shall be deemed to be sufficiently served if:
>
> (i) sent by registered post to the addressee at the addressee's last known address in New Zealand, or in the case of a corporation to its registered office; and
>
> (ii) sent by facsimile to the facsimile number from time to time notified by that party in writing to the other party.

Summary of Reasons for Interim Judgment on this issue

[210] Mr Wilding says that the failure of WHHL to offer the same terms of lease to TML as were offered to Terra Firma constitutes a breach of leasehold obligation by WHHL and otherwise represents a failure by the directors of TML to enforce such right, or at an equitable and conduct level that the failure to make the same lease available to TML should sound in compensation to TML under s 174 of the Act.

[211] The approximately 450 head of cattle previously run on Lagoon Flat could not all be grazed at Te Mania. Some were sold off and the balance of about 256 head were moved to Te Mania. Mr Wilding says that TML had the same opportunity given Terra Firma, a total 12 months lease, and would not have incurred extra costs for silage, hay, feed, molasses, barley, silage, grass seed, straw, cartage and tractor (feeding) costs. Mr Wilding's claim is that none of the costs would have been incurred if TML had the use of the Lagoon Flat land. The area was in drought and he says approximately 73 ha of Lagoon Flat irrigated land would have insulated TML against that.

[212] I have concluded that Mr Wilding's claim for damages or compensation under s 174 to fail on several grounds, and state them shortly.

[213] First, I do not consider that there was, *at law*, a renewal of the lease to create a right of first refusal to lease to TML. The pleading was sparse, that the lease was renewed for a second five-year term, 2009–2014. The lease was not formally renewed by the simple written notice required under cl 3.2, and while there is evidence of the understanding by some parties that it was in a second five-year term, there is insufficient evidence to found an agreement to that effect, in contract or in equity and there is no pleading to that effect. The failure to renew the lease, according to its terms, reflects the finding that issues of tenure were dealt with on a very casual basis. Mr Dale says in the end this does not matter as under s 174 of the Act the Court can look more broadly at the refusal to offer a lease, beyond reference to the contract.

[214] If, contrary to this finding, there was a right of first refusal under a renewal, WHHL and the defendants say that was met to the extent that at the end of the second five-year term there was a holding over, and rather than require TML to leave Lagoon Flat, WHHL allowed TML to remain there for several months, discharging any obligation which WHHL had to TML. TML held over on a monthly basis certainly from 31 July 2014 until given notice, and its cattle were removed on 31 October 2014. Lagoon Flat was then leased to Terra Firma which was in a lesser way a competitor business, for which Mr Harrington worked for a time when he left TML's employ in 2014. There was clearly no offer of the right of first refusal, on the terms offered Terra Firma, and the holding over does not constitute such. It is by nature just that, a holding over.

[215] Even if there was an obligation to offer a right of first refusal, I do not consider the failure to do so means that TML suffered any loss as the result. The herd size had been reduced and Mr Wilding at first stated very clearly that he did not consider Lagoon Flat would be needed. The point was debatable. Whatever the motivations of WHHL and its directors and defendants, it is not shown that the right of first refusal would have been taken up by TML, or that it should have been, or that losses resulted because it was not taken up. That was properly a matter for commercial judgment, and the evidence does not establish a loss.

[216] In short, I consider this claim by Mr Wilding fails at every level, as now explained.

The history of the Lagoon Flat lease

[217] Bee Teck holds a First Class Honours Degree in Engineering Production from the University of Birmingham and is highly qualified and experienced in international business. He holds a Diploma in Management Studies from the University of Chicago.

[218] In 1996 Mr Wong and Bee Teck were looking to invest in New Zealand farmland, to create business opportunities in China. They were shown the Lagoon Flat property by Mr Wilding, and entered an agreement for sale and purchase in December 1996, for settlement in March 1997. In the name of WHHL they purchased Lagoon Flat's 252.4 ha, and took an assignment of the licence to occupy 17.4 ha of land from DOC.

[219] Mr Wilding introduced Bee Teck and Mr Hong to Mr Stock of Buddle Findlay solicitors, who acted for WHHL. The purchase of Lagoon Flat and the incorporation of TML were related. Bee Teck thinks the decision to purchase Lagoon Flat came first, with a plan developing about "Te Mania International", the name given a venture into the Chinese market. Mr Stock wrote to the Overseas Investment Commission (as it was) on behalf of WHHL seeking consent to the purchase. The importance of Lagoon Flat in the future of the Te Mania stud could not have been clearer. The "rationale behind the proposed investment" described Lagoon Flat's suitability for grazing cattle on coastal flats and steeper hill country, with a right to irrigate the coastal flats. A joint venture company would be

formed with Mr Wilding owning 50 per cent of the shares, WHHL 25 per cent and a third party 25 per cent. Te Mania Angus Stud was described in detail, and the 25 per cent unnamed shareholder would be someone able to actively contribute to the development of the joint venture business. The expansion of Te Mania Angus Stud was contemplated close to Te Mania. Lagoon Flat would house a feedlot, and graze stud stock and steers contracted to other farmers for finishing. The combination of the stud, feedlot, and farmland at Lagoon Flat would provide a strong productive base for the combined operation. The Te Mania Angus Stud would sell into the joint venture company its Angus Stud herd, machinery and feedlot assets, and the company would lease and manage the farm occupied by the stud on terms to be agreed. Bee Teck and Mr Wong would provide assistance in marketing of beef and stud animals, given their interests in China and the South East Asian region, which were said to be well behind New Zealand in the development of high quality stud animals through genetic engineering. Lagoon Flat would be a "show farm" for contacts in South East Asia.

[220] The application to the Overseas Investment Commission added that:

> it is believed that the Te Mania brand can be better developed deriving greater profit from the operation of the Te Mania Angus Stud, the Property and Licensed Land than could be obtained were the Te Mania Angus Stud, the Property and Licensed Land to be farmed separately.

[221] When TML took occupation of Lagoon Flat, there was no written agreement but the rental was agreed at TML Board meetings. This informality reflected the trust and goodwill of the new relationships, and an assumption that general business practice and farm lease terms would apply.

[222] The Shareholders' Agreement was operative from 1 August 2004. It recorded that a lease of Lagoon Flat would be entered for a term of five years with a right of renewal of five years expressed in this way.

> 6 **LEASES OF PROPERTIES**
>
> 6.1 TW agrees to cause Te Mania Properties Limited to enter into a lease of the property known as Te Mania in favour of TML for a term of five years together with a right of renewal for five years.
>
> 6.2 WHL will enter into a lease of the property known as Lagoon Flat in favour of TML for a term of five years together with a right of renewal for five years.
>
> 6.3 The terms and provisions of such leases in 6.1 and 6.2 above shall be in accordance with the leases attached as Appendix 1.

[223] The defendants say there were no leases attached as contemplated. Bee Teck now accepts that Lagoon Flat was leased to TML by the agreement to lease after the dispute developed when it was withdrawn from TML, but until the lease came to light as discussed further, he said he had not signed a lease, and there was no right of first refusal. Mr Wilding says this account is not feasible.

The unfolding dispute

[224] By 21 March 2014, TML had occupied Lagoon Flat under the 2005 lease, whether renewed or not, for close to 10 years.

[225] At the 21 March 2014 board meeting Mr Harrington said that the Lagoon Flat and Te Mania leases expired on 31 July 2014, which would be the case if they were held under a second five-year renewal term. That is exactly what Mr Harrington thought, as his correspondence recorded. Mr Wilding said the time to discuss the leases was when they were up for renewal, another example of a lax and imprudent approach to tenure.

Terra Firma

[226] After 31 July 2014, TML held over on Lagoon Flat but the narrative developed to include Terra Firma. The association by WHHL and its shareholders with Terra Firma, including Mr Harrington working for Terra Firma, and the refusal to allow TML the lease of Lagoon Flat became a very sore point for Mr Wilding.

[227] Bee Teck agreed that he asked Mr Harrington to talk to Mr and Mrs Luporini at Terra Firma, but he only wanted a very short term lease because WHHL wanted to sell Lagoon Flat. He referred to a six months or 12

months lease and that TML should be given 30 days notice to terminate the month-by-month holding over lease, which would force TML to sell or auction off more cattle in the October and November sales.

[228] Ms Adams wrote to Bee Teck on 25 September 2014 and referred to the correspondence and said "it seems like a sensible approach to put the pressure that is required on TML to ensure either the cows are sold or you are brought out".

[229] On 24 October 2014, a lease was entered with Terra Firma for six months plus a right to extend that for a further six months. There was no doubt that Bee Teck saw this as a way to put pressure on Mr Wilding regarding the future of TML, but it also fitted his clear wish to exit TML, and to sell Lagoon Flat. On 25 September 2014, Mr Harrington wrote to Bee Teck. He and Ms Adams would help his divestment and said:

> I can't think, for the life of me—why would you want to lease back to Tim or give him a first right of refusal on purchase when he has screwed you all over the years!! and as you say it will place more pressure on TML to get you and Mr Wong out with fair value for your shareholding.

Renewal of the Lease

[230] The starting point is that:[37]

> A lessee who wishes to exercise a right of renewal must proceed in conformity with the conditions in the renewal clause in the lease and must indicate clearly and unequivocally his or her intention to exercise the right.

[231] There must, in the ordinary course, be a clear manifestation of an unequivocal intention to exercise the option.[38] In certain circumstances, a deemed renewal of the lease may be implied where the lessee, paying the rent and otherwise not in breach of any covenants, remains in occupation, and this ongoing position is accepted by the landlord. However, this applies only where the lease provision containing the right of renewal is silent with regards to the notice which must be given as part of the exercise of the right.[39] Clause 3.2 of the lease agreement provides that TML must give to WHHL three months notice "prior to the expiry of the initial term". This is consistent with cl 3.4, which required, if the parties wished to extend the lease on terms, an express agreement by the parties in writing. In these circumstances, the limited doctrine of an implied renewal discussed in *Gardner v Blaxill*, does not apply.

[232] A lease was held to exist notwithstanding the option to renew not being exercised, where the lessee remains in possession after expiry of the lease but pays a higher rent.[40] The rationale is that a new lease on the same terms (except as to rent) has been created, and the higher rent is a "counter-offer" accepted by the lessor.[41]

[233] Under the express terms of the contract, I do not consider that there was a valid renewal of the lease.

Arguments for an estoppel against a denial the lease was renewed—Implied contract

[234] These were not pleaded issues, as such.

[235] An equitable estoppel may arise where one party has induced another to believe in, and rely to their detriment on, the creation of a leasehold interest in land, and where it would be unconscionable for the party making the representation to resile from that.[42] Unconscionable conduct lies at the heart of the rationale behind the doctrine.[43]

[236] As the learned author of *Hinde on Commercial Leases* states:[44]

> When either a lessor or a lessee has led the other party to believe that a renewal of lease will be granted or taken up, as the case may be, the ordinary principles of estoppel may, in appropriate circumstances, be applied, either to prevent the party who gave the assurance from resiling from it, or to compensate the disappointed party by an award of damages.

[237] Unconscionability is the touchstone, and in the present case, where the parties have been lax in addressing the term of the lease, relative culpability is relevant:[45]

> The degree to which the representor was involved in the creation or encouragement of the belief or expectation will be an important factor in the determination of unconscionability. The smaller the role of the allegedly estopped party in the adoption or encouragement of the belief or expectation, the less likely that it will be bound in conscience to abide by it.

[238] There is Australian authority to the effect that a lessee's claim in estoppel may be greater where the lessee has been encouraged by the lessor, either directly or through a failure to assert the correct legal position, to expend money or perform other acts.[46] Conventionally, an estoppel must be pleaded, and Mr Wilding has not done so. He pleads that there was a renewal of the lease, but this is disputed by the second, fourth and fifth defendants. Mr Dale puts that, for all material purposes, the lease was on foot by reason of a valid renewal, or at least that equity should take that the view. This contention is that the lease was renewed but it is not pleaded that the words or actions of the relevant parties misled TML or caused it detriment. TML simply occupied Lagoon Flat with an assumption of tenure. Indeed, two of the defendants purported not to even have known of the lease's existence and for a while no one could even locate a copy.

[239] It is true that in the alleged second five-year term, there was never a reference to a holding over or a monthly tenancy. The parties acted as if there was a lease in place to the extent the rent was paid. Mr Harrington thought the lease was in a second five-year term. Mr Wilding seems to have thought so too. Bee Teck's position is more complex. When Mr Harrington pointed out that the lease would expire on 31 July 2014, there is no evidence that Bee Teck denied that. When Mr Wilding challenged WHHL about the right of first refusal, Bee Teck at first said he and Mr Wong for WHHL did not sign a lease agreement with TML, and there was no lease agreement. Bee Teck said he and Mr Wong thought they (WHHL) were bound by the Shareholders' Agreement for a term of five years plus a further five years and WHHL honoured that commitment. He could not say what the terms of the "lease" or other arrangement were, or how a second five year term was created except by reference to the Shareholders' Agreement which by cl 6.2 expressly referred to a right of renewal.

[240] Bee Teck seems to have been well aware of the Lagoon Flat lease as his email of 16 September 2014 records that he would try to locate a copy of the:

> … TML old lease agreement for Lagoon Flat. If not, it should be exactly the same as that for Tim's Te Mania property because it is prepared by the same lawyer David [Stock]. I will also check with Mr Wong if he has a copy.

[241] The assertion that such an important commercial contract was never made, is hard to understand, notwithstanding that 10 years or more had passed. The fact Bee Teck could not locate a copy of the lease does not mean so much when Mr Wilding too could not locate a copy. No one seemed to have a copy of the lease. Bee Teck denied he had signed a lease, although he plainly did sign the lease. He also signed the lease for Te Mania. They were both signed on the same day. Apart from this curious point, Bee Teck's evidence, and his correspondence, was lucid and straightforward. Mr Dale submits that this aspect of Bee Teck's evidence goes to his credibility. I conclude that the position Bee Teck first took, that there was no lease signed, is partly explicable by the fact that another form of the Lagoon Flat lease had previously been partly signed.

[242] I do not make a finding against Bee Teck's credibility and do not have to do so. It is simply a very surprising version of events that the very existence of the agreement to lease Lagoon Flat was denied at a time when WHHL was about to enter into a new commercial lease agreement with Terra Firma and terminate TML's occupation. It suited WHHL to first contend that there was no lease agreement of Lagoon Flat by TML, then once that was clearly incorrect, to contend that there was no renewal.

Conclusion as to renewal

[243] There was no renewal of the lease on the basis pleaded. The parties' representations to each other in 2014 and conduct prior are not sufficient to find that the lease was renewed although a different pleading would have brought renewed focus to that. The right of first refusal was not, therefore, available. No remedy lies in equity. Estoppel is not pleaded by the plaintiffs, nor is there an element of unconscionability which should found relief. No implied contract is pleaded. The parties appear to be mistaken about a formal renewal of the lease in different ways. Mr Dale says this does not matter and that the issue should not be approached in strict contractual terms, but rather the defendants' obligations to TML as directors.

Effect on TML

[244] Mr Wilding at first said squarely that the Lagoon Flat lease had run its course and that it would be awkward to run the 500 odd cows the property could carry, but given the cattle sold, calving results, and after a stock reconciliation, Mr Wilding said that TML would not need to sell more cattle beyond normal culling practices, and he could run them on the remaining leased properties and the feedlot. He did not want to downsize any further. He said that operational costs might increase slightly if more crop had to be planted on the remaining lease properties. Bee Teck thought that the herd size should be reduced further, and he wrote in that regard on 3 October 2014. He told Mr Wilding that Mr Wong and he would be open to offers for Lagoon Flat.

[245] Then Mr Wilding changed tack and asserted an obligation to offer a lease to TML. His email of 10 October 2014 to Bee Teck explained:

> As the major land providers to TML we both need to ensure that the company interests are properly protected which is why these conditions are also in my lease [Te Mania].

[246] This latter stance is a bone of contention in itself, apart from the fact he first said exactly the opposite, that TML did not need Lagoon Flat. Mr Wilding had been quite prepared to sell TMPL lands, and was dismissive and indifferent to the effect on, TML. Mr Wilding looked to some arrangement whereby Bee Teck and Mr Wong might sell their interest in TML and Lagoon Flat. Bee Teck treated this as a threat, to be used as leverage.

[247] Positions were starkly drawn. Bee Teck said that the best solution was for the Wilding family to buy out the other shareholders, so TML could be run as a family concern. Mr Wilding wanted a copy of the Lagoon Flat lease, and said it would be irresponsible and negligent for WHHL to let Lagoon Flat to another. Nevertheless on 24 October 2014 WHHL did lease Lagoon Flat to Terra Firma. Most of what Bee Teck thought and did at the time is set out in his email of 25 October 2014, where he explained:

> with regard to TML operations, as a director and shareholder of TML, I had made it known to the Board that TML should reduce herd size (starting from selling the 400 cows earlier in June this year) to improve cash flows, reduce bank borrowings, and reduce disproportionately high expenses, in order to increase the value of TML. Furthermore, as it is WHH's intention to sell Lagoon Flat as soon as we get a good offer, it is not in TML's best interest to continue leasing Lagoon Flat as WHH can only give short term lease to be terminated at short notice when there is a suitable buyer. Hence giving up Lagoon Flat (and perhaps even Wadi) would be in the right direction to return TML to profitability. I had asked for a TML Board meeting to discuss this.

[248] Bee Teck responded at trial to Mr Wilding's evidence that the Lagoon Flat land and infrastructure were essential for the stud operation, and that day-to-day management of mating groups and bull mobs was seriously compromised without Lagoon Flat, resulting in stress to the animals, and extra work. Bee Teck says that was the first time that this had been raised and that stands in contrast to Mr Wilding's advice on 2 October 2014 that TML could get by, and the views of Mr Harrington and Ms Adams that the reduced herd meant Lagoon Flat was not needed, even without other stock reduction.

[249] Mr Dale accepts that on contractual principles, Mr Wilding for TML could, at best, only insist upon renewing the Lagoon Flat lease for a year. Dr Geenty, Mr Smith and, to a degree Mr Stone, emphasised the importance of the 73 ha of irrigated land on Lagoon Flat. While provocative, I do not see anything in this land being leased to a competitor or neighbour as any different to a lease to anyone else. The proper approach is simply to address the effect on TML of not having Lagoon Flat, which in turn involves consideration of whether TML would have taken up a further lease.

[250] Dr Geenty, giving evidence for Mr Wilding, did not think a one year lease was sufficiently viable for TML to take up. Dr Geenty is a highly qualified research and development consultant to primary industries who had been providing operational advice to TML's EXCO. Mr Dale says that is not decisive, and is based on Dr Geenty's conclusions after a profit and loss analysis, rather than protecting the interests of TML and its stock. Mr Wilding claims that the failure to offer a Lagoon Flat lease, even for a year, has caused considerable loss to TML.

[251] The allegation that the WHHL defendants should have voted to sue WHHL to secure a further lease of Lagoon Flat, is based on the Shareholders' Agreement, and the requirement that the directors act in the best interests of the company. The defendant directors say they received independent legal advice from Mr McKenzie and to have ignored that would have been imprudent. That advice was if litigation had commenced against WHHL,

it may not have been successful, and it would have been costly. They say the majority of directors would not have voted to take up a further lease term. The WHHL defendants, bar Mr Hong, say that they would *not* have taken up an offer of a lease on the same terms as Terra Firma, so there was no loss, and they deny that any loss is otherwise proven, even if such a lease had been taken up. This stance is not conclusive, as to say they would not have taken up a new lease, when not to do so was in breach of obligation to TML, cannot determine the issue.

[252] Mr Harrington says that in June 2014, after the 417 cows were sold to reduce debt (some 20 per cent of the herd), TML no longer needed Lagoon Flat. It made no commercial sense to renew the lease or take a further lease, given the rental cost and additional operating cost of Kirriemuir which was even more costly. Mr Harrington says Te Mania and Lagoon Flat are of a similar size and infrastructure. He needed work after leaving TML on 1 October 2014 and he went to Terra Firma on 1 November 2014 before resigning in February 2016; but that was nothing to do with the leasing of Lagoon Flat.

[253] TML reduced its herd size in June 2014 but did not reduce its overdraft limit or pay off term debt. Dr Geenty reported that TML had optimum pasture utilisation at 72 per cent without Lagoon Flat, consistent with Mr MacDonald's analysis in September 2014. The Lansdowne lease was available until December 2015. So the TML directors say they had reasonable grounds for the decision not to call upon WHHL to offer Lagoon Flat to TML.

[254] On the face of it Mr Stone seems to have been in a good position to say the Lagoon flat land was extremely important to TML, but that perspective must be considered against the financial position in 2014, the sale of capital stock, the falling out between the parties, and how many stock units were on hand at that time in 2014. He utilised a stock number when TML could not afford more stock and he assumed a longer term lease than the 12 months it was available, at best. The same comments apply to Mr Smith in particular, as to the reinstatement of the herd size, which in my judgment would not have occurred, for proper reason.

[255] I consider the WHHL defendants are correct that the proposition that Lagoon Flat could be subleased for growing vegetables is answered by the fact that that such activity was not permitted within the terms of the lease and the irrigation resource consent.

Advice

[256] On 21 August 2015, Mr Mackenzie advised the TML Board regarding a claim for breach of lease by WHHL, but concluded it would not be prudent to pursue that because 75 per cent of directors were needed to agree a new lease with WHHL and the majority were not in favour. WHHL did not see the advice. On 18 September 2015, the Board resolved not to pursue claims against Mr Harrington or WHHL. Mr Wilding was, in any event, the only director who wanted to do so.

Did TML suffer loss without the lease of Lagoon Flat?

[257] Mr Wilding said TML lost $987,057.46 without the use of Lagoon Flat for one year although the 4ASOC sought $1.35 million including loss of profits. These figures are strikingly out of proportion to the turnover of TML, or profits and losses over its whole lifetime.

[258] I do not accept Dr Geenty's and William Wilding's calculations and evidence. The land subject to the lease was 197 ha on the western side of the railway line, not the entire property. There was no right of first refusal in respect of the land on the eastern side of the railway line. Dr Geenty worked from information provided to him by William Wilding and an assumption that TML had an ongoing right of renewal to lease the Lagoon Flat, when, if anything, it had a right of first refusal to take up a lease for one year.

[259] The damages calculation first advanced was based on an optimal stock number, but it would take three years to get to that level. There is a conflict as to whether 9,600 stock units are optimal. Mr Wilding said that TML was well placed after the herd reduced, perhaps a bit low on cows. Dr Geenty said that Lagoon Flat represented 22 per cent of TML's total leaseholdings, which supported 7,531 stock units as at 31 July 2014, against a carrying capacity of 11,238 stock units. It was, in my view, quite appropriate that the defendant directors, and initially Mr Wilding, should reach a commercial decision whether TML retained the entire leased area, or should reduce it for costs reasons. Even after surrendering Lagoon Flat, the carrying capacity was in excess of the stock carried.

[260] TML did not, I conclude, need the Lagoon Flat lease based on stock numbers alone, although that is not the end of it. Dr Geenty says the irrigation was a real factor in any decision, and options to increase revenue through grazing or sale of feed had to be looked at. Dr Geenty said that if Lagoon Flat was leased, TML could increase the cow herd, or it could sub-lease 50 ha of irrigated land to a market gardening company. All this, in my view, failed to

bring to account what could be, at best, a one year lease, and that these ideas were not requirements imposed on the directors, but just business decisions, whatever their underlying motivation.

[261] The business decision whether to take on Lagoon Flat, or to try to enforce the alleged right, thus comprehended a series of factors, with none predominant. Any decision would have to bring to account the future direction of the business. Dr Geenty says without agreement at Board and management level, given the historically poor financial performance of TML, new commitments should not have been entered. A *different* decision might have been taken as to Lagoon Flat, but it was not unreasonable to surrender the Lagoon Flat lease on his evidence, although he would have sought a short term option for the use of Lagoon Flat from October 2014. By November 2015 the position was quite different because of excess feed available to TML. There is much in this view. Getting out of rather than remaining in such a poisoned relationship was sensible, let alone based on an economic decision.

[262] It is also imperative that the "loss" of Lagoon Flat not be viewed through the clear lens of hindsight, and be addressed as at the end of 2014.

[263] Dr Geenty concluded TML lost $137,322 in 2015 and $167,106 in 2016 by not leasing the Lagoon Flat property. Mr Glennie, called for the defendants, does not agree with Dr Geenty's methodology, and he considers the sample used for determining the average profit to be too small. Dr Geenty uses the full theoretical carrying capacity against the average stock number carried, and he made no allowance for other properties leased by TML in the period 2011–2013. Lagoon Flat contributed $50,875.20 to Ebitda on a pro rata basis. If the lease was lost and stock sold, sale proceeds would be used to repay debt, and overall the net annual impact of the loss of Lagoon Flat to TML he calculated at $31,563. That is what Lagoon Flat added historically, on an annual basis. He calculates a further loss of $28,611 as potentially due to the drought, but in October 2014 drought conditions were not at their most severe.

Feed and supplements

[264] The claim for feed brought in exceeds the entire cost of the feed and grazing expenses for the two years August 2014 to July 2016. There is contest regarding supplementary feed required during the drought. Mr Glubb of Heartland said that $67,000 was included in the 2016 budget for this purpose. Having heard from William Wilding, I do not accept this was the feed required for those animals displaced from Lagoon Flat, and if they were incurred to create a feed bank, then in substantial part that was used to feed the GoBeef animals, for which WHHL, and the defendants should not be expected to make good. The accounts do not include cartage, but even with that is added the figure of $337,100.43 claimed for extra feed and supplements is not reached. There is no allowance made for the normal feed costs incurred by TML, and they were significant: for 2012, over $100,000; 2013, $183,939; and 2014, $58,059. At a profit of $51.80 per stock unit, paying $237.39 per stock unit in feed is out of all proportion. So feed purchases at the level stated for Mr Wilding must have gone to stock carried on other properties. I do not accept that the 2015 and 2016 feed and grazing expenses correlate with the loss of Lagoon Flat in a drought year. In fact the supplementary feed was quite likely to have been required for what Mr Wilding described as the "worst drought North Canterbury has suffered in decades".

Forced sale and intensification claims

[265] Mr Glennie disputes that the irrigated land would have produced 15–20 tDM/annum dry matter, and says it would be nearer 10–12 tDM/annum given his observation of the property in a normal year, and less in a very dry season. The claim that TML lost $104,237.80 by selling stock earlier than it would have done was assessed against the need to carry them for 135 days to grow at about 0.9 kg/day. That does not allow for the cost of feeding such stock to sale, some $90,720 of the amount claimed. It cost $3 per day to feed the stock and over 135 days that is $405 per head. There is no allowance for reduction in interest costs from stock sales nor for the fact that the dry land would have been under severe pressure at Lagoon Flat.

[266] An intensification claim of $278,237 includes a substantial fertiliser input of $181,258, which is presumed to be the capital fertiliser in Mr Flynn's calculation relevant to the TMPL claim against TML, under *Issue (7).*

[267] Mr Glennie in his supplementary brief says that the irrigation infrastructure on Lagoon Flat is not as good as that on Te Mania and it would have struggled to keep up with the pasture requirement for 450 cattle. In my view Mr Glennie's evidence, which I prefer, fits with Mr Wilding's first assessment of the difference that it would make to TML losing Lagoon Flat when he wrote on 2 October 2014, namely some small increase in operational costs. I consider the impact of the drought may not have been fully brought to account, and that was to come, but it should not be judged in hindsight.

[268] In all these claims, the source documentation has been discovered and there is no independent or expert assessment based on such, although offered by William Wilding "if required".

The damages and compensation claim—Conclusion

[269] Mr Dale recognised that an "orthodox" claim for damages by TML against WHHL would have faced practical difficulties, not least being that the directors of TML and Mr Harrington would have actively encouraged a breach, if there was one, because they were looking to distance themselves from TML.

[270] Mr Dale says this issue should be addressed under s 174(2)(b) of the Act and the defendant directors should have made Lagoon Flat available to TML in the interest of TML. In my view, it was no worse than, and analogous with Mr Wilding indicating sale of TMPL lands without any thought for TML. That came to nothing, but in this case, for reasons which are explicit in the correspondence, the decision was taken to remove Lagoon Flat with mixed thoughts for the impact that would have on TML. It fitted with the shareholders in WHHL wanting to sell Lagoon Flat, and to apply commercial pressure by withdrawing the property from TML use. On the other hand, Mr Wilding had said at the time that the loss of Lagoon Flat could be accommodated, and that was an entirely reasonable view to take, and indeed supported by the evidence.

[271] TML was always vulnerable to the extraordinary weakness in security of its tenure for its operations. Lagoon Flat is just one example. Mr Dale advocates for this issue being addressed in equity rather than in contractual terms, but I do not consider the intervention of equity saves the position for Mr Wilding and the pleading does not comprehend it. He was prepared to sell TMPL land to TML's detriment. That in equity stands in his way.

[272] I conclude there was no renewal, and thus no right of first refusal. I further conclude that the defendants had mixed motivations not to lease Lagoon Flat to TML but reasonably thought it was not needed, and Mr Harrington and even Mr Wilding at one point agreed with that. There was a commercial decision to be taken and it reasonably included not leasing Lagoon Flat again. The decision not to bring proceedings was reasonable. There was in the end no loss suffered as the evidence does not satisfy me of that, indeed I am satisfied to the contrary.

(3) The DOC land

[273] WHHL seeks an order that Mr and Mrs Wilding hold the DOC licence in trust for WHHL. Mr and Mrs Wilding say they hold it in trust for TML.

[274] After Mr and Mrs Wilding secured the licence for the DOC land, Mr Wilding wrote to Bee Teck telling him that Terra Firma should take its cattle from the land. Only then did Bee Teck realise that the WHHL lease grazing licence had lapsed long ago and that Mr Wilding had obtained the grazing licence in his name with Mrs Wilding. The grazing licence in favour of WHHL had lapsed in June 2007, but ran on with WHHL paying the rates. Since Lagoon Flat was purchased, WHHL has paid the local authority rates on the DOC land, right up to date. That is despite the fact the grazing concession is now in Mr and Mrs Wilding's names.

[275] WHHL wants to add this licence to its Lagoon Flat holding. Mr Dale says there is no evidence that DOC might have consented to a licence in favour of WHHL, but the case for WHHL is that TML through Mr Wilding gained the licence when it should have been taken up for WHHL, and the Court should now effect that.

Agency

[276] Mr Wilding was agent for WHHL when Lagoon Flat was purchased, and thus under a fiduciary duty. Fiduciaries must not utilise their position adversely to the interests of the principal. If any transaction is entered by the fiduciary which does or may involve a conflict of interest with the principal, that must be disclosed and the principal's consent obtained, otherwise it is in breach. Usually such obligations come to an end with the agency itself, but some fiduciary duties, such as upholding a confidence, continue after the relationship has ended.

[277] The question here is whether Mr Wilding held a continuing duty to WHHL when he sought and obtained the licence in December 2014. If so, he now holds the licence for WHHL. WHHL says it relied on Mr Wilding to negotiate the assignment of the licence during the purchase of Lagoon Flat, and was responsible for renewing it when it expired in 2003. Mr Wilding says the agency for WHHL ended when TML took the assignment, and certainly after it lapsed in 2007. He executed a licence in 2003 as director of WHHL, and was involved in irrigation issues for WHHL between 2003 and 2008.

[278] The WHHL defendants say Mr Wilding did not tell WHHL that he sought the grazing licence, nor that it had expired. Only Mr Wilding voted in favour of TML taking a sub licence or lease of the DOC land from Mr and Mrs Wilding, because the WHHL defendants considered that TML had excess capacity with its reduced stock numbers and could not afford further leases, and the land was across the river from other TML land. That was based on TML's carrying capacity, not WHHL's interest in the DOC land.

Discussion

[279] I conclude that had WHHL sought a renewal of the licence at any time after 2003, it would have secured it. Bee Teck attempted to buy the land in 2009, at a time when Mr Dale submits, and I agree, that Mr Wilding's agency with WHHL had ended. He held no fiduciary obligation arising from his role long past.

[280] I do not regard Mr Wilding as holding fiduciary duties to WHHL, long after its licence had expired. It had the same information about the licence as Mr Wilding. It is another example of the very casual attention given to tenure by all parties. Mr Wilding was entitled to acquire the DOC licence in trust for TML, and thus for the benefit of all TML shareholders. It is not because Mr Wilding was under a fiduciary duty as agent that he gained or utilised confidential information. It was not confidential. It was publicly available information, to WHHL, TML, and their respective shareholders and directors.

[281] The heart of the submission for WHHL is that Mr Wilding knew the DOC licence land was available *because of* his agency with WHHL, and that he did not act in good faith, but instead personally profited by creating the impression with DOC that he and WHHL were as one. There is no evidence of that. Mr Wilding simply took the opportunity to secure the licence for TML's use, and it would have passed to TML with liquidation.

[282] I do not consider there was any deception, or breach of fiduciary duty by Mr Wilding, but he saw an opportunity which in a less polarised setting, would have been better exercised by his telling WHHL that the licence had expired. He was motivated, and justly so, to protect TML.

[283] He was not in breach of a fiduciary duty to WHHL because none existed when he and Mrs Wilding took up the licence. The licence now reflects, in the *Schedule* to Interim Judgment and these Reasons for Interim Judgment, as an asset of TML. Mr Oxnam valued the 10-year licence in the name of Mr and Mrs Wilding as being worth $14,000. I accept Mr Oxnam's evidence.

(4) Are Mr Harrington and the defendants liable to Mr Wilding for indemnity costs incurred by him associated with the attempt to wind up TML?

[284] The history of Mr Harrington commencing, and then continuing winding up proceedings has been addressed. The proper measure of this issue is found in the judgment of Associate Judge Matthews, and the conclusion in this judgment that the conduct of Mr Harrington supported by the WHHL defendants was for a collateral purpose, to solve to the impasse between the shareholders and directors. It was not soundly based on the insolvency of TML, as the Judge found.

[285] Had it not been for Mr Wilding's intervention, the company would likely have been put into liquidation in highly questionable circumstances of insolvency. On the facts before Associate Judge Matthews and on the further evidence in this Court, this was not soundly based.

[286] Bee Teck was cross-examined about the attempt to wind up TML, and he said the sooner it was wound up the more shareholder value would be preserved. There is some reason now to think that is so, given hindsight. The intent to preserve the equity of the company was foremost in Bee Teck's mind. The steps that were taken to call in debts, to reduce lease commitments with the cow herd reduction, and to take Lagoon Flat out of TML, were all matters of reasonably differing opinions.

[287] TML is essentially on a lifeline now with cash support from Mr Wilding and Mr Wing's deferral of creditors in anticipation of judgment.

[288] I regard the use of the liquidation proceedings, once Mr Harrington's position moved to allege insolvency of TML on the facts, as antithetical to the best interests of TML, and he was assisted in this by the passive stance of the defendant directors. Whether Mr Wilding should have further costs remains for argument, and against whom. It does not affect TML as such, and is better addressed in the context of costs overall.

(5) The alleged mistreatment of stock

Primary findings

[289] I find for reasons which are developed further, that something went seriously wrong with stock management in 2014. I think this was associated with the extreme stress on Mr Harrington. I find that the allegations of deliberate mistreatment were, from Mr Wilding's perspective, understandable, but my judgment is squarely to the contrary. Mr Harrington did not deliberately neglect or starve these animals.

Analysis

[290] The evidence demonstrates that Mr Harrington is a skilled and highly regarded stock manager. His qualities are endorsed by Mr Wilding and William Wilding, and others who know his work.

[291] Mr Hunt submits that Mr Wilding was determined to remove Mr Harrington as an employee and director of TML and began to threaten legal proceedings, to undermine, criticise, and challenge him. Because of what he calls a "campaign", Mr Harrington needed stress leave, and later resigned after unfounded allegations of animal neglect were made against him. Mr Hunt submits that the allegations were elevated to deliberate neglect and starvation to get around a legal barrier to a claim in negligence before the ERA.

[292] Mr Harrington was facing a threat to his employment because on 16 March 2014, Mr Wilding wrote to Bee Teck and Mr Harrington and said that if agreement was not reached on certain agenda items, then one option was to pass a vote of no confidence in the managing director (Mr Harrington). Mr Hunt refers to Mr Heyward's comment to Mr Wilding on 25 March 2014 that the hacked emails indicated to him that things were going to get worse and "if you can get rid [of] Johnny now is [sic] do it before he causes a hell of a lot more trouble". He suggested that Mr Harrington should be fired "asap".

[293] The 2014 bull sale took place on 18 June. Mr Wilding refers to a comment by Bee Teck on 30 June 2014 that the sale was not as robust as the previous year. Mr Wilding replied on 6 July 2014 to say that the average price achieved was $6,500, and the bulls sold (115) compared with the previous year meant that the sale was down by some $250,000. He asserted that sales by competitors in the North Island the following week were at an average of nearly $9,000, with nearly total clearances. Mr Wilding said the consensus of clients and industry experts was that the bulls were not in an acceptable condition, that it was a herd management issue, and that Mr Harrington should answer for that. He hoped that Mr Harrington would give priority to the yearling bulls to be sold in the spring sale. He said the poor condition of the animals had been mentioned to him by William Wilding who had returned from overseas, but as Mr Wilding had no involvement with the stock, this had gone no further. Mr Harrington wrote to the directors and said that the yearling bulls were "back in weight slightly" and referred to the three month period leading up to the sale as being the wettest in his 15 years on Te Mania. He contested Mr Wilding's assertions of the market and said:

> For those directors that may not know—the competitors in the North Island that had sales the following week to ours, only two sold over fifty bulls—one sold 72 (black 8 bulls from 2013) and one sold 85 (up to 7 bulls from 2013 also 7 of these sold for stud duties) the rest ranged from 7–44 bulls sold. So I will let you make your own conclusions here but point out that our first 50 bulls sold would have averaged well over $8K, but don't believe it is the average but the gross that we should be interested in. If it is all about averages/clearance maybe we should cut the numbers back in the sale? A few clients commented to me they were very happy and said to me that they were able to get good bulls and value for money—so brought their requirements and a spare in some cases! Which I believe was important as after the last few sales—some potential buyers had been disgruntled that the bulls were getting to expensive and out of their price range!

[294] The 150 bulls sold in 2013 made for an all-time record for the stud and New Zealand and the four bigger clients who did not buy in the year, all had specific reasons not to buy at this sale. The sale of Mangaohane Station did not help because that had been a major buyer in the front half of the catalogue. There were six new clients. He said that the biggest negative feedback that he had was the fact that Te Mania was on the market, and the uncertainty of the herd for the future. That led to a concern regarding the three-year guarantee being honoured.

[295] A week later, Young Hunter advised that Mr Harrington would take leave from 17 July 2014 because of "stress due to the current environment and circumstances of his accommodation at work". A medical certificate indicated that he would resume work on 4 August 2014, and a further certificate extended this to 17 August 2014.

[296] On 28 July 2014 Mr Harrington advised that the stockman, Mr Carlton, would be leaving Te Mania on 3 August 2014, ostensibly because he had found other employment. 700 cattle required grazing behind an electric fence and the wire needed shifting daily to feed the animals. The cows were grazing on Wadi as they were close to calving, and the cattle were at a vulnerable stage in their development. Mr Carlton was asked why he was leaving when TML was down in staff numbers, and he is reported to have said that he was told that he had to find other work. I do not consider the evidence proves this, one way or another.

[297] This put TML in an awkward position, but somehow the animals had to be looked after. Mr Harrington said he would work from Ms Adams' home in Ashburton, but he agreed that William Wilding could help with stock work at the end of July. Until this time, Mr Wilding had little to do with on farm work, but in this setting, which I accept required his intervention, he inspected the stock on 30 July 2014, and met with Mr Patrick Lane of the New Zealand Angus Council, and Mr Sidey, a stud stock agent. They inspected the bull calves with Mr Haugh, who had advised TML on genetics for several years, and knew about day to day management. Mr Wilding said he was horrified at the condition of the bull calves and that they were under stress. Mr Lane was concerned enough to later write on 5 August 2014 to say that he was:

> appalled at the lack of condition and the ill thrift of these animals. It was apparent since weaning these bulls have not been treated well at all and lost a considerable amount of weight.

[298] Kevin Ryan (Mr Ryan), a leading stud stock agent, was in the area the day after that inspection, and was also asked to inspect the yearling bulls. He did so and in an email on 1 August 2014 gave his opinion that "all the groups were showing starvation symptoms and suffering high stress levels". When asked by Bee Teck for further information, Mr Ryan said the three main groups of yearling bulls totalled 300, but they did not include the group of 50 bulls with the poorest conditioning taken out earlier. He put 100 as in a bad way, another 100 in very poor condition. The best of the bulls he thought were not as heavy as the worst calves on a large station he had visited in mid-Canterbury. He thought the situation was serious enough that there was potential for a prosecution for animal cruelty. Mr Carlton had some handwritten instructions which he said he had been working from, and the feed breaks were half of what the animals required on a dry matter basis.

[299] Virginia Williams (Dr Williams) and Dr Page are veterinarians, and TML's vet was Mr Brooks. They were all engaged to examine the cattle. Dr Page inspected on 31 July 2014, 1 August 2014 and 5 August 2014. He weighed the animals, took samples and produced a report. The thrust of his report was that the bulls required double the pasture allocation given them, and their feeding was insufficient, about 50 per cent of that required. The bulls were of small frame size and low weight for their age, with a low body condition score. Some looked sick. His conclusion was that they had been fed insufficiently since weaning, and suffered from selenium deficiency.

[300] Dr Williams is Chair of the Government's Animal Ethics Advisory Committee. Mr Wilding said he spoke with Dr Williams because he was concerned about possible vicarious liability as directors, for animal neglect. Dr Williams inspected on 3 August 2014, and endorsed the measures put in place to increase feed availability. Whatever the cause, whether inadequate feeding or a previously unidentified selenium deficiency, she said that the poor growth rate of the cattle demonstrated an "unacceptable degree of animal welfare compromise". By then the weakest of the animals had been put in a "hospital paddock" and the mobs had been split into smaller groups to alleviate stress. The electric fence break was to provide greater feed.

[301] Mr Brooks came to Te Mania on 4 August 2014 and Mr Wilding met him with Mr Haugh at the Te Mania yards. Mr Haugh was then acting as an overseer while Mr Harrington was away. Mr Haugh swore an affidavit on 12 December 2014 which addressed animal welfare but its admissibility was challenged and I have ruled against its admission to evidence. He met Mr Brooks and Mr Harrington on 4 August 2014 but Mr Wilding cannot say, from his direct knowledge, what Mr Harrington told Mr Brooks and Mr Haugh. There was strong dispute about whether Mr Harrington told Mr Haugh it was not necessary for him to inspect the cattle with Mr Brooks and Mr Harrington, as Mr Wilding alleges.

[302] Mr Brooks gave evidence that he was telephoned on 4 August 2014 by Mr Harrington who said he had been accused of animal neglect at Te Mania. He dropped everything because it seemed so serious, and took Mr MacDonald with him. At Lagoon Flat they saw a group of rising one year old bulls and two groups of heifers. Mr Brooks says that Mr Harrington was "really surprised and disappointed at the condition of the calves that we saw. I did not realise at the time that he had not seen them for some time".

[303] Mr Brooks did not know Mr Wilding but spoke to him by telephone shortly after his visit. Mr Brooks said that he had inspected three mobs of bull calves at Lagoon Flat, Te Mania and what turns out to be Richard's Point, where Mr Wilding says the best bulls were located. There were in fact seven (or eight) mobs of bulls. Under cross-examination Mr Brooks said that he was not aware that there were eight mobs, and had he known, he agrees that given his duty to the welfare of the animals he would have looked at them. Taken to a map of the Te Mania lands, he could not remember or say exactly where he was when he inspected. But the three mobs of bull calves included Lagoon Flat and he agreed that one other was at Te Mania in a paddock which on the evidence was Richard's Point. He was shown photographs of the young bulls and did not think they indicated much, other than that some looked light. Mr Wilding told Mr Brooks that he had not seen the worst affected animals and that he should be careful writing his report until he had all the facts, and he could visit Te Mania again. Mr Brooks did not visit again, because Dr Page was going to do so, but after he received a report on the bull weights and test results, he made a report which said the starvation or neglect of animal welfare was not substantiated.

[304] The calves he saw were not obviously hungry, they had access to hay and there were no obviously sick or injured animals. He says while he understands there were other animals that had been removed from the mob, he was unaware of them at the time. Neither Mr Harrington nor he was comfortable with the feed available to the animals and the thought that the break-feeding regime may have been at variance with the instructions left. There was plenty of winter feed, crop, hay and silage. He knew from conversations with Mr Wilding, Mr Haugh, and Dr Page that there had been a serious problem with the calves that required urgent attention and there had been corrective measures taken. The beef cows and heifers were in good pre-calving condition, although the weaning to August weights were lower than expected given the EBV values of the stud. It was his opinion that after winter these calves would exhibit a compensatory growth pattern and weight gain after a break-feeding regime.

[305] He did, however, acknowledge there were some issues. The growth rate of these calves was half of what it should have been and some were suffering more seriously, and had lost weight. He referred to an extremely wet winter. The calves had extremely low selenium levels, which is growth limiting. There was a shortfall in feed allocation which remained unexplained, and which was of great distress to Mr Harrington. Overall, Mr Brooks was disappointed with the animals given Te Mania's reputation. On the other hand, when he visited Te Mania about the time of the June 2014 bull sale for semen testing, the sale bulls were in excellent condition.

[306] Mr Brooks does, however, agree with Dr Page's report and respects his opinion. He acknowledged that Dr Williams is highly respected.

[307] Mr MacDonald inspected on 6 August 2014 and said the calves were the worst he had seen at Te Mania in 25 years, although there was good feed which should have been available. The winter had been wet, but it had also been warm.

[308] Another perspective was provided by Mr and Mrs Williams of Banks Peninsula, who have a long relationship with Te Mania, buying bulls since 1990. Mr Williams' relationship with Mr Harrington is longstanding. He was a director of Farmpure, brought on board by Mr Wilding. Farmpure is a vehicle which supplies Te Mania beef to a supermarket chain. On 6 June 2014 he travelled with his wife Ruth Williams to preview the two year old sale bulls, and he was disappointed. He thought the quality and presentation was not up to Te Mania's usual standard. The rising one year old bulls in the paddock between the road and the river were to him "most alarming". It sufficiently concerned them that Mr and Mrs Williams thought there may be an effect on the quality of the bulls available for them to purchase the next year. Mr Williams thought it odd that these bulls should be grazed next to the road. Mr Harrington commented to him that their condition was because of the wet weather. That reaction seemed to Mr Williams out of character. Although the Williams' property cannot be regarded as equivalent to Te Mania, nevertheless the growth rates on Banks Peninsula were the best in 27 years.

[309] Mr Harrington was cross-examined about the Williams' evidence, that on their inspection the stock was not up to Te Mania's usual standard. He said they spent the whole afternoon and into the evening looking at the stock, so the inference was that they were not put off by it. He said that whereas Mr Williams said the autumn rain meant the stock should have been in good condition, the comparison with the Williams' Banks Peninsula property and Te Mania with its swampy flats is not valid. When Mr Williams said the rising one year old bulls were in very poor condition so they were worried about the young bulls the following year, he said there were no such remarks made to him, and they simply drove past those bulls. It was submitted that Mr and Mrs Williams were surprised the bulls were in such poor condition and yet were so publicly viewable. Mr Harrington said the Williams only saw one mob of yearling bulls out of three in the riverbed paddocks. He says he told them that they were extremely tight for feed, but there was no in-depth discussion around that.

[310] To the allegation that Mr Harrington deliberately neglected these animals, he responded that "these are my life". He agreed that the young bulls were light in condition and said this was the product of "population pressure" which tests the animals, and the shortage of feed. These young bulls were not of "high priority" so far as feed was concerned. Having said in evidence that he told Mr and Mrs Williams that it was extremely tight for feed, he then said he could not recall whether he told Mr and Mrs Williams that.

[311] Mr Harrington said he took stress leave as a result of the internal conflicts. I regard this as entirely understandable. He says he spoke to Mr Carlton, who was to carry out his usual duties. Mr Chan would be involved in feeding-out and providing supplements. They were both experienced workers, and Mr Harrington thought that he could leave routine tasks to them. He says that when Mr Carlton said he was leaving, he advised that he would leave it to TML to find someone on a short term basis, and Sam Sidey was an available casual worker.

[312] On 31 July 2014 Mr Harrington took umbrage about a remark by Mr Wilding, who he thought was making a mockery of his sick leave, and not treating it as genuine. However, he said he would offer William Wilding a job, Mr Wilding did apologise for his comment.

[313] Mr Harrington's defence to the allegation of mismanagement is not only that the cattle were his life but he had great pride in the development of the Te Mania herd and the progeny. It was neither in TML's economic interest, nor his to manage these young bulls, and that would be contrary to his philosophy of farming and running animals. He regards the allegation against him as a "deliberate and calculated insult", designed only to pressure him, and other shareholders and directors.

[314] He says that claims of permanent or serious harm were not borne out by what followed as the animals matured, and I find he is correct in that. The allegation first made in the proceedings was that in some way the genetics derived from these young bulls were affected, but there was no evidential basis for that whatsoever. The bull weights were down but within the weight range for the rising one year old bulls from the previous six years. In 2009, the yearling bulls had been, on average, lighter. Mr Harrington says that the problems observed were to do with a very wet autumn and selenium deficiency, later discovered. He was most concerned that the 600 day weights were not given to him earlier so he could assess whether any long term harm was done to them. 41 of these bulls were sold at the yearling sale on 8 October 2014, comparable with the 2013 sale as to number and average price. In 2015, 35 bulls were sold for a lower average price. The 600 day weights were available in the June section of this trial and they were, in his words "normal". Mr Haugh wrote to Mr Harrington on 9 October 2014 telling him it was a good sale, he had heard comments it was the "best line up we have had".

[315] Bee Teck says that two weeks after Mr Harrington took stress leave, Mr Ryan wrote to him to say the bulls he inspected were in terrible condition. Bee Teck and Mr Wong were not able to do a great deal about this at a distance, but while he was concerned about the state of the animals, he thought the position had been used against Mr Harrington by Mr Wilding. The WHHL defendants submit that it is odd that this issue was not raised for two weeks. If Mr Wilding and Mr Sidey were horrified at the state of the stock, Mr Wilding did not say so when he wrote to the directors that evening. Bee Teck suggested a joint inspection to reconcile conflicting information he was receiving, but this was apparently not taken up.

Conclusion as to alleged mismanagement

[316] I have considered all the evidence of the condition of these young bulls. There is no doubt that a substantial number were in very poor condition. The evidence of Dr Williams struck me as straightforward and thoughtful and was, if anything, understated in delivery. Her inspection and the examination of weights of this particular cohort of bulls, and proven selenium deficiency, indicated an unacceptable degree of animal welfare compromise. Factors included a wet winter/autumn and the selenium deficiency, but the problem went deeper. The animals had been severely underfed. I am satisfied this was the case well before Mr Harrington took stress leave.

[317] I am not prepared to attribute the June 2014 bull sale itself as reflective of any mismanagement of the herd. There is insufficient evidence of that. However, something more serious occurred with regard to the condition of the young bulls. It is not, I find, simply attributable to the fact that Mr Harrington took stress leave and that someone else took over, and the feed-breaks were insufficient. I do not consider that their condition was the product of "hard farming" and poor weather, and that is not supported by any independent expert evidence. While there are different management practices, there is a fundamental need for a certain amount of dry matter per day and supplements to be fed to the individual animal.

[318] Although Mr Ryan was, in my view, well aligned with the Wilding interests when the undoubted problem with

the animals was discovered, his evidence of the condition of those animals broadly corresponded with that of other witnesses who had no such alignment.

[319] I consider the matters raised by Mr Harrington and supported by the defendants, reflect a highly defensive position which can be understood. The evidence as to the seriously poor condition of the young bulls was compelling. What was required of Mr Harrington, which should have had the support of the other defendants, was an immediate palms-up approach to resolution, with a full investigation undertaken. A comprehensive inspection without any restriction, and which left no doubt as to the animals for inspection, in short, acting in the best interests of the company was needed. It was no doubt difficult for Mr Harrington to do this, as he was the manager, and he was under such stress. For some reason, Mr Harrington's usual standards fell away, and while I agree with Mr Hunt that allowing the stock to deteriorate to such a degree is not consistent with his excellent reputation, nor his interest as a shareholder, I consider the point had been reached when rational decision making, and meeting his usual very high standards of performance were compromised by a very corrosive working environment.

[320] In short, the reputation of TML was put at risk by this incident but I do not consider for a moment this was deliberate misconduct by Mr Harrington. The cattle were his pride. His good reputation was on the line. Forcing liquidation of TML in this way or putting TML under financial stress would have been against his interests, and those aligned with him. While he carried responsibility for the livestock there was no deliberate maltreatment of these animals. I do not overlook this serious and unusual circumstance, which did threaten TML's interests, but in the end no loss or lasting damage occurred, and I reject any suggestion it was part of a "hidden agenda" by Mr Harrington with or without the defendants. It was simply a product of the severe stress on Mr Harrington, itself the product of the severely broken relationships.

Should the directors have taken action against Mr Harrington arising from stock mismanagement in defence of his claim for wages and other entitlements?

[321] The answer in short is that they should not have taken such action.

[322] Mr Mackenzie gave TML an opinion on 18 August 2015. He concluded there was a legal barrier to a claim for employee negligence and the practicalities of litigation, costs, and the prospect of appeal, meant that it was not prudent to undertake a counterclaim against Mr Harrington in the employment proceedings.

[323] Although there was no individual employment agreement between TML and Mr Harrington as required by the Employment Relations Act 2000, conceptually the claim would be in contract, pursuant to Mr Harrington's implied obligation to exercise reasonable care and skill in his role of general manager. Mr Mackenzie's review of the authorities led him to conclude that a negligence action in this setting was no longer available and that "this case may be an expensive way to confirm that". I agree.

[324] The legal hurdle was seen by Mr Mackenzie as a significant risk and he was right to advise reflection before further time and money was spent exploring the facts of the case. At a factual level, even after the volume of evidence in this Court, the exact reasons are not clear, other than that the animals were severely malnourished. However, while that broadly lies at Mr Harrington's door, much more would need to be known about the feed regime before and after Mr Harrington took stress leave, in order to determine any degree of fault attributable to Mr Harrington.

[325] I do not see any point in my entering a discussion of the kind Mr Mackenzie contemplated in reaching his view, because his advice was properly given, and reasonably taken by, the directors. Further, I find that there is no financial or other damage proven. With that, and legal and factual barriers to any claim against Mr Harrington, not only at the time, but now, there was and is no claim which should have been made against him.

[326] That is not the end of Mr Dale's argument for Mr Wilding, as he says there was still the opportunity to apply pressure on Mr Harrington, to force him to settle his claim for what were undisputed wage and other entitlements. Tactically, that was at least a consideration at the time. Mr Dale puts this as a loss of a chance. However, to hold that, that chance should have been taken up when there was sound legal advice against it where no loss could be proven, means that any judgment in favour of TML as Mr Wilding seeks would be based on the directors putting aside Mr Mackenzie's advice, putting aside the need to prove loss, and simply putting their case on a failure of performance on the part of Mr Harrington.

[327] Assessing a loss of a chance in the end is for the Court. I do not consider the directors can be faulted by not taking up what was at the very best a long shot. The prospect of TML still bringing a claim against Mr Harrington is effectively ended by the terms of this judgment and even if it was before this Court on all the facts, there was in the

end no loss to TML. There is therefore no basis to order any compensation to be paid to TML by Mr Harrington or any other defendants.

(6) Malicious prosecution and abuse of process

[328] Mr Harrington sues Mr Wilding in the torts of malicious prosecution and/or abuse of process. Judgment on this issue does not bear on the valuation of TML shares, and stands apart, except to the extent that Mr Harrington says that Mr Wilding's conduct is a relevant consideration for relief under s 174 of the Act.

Mr Harrington's case

[329] As of 1 November 2014, Lagoon Flat was leased to Terra Firma. Mr Harrington had left Te Mania and was working for Terra Firma.

[330] Feed was scarce. He says that he asked Mr Chan, who worked for TML, whether TML was going to use a bale of hay owned by TML at the entrance to the Lagoon Flat property which TML had leased. The bale had been partly consumed, but there were nine other bales of hay on a strip of railway land leased by TML.

[331] Mr Harrington says that Mr Chan told him he was "not worried about the hay", or an equivalent expression, which Mr Harrington understood meant that he was "not going to take the hay away". With this understanding Mr Harrington took all 10 bales and fed them to Terra Firma livestock between January and May 2015.

[332] On 21 May 2015, Mr Wilding reported the hay missing to Senior Constable Dewes. Mr Hunt says that Senior Constable Dewes was under the impression that Mr Wilding was authorised to make a complaint on behalf of TML as the owner of the hay, and that after speaking to William Wilding, he went to ask Mr Harrington about the hay. Mr Harrington said he had taken it, and told him what Mr Chan had said to him.

[333] It is central to Mr Harrington's case that Senior Constable Dewes said in evidence that he would not have gone further with a criminal investigation if he knew that Mr Harrington was a director of TML. Mr Harrington had not said he was a director of TML when he spoke with the constable on 21 May 2015.

[334] William Wilding left voice messages for Senior Constable Dewes after Mr Chan denied he had spoken with Mr Harrington about the hay. Senior Constable Dewes followed up on this and Mr Chan told him on 14 June 2015 that he did not recall speaking to Mr Harrington about the hay.

[335] After speaking with Sergeants Crosson and Pabst, Senior Constable Dewes served a summons on Mr Harrington on 24 June 2015, having completed charging documents for the theft of 10 bales of hay from TML. There were others present when Mr Harrington was served with the summons, which required him to appear in the District Court. Mr Harrington gave a formal statement to the police at that time.

[336] On 25 June 2015, Mr Wilding emailed Senior Constable Dewes, and disclosed that Mr Harrington had been a manager of TML, and was a director. On the same day he emailed the TML directors, bar Ms Adams and Mr Harrington, in effect calling for Mr Harrington's resignation in light of the prosecution. The other directors did not support this, and Mr Hunt submits that they treated this incident as a mere misunderstanding between Mr Harrington and Mr Chan.

[337] On 26 June 2015 Senior Constable Dewes recorded that Mr Harrington was a former TML employee, and finalised his own written statement. Then on 28 June 2015 Mr Wilding emailed TML directors, again bar Ms Adams and Mr Harrington to say that theft and lying were slightly more serious than a "misunderstanding" and that whoever was responsible for taking the hay must return what had been taken within the next week otherwise further charges might be laid. Terra Firma replaced the hay in late June.

[338] Mr Hunt joined the narrative and wrote to the Police to say that Mr Harrington was a TML shareholder and director, and that Mr Wilding was not authorised to make a complaint for TML. Ewart & Ewart, acting for Mr Wilding, wrote to Lane Neave and Senior Constable Dewes advising that the complaint would not be withdrawn.

[339] Mr Hunt wrote again asserting that Mr Wilding had no right or authority to lay a complaint on behalf of TML, and that he had done so to cause embarrassment and distress to Mr Harrington in the context of the bitter and ongoing company dispute.

[340] Then Mr Wilding swore an affidavit on 14 July 2014 in support of an application in the High Court for an

interim order to remove Mr Harrington and Ms Adams as directors, alleging Mr Harrington was conflicted in his work for Terra Firma, by taking TML's hay to feed that company's stock, and that the charges were laid by the Police because the explanation that Mr Harrington gave proved to be untrue.

[341] Sergeant Crosson, Senior Constable Dewes' supervisor, decided that the Police should terminate the prosecution as their initial understanding was that Mr Wilding had authority to act on behalf of TML *in making the theft allegation against Mr Harrington*, and that was not the case (the Court's emphasis). The reasons given were that Mr Harrington was a director and shareholder of TML, to whom the hay belonged, and that the Board neither supported a complaint of theft, nor did it consent to the prosecution of Mr Harrington. The matter seemed to the Police to fall within the civil arena given the ructions between the directors, and it should be dealt with at the Board table. The matter, in its view, did not warrant intervention by the criminal law.

[342] Mr Hunt properly referred in his closing submissions to this passage of evidence given by Sergeant Crosson:

> Q. So when you brought to [account] the fact that the other directors did not support this prosecution and they did not authorise the prosecution that's not the same point as to whether there was any belief or agreement or consent that the hay be taken in the first place, as I understand it?
>
> R. I, I took that to, to say that the fact that it was taken they weren't concerned about it and they didn't wish it to be proceeded, so that was my understanding of it.
>
> S. They didn't want the prosecution to proceed?
>
> T. Yes.
>
> U. And they didn't authorise it as Mr Hunt, I think, wrote to you, but why was it relevant in terms of your decision whether an offence had been committed that they said that?
>
> V. Because I felt that even though technically an offence could have been committed it didn't warrant going to the criminal process, it should have been dealt with civilly.
>
> W. That's what I was driving at.
>
> X. Yes.
>
> Y. Basically it did distinguish in your mind between whether an offence might be proved and whether in fact there was a warrant to keep going with the prosecution?
>
> Z. Yes Sir.
>
> AA. I see. It's the sort of thing that particularly in the country you would like to see result by handshake?
>
> BB. Yes.
>
> CC. And, or at least a cheque.
>
> DD. Yes Sir.

[343] To succeed in his claim for the tort of malicious prosecution, Mr Harrington must prove the following five elements:

(a) Mr Wilding was responsible for prosecuting Mr Harrington;[47]

(b) the proceeding was determined in Mr Harrington's favour;[48]

(c) Mr Wilding brought the proceeding without any reasonable cause;[49]

(d) Mr Wilding acted maliciously;[50] and

(e) Mr Harrington suffered damage as a consequence of the proceeding.

[344] Mr Hunt laid emphasis on the proposition that the criminal prosecution "was one part of a broader campaign conducted by Mr Wilding against Mr Harrington over a considerable period of time". That included the broken relationships within TML, and that Mr Wilding believed Mr Harrington had turned Bee Teck against him. It included the hacking of emails, the allegation that Mr Harrington had a hidden agenda and was proposing a split of TML and Mr Wilding's threat to move a motion of no confidence in Mr Harrington. Ewart & Ewart had written on 15 April 2014 to say that Mr Harrington should resign as an employee and director. There were the allegations of animal neglect

in August 2014. Mr Wilding commenced proceedings to remove Mr Harrington as a TML director at the beginning of May 2015 because of alleged conflict of interest given his employment at Terra Firma.

[345] Mr Hunt distinguishes the complaint being laid, and later Mr Wilding supporting the complaint even when requested not to do so. Mr Hunt says Mr Wilding's reason for pressing the prosecution and referring to it in civil proceedings was his strong dislike of Mr Harrington, and his desire to remove him as a director, and that he was motivated to damage Mr Harrington's standing and reputation by branding him as a thief.

Analysis

[346] On 20 May 2015, William Wilding reported that TML could not find a bull and he was referred to the Police Crime Reporting telephone number. The next day Mr Wilding went to the Cheviot Police Station and reported that hay bales were stolen from Te Mania at Claverley Road beside the Conway River Lime Company. He made no allegation against Mr Harrington or anyone else. Mr Wilding was recorded as the complainant and the property value between $500 and $1,000. Bales of hay were then worth about $100. One of the bales had been partly eaten, and the other nine bales were in better condition.

[347] Senior Constable Dewes gave evidence that he understood that Mr Wilding was a director of TML and that he had full authority to make the complaint, and was doing so on behalf of the Board. That was not necessary for a complaint to be made and it was only his assumption, and I find that Mr Wilding did not say this. In the end, the fact Mr Wilding did not have that support of the Board, was influential in the decision taken by the police not to take the prosecution further.

[348] Senior Constable Dewes investigated. He drove to Claverley Road and photographed the remaining bales, and later spoke to Mr Harrington who was working at the woolshed next door. There was no indication to this point that Mr Harrington was involved in the hay being taken. No one had mentioned him.

[349] Mr Harrington told Senior Constable Dewes he had used some of the hay to feed stock and that one of TML's employees, Clement (Clem) Chan had authorised him to take them. Senior Constable Dewes says he told Mr Harrington to make arrangements to pay for the hay or he might be charged with theft.

[350] Then on 27 May 2015, six days after the first discussion with Mr Harrington, William Wilding told Senior Constable Dewes that Mr Chan had never spoken to Mr Harrington about the hay, and on 10 June 2015, Senior Constable Dewes rang Mr Wilding and found out they had not been paid for. Only then, on 11 June did Sergeant Crosson instruct Senior Constable Dewes to charge Mr Harrington.

[351] On 12 June, Mr Wilding expressed himself to Senior Constable Dewes in a conciliatory way by saying:

> We are happy to take the advice of your Sergeant and accept diversion is the most appropriate way to handle this matter, but would like a full report provided including the detail as to why Clem Chan was implicated.

[352] On 14 June 2015, Senior Constable Dewes visited Mr Chan and took a witness statement from him. It states that he knew that something had "gone down" between Mr Harrington and Mr Wilding, but that he had tried to stay out of that. He spoke well of Mr Harrington. He was asked whether Mr Harrington asked him about the hay bales and he replied, with what I consider to be a hint of equivocation: "No. I don't think so." Senior Constable Dewes then told him that he had spoken to Mr Harrington who admitted taking the hay but that he asked Mr Chan what Te Mania was going to do with them. Mr Chan said, "No I can't recall that." I am conscious Mr Chan has not given evidence.

[353] On 24 June 2015 Mr Harrington was served. The Senior Constable made notes including a caution given Mr Harrington:

> 1315 hrs—488 Claverley Road. Summons JOHN HARRINGTON re the theft of bales. He said he was waiting for an invoice from Will [Wilding]. He recalls talking to Clem who was picking up the hay feeders about one to two weeks after the 1st of November, the new lease date. One bale was sitting at the gate by the entrance to the cattle yard. John said he asked Clem what they were going to do with the hay and Clem said he wasn't worried about it. He took it that they didn't want the sale so he used it. It sat there for some months. Caution given.
>
> Q. What was your reason for taking the 10 bales from under the tress?

R. As I said at the time, the indication I had was that they didn't want them. The other bale had sat there for some time and no one attempted to come and get it.

S. Why didn't you get clarification from Te Mania management, Tim or Will WILDING?

T. Well I guess Clem was in charge of the feed and that is the answer he gave me.

U. I just want to clarify why you didn't pay for the bales of hay after I spoke to you last?

V. I thought William was going to send me an invoice. It was a misunderstanding I guess. I thought you were going to speak to Will and what value they were going to put on the bales.

W. Will you sign my notebook as being a true and correct record?

Mr Harrington signed my notebook as being a true and correct record.

[354] On 25 June 2015, Mr Wilding responded to a message from the Police that the charge was laid and asked if Mr Dewes had managed to find out who received the stolen hay because Mr Harrington did not own livestock himself.

[355] Senior Constable Dewes wrote to Mr Wilding to inform him that Mr Harrington would appear in court, and a Victim Impact Statement would be needed. He said Mr Harrington had fed the hay to the (Terra Firma) stock which he managed and that he would arrange for reparation. A cheque should be expected for 10 bales at $100 per bale. Mr Harrington knew nothing of the missing bull.

[356] On 27 June 2015, Mr Wilding again took a reasoned approach, based on the claimed authority to take the hay given by Mr Chan. He asked if a statement had been obtained from Mr Chan, reflecting that "should that be true then we will look on this in a different light even though Clem has no jurisdiction to give hay away".

[357] He said that because of the severity of the drought and availability of hay, TML would prefer that Mr Harrington replace the hay, as it was needed.

[358] What followed reflected not a different version of the facts regarding the circumstances in which the hay was taken, as Senior Constable Dewes understood them, but rather his realisation that the hay belonged to TML, and that the prosecution was not supported by TML as such, nor the defendant directors. Young Hunter solicitors wrote to the Police on 30 June 2015, telling Senior Constable Dewes that Mr Harrington being charged was of serious concern, and that he was a director and shareholder of TML which was the owner of the 10 bales of hay allegedly stolen. Mr Hunt said that the directors had never agreed to lay a complaint with the police and Mr Wilding did not discuss his intention to do so with the Board directors obtain their approval.

[359] Mr Hunt said there were good reasons to suspect that the complaint was not only without foundation but lodged with intent to cause embarrassment and distress to Mr Harrington, a former employee of TML, and still a director and shareholder, in the context of "a bitter intra company dispute in which Mr Wilding has made various serious allegations regarding Mr Harrington and which are denied".

[360] Two other (unnamed) directors of TML did not approve of the complaint being made, or the laying of the charge, and wanted it withdrawn. Mr Ewart for Mr Wilding, wrote to Lane Neave, copied to Senior Constable Dewes, saying the complaint would not be withdrawn. He explained that it had been laid because the hay had been taken at a time of serious feed shortage, and the matter was now with the police.

[361] He repeated Mr Wilding's statement that Mr Harrington said the taking of the hay had been authorised by Mr Chan, who had said that he had not authorised that it be taken. It was "at that point that the Police officer made the decision that Mr Harrington should be charged". The letter went on "the complaint was not laid for any financial benefit and does not require the authority of the Board for it to be laid".

[362] There was other correspondence from Mr Hunt in which the Board's stance was mentioned, including the following statement:

> In our view, Mr Wilding has had absolutely no right to lay a complaint other than on behalf of TML, and he did not have authority to do so on behalf of TML.

[363] Then it was asserted, as the basis for the alleged torts of malicious prosecution and abuse of process, that (the complaint) laid [was] "not only without foundation but was deliberately lodged with the intent to cause embarrassment and distress to Mr Harrington, a former employee of TML".

[364] The Summary of Facts prepared by Senior Constable Dewes said that Mr Harrington took 10 bales of hay belonging to TML and fed them to livestock he was tending, with his explanation that he took the hay because he thought TML did not want it. A Victim Impact Statement from Mr Wilding referred to the lack of feed in the drought, and that the explanation given by Mr Harrington that Mr Chan authorised him to take the hay had been unsettling for staff and management because it was untrue. The Statement recorded that the theft of hay was one of a number of ongoing issues "which I believe have been designed to disrupt the company".

Sergeant Crosson

[365] Sergeant Crosson gave evidence that he instructed Senior Constable Dewes to charge Mr Harrington with theft. He assumed that Mr Wilding had full authority to make the theft complaint and was acting on behalf of the TML Board in doing so. As a matter of law Mr Wilding did not require the approval of the Board. Sergeant Crosson said that he took the decision that the prosecution should not continue on the basis that the TML Board did not support the complaint of theft, nor consent to the prosecution of Mr Harrington. That decision was not based on the primary facts on which the police relied in deciding to prosecute. Sergeant Crosson acknowledged that he thought that while the facts might justify a prosecution, in the circumstances of opposition from TML, or at least some of its directors, then the matter was best dealt with "at the Board table".

[366] Sergeant Crosson wrote to Mr Hunt and said that he and Senior Constable Dewes thought that the complaint had been laid with the authority of the Board, but because that was not the case then it fell into the civil arena. He said that no charging documents had been entered and Mr Harrington did not need to make an appearance in court. The matter was thus cleared as "no offence".

Mr Wilding's response to the Police decision

[367] Mr Wilding wrote to the Police on 17 July 2015 to clarify that he had not alleged that Mr Harrington stole hay from Te Mania. When it was discovered that hay had been taken, and a bull was missing, that was reported to the Cheviot Police, resulting in Senior Constable Dewes investigating. He added that just because Mr Harrington was a director and shareholder of TML that did not give him the right to take company property. He expressed concern that staff may think it acceptable to help themselves to valuable feed supplies and think they are above the law and he said "I hope Mr Harrington understands that and apologises to the staff member in question". He added:

> In the meantime I am happy to let the matter rest but should Mr Harrington attempt any more acts of sabotage against the company then I reserve my rights on this matter.

[368] There was then correspondence from Mr Dale seeking confirmation that the report of the theft of hay was made by William Wilding and not Mr Wilding, and that Mr Harrington was not identified as the culprit. Sergeant Crosson replied to confirm that William Wilding had telephoned the Cheviot Police, and that he had reported the missing bull. The Sergeant said that Senior Constable Dewes told him that neither William Wilding nor Mr Wilding said that Mr Harrington was a suspect, and Senior Constable Dewes of his own volition chose to speak with Mr Harrington and asked him if he had knowledge of the hay.

Observations

[369] It is odd if Mr Chan told Mr Harrington what he says gave him the reason for taking the hay. There is no evidence that he was authorised to dispose of hay belonging to TML, and "not being bothered" or not being "worried" about it suggests that TML "did not care", which is what Mr Harrington says he took from the remark. One would expect a person with authority to say directly that the person enquiring could or could not have it, or if he could not make that call, that the person ask the owner.

[370] Mr Harrington gave the Police an explanation which rested entirely on what Mr Chan had told him. When that explanation was explored by Mr Wilding and by the police, Mr Chan did not support it, in the sense that he did not recall such a discussion. The curious and ambiguous statement attributed to Mr Chan, who was not called as a witness, rests on Mr Harrington's evidence as it finds no support in the evidence of what Mr Chan said to the Police, or to Mr Wilding.

[371] It was inherently unlikely that at a time of shortage of winter feed that Mr Chan would have given away hay which belonged to his employer, some $1,000 worth. There may have been some doubt about the bale of hay by the gate which had been partly eaten, but the same could not be said for the other nine bales of hay which Mr Harrington subsequently removed.

[372] The decision not to prosecute further was not based on an assessment of the facts referred to above, but a realisation that some of the directors of TML did not support a prosecution. That was based on their allegiance to Mr Harrington and their view that this was a misunderstanding. Mr Wilding was told that Mr Chan had not given his permission for the hay to be removed. It is not uncommon for complaints to be made about fellow directors, or evidence to be given against them, and/or among senior staff. The fact that someone is a director or senior officer gives them no licence to take that which is not theirs.

[373] The police took a pragmatic and principled approach to resolution, acting entirely within their discretion. Had Mr Harrington arranged to pay for the hay, it is highly probable that he would not have been charged. I do not need to reach any conclusion whether Mr Harrington stole the hay or not, but it would be wrong to leave him with a cloud over his head. He has given evidence. Mr Chan has not. A misunderstanding is quite possible. Mr Chan may have referred to the single part bale, not the other nine bales, if there was a discussion. Another curious fact is that the hay was so easily traceable. If there was dishonesty involved, Mr Harrington would have to assume he would soon be picked up on it. It is also odd that Mr Harrington did not, immediately on knowing of the complaint, say that he thought he was entitled to take it, and arrange payment straight away. Instead, his explanation for not paying, which failure prompted the prosecution, was that he thought that William Wilding would send him an invoice. That should have been quite unnecessary, as if this was simply a misunderstanding one would have expected Mr Harrington to jump to it, sending an email of explanation and acting proactively to find out the payment required. However, the relationship between Mr Wilding and Mr Harrington was so embittered by then that I find that what might ordinarily be thought a normal response would not necessarily have followed.

[374] I consider that Mr Wilding did nothing to point to Mr Harrington in the first place, and reacted as information came to him. He came to light as the person who took the hay, with an explanation which was tested and not accepted. Later Mr Wilding expressed his view that what the other directors thought should not have influenced the outcome.

[375] Mr Wilding was otherwise quite prepared to see the prosecution dropped if Mr Chan had in fact authorised that the hay be taken. When faced with the contention that Mr Chan had given permission that Mr Harrington take the hay, Mr Wilding expressed himself in a moderate way, and in particular on 27 June 2015 said that if Mr Chan had told Mr Harrington he could take the hay then he would look at the incident in a different light “even though Clem has no jurisdiction to give hay away”. Even when the decision was taken not to take the prosecution further, he was “happy to let the matter rest”.

[376] I turn to the elements of the two torts.

Did Mr Wilding “prosecute” Mr Harrington?

[377] Mr Hunt’s submission is that Mr Wilding was responsible for prosecuting Mr Harrington because William Wilding first spoke to the Police about a missing bull, then Mr Wilding told the Police about the missing hay.

[378] The initial Police Complaint Acknowledgment Form refers to Mr Wilding as the complainant in respect of the hay. Mr Wilding clearly provided information relevant to the general complaint. As a matter of law I conclude Mr Wilding was instrumental in making the complaint which led to the investigation and then prosecution of Mr Harrington. However, Mr Wilding did not in the first instance lay a complaint against Mr Harrington. He simply made a report of theft.

[379] Mr Hunt is therefore incorrect in saying that Mr Wilding put the Police in possession of information which “compelled” the issuing of a summons. He did not. He simply advised the Police of the theft of hay and said nothing to implicate Mr Harrington, and there is no evidence that he knew the complaint would lead to him. There was no inkling of where the investigation trail would lead. It is important to recognise that at the outset Mr Wilding did not seek the prosecution of Mr Harrington, but rather that the Police investigate a theft of hay. From their own enquiries they identified Mr Harrington, and considered his explanation with Mr Chan. The Police were told that Mr Chan did not support Mr Harrington’s explanation but that was a truthful report to the Police I find. The Police checked this with Mr Chan as well.

[380] The next leg of analysis is whether Mr Wilding "prosecuted" Mr Harrington when he refused *to withdraw* the complaint, which he did by his solicitor's letter of 6 July 2015, sent to Lane Neave and to the Police. Mr Hunt's submission is that once Mr Harrington was identified as the person who took the hay, his position as a TML director and shareholder, the Board's attitude to the prosecution, and the civil proceedings against Mr Harrington should have been advised the Police. Had the Police been told earlier, Mr Hunt says that Mr Harrington would never have been charged and to that extent he is right in part.

[381] The Board's position was not made known when the Police decided to prosecute, so the submission is incorrect in that regard, but it is said that Mr Harrington's status had to be advised the Police. I do not agree, as the facts spoke for themselves. It is also incorrect to say that Mr Wilding's civil proceedings against Mr Harrington seeking his removal as director *relied* on the complaint, although it was one of the matters raised by Mr Wilding.

[382] I have heard the evidence and reject the proposition that Mr Wilding deliberately withheld information from the Police about Mr Harrington's shareholding, directorship, and the intra company disputes. These factors were technically irrelevant to the Police in their decision to investigate and prosecute based on the facts. As the Police acknowledged through Sergeant Crosson, the facts required to prove the charge were unchanged by these factors, and these factors went to the discretion to lay and then continue the charges.

[383] To summarise, Mr Wilding did not initiate the prosecution of Mr Harrington as such, other than to lay the complaint, but it was not against Mr Harrington, and he did not make a decision that he should be prosecuted, nor push for that. Later, Mr Wilding's opposition to withdraw the prosecution temporarily stayed the Police hand, but in the end it had no effect because the Police regarded the matter as one which better fell within the civil arena rather than the criminal law. I do not regard this first element, that Mr Wilding prosecuted Mr Harrington, as established. If he had been untruthful in any respect to sustain the prosecution that would be different. Nevertheless, I go on to consider the other four elements.

Was the prosecution determined in Mr Harrington's favour?

[384] The prosecution came to an end to Mr Harrington's advantage, based on his position in TML, and the Board's expressed view. That was not a decision reached on the merits, but Mr Harrington has the presumption of innocence in his favour, so the outcome for the purpose of the tort was in his favour, for the very clear reasons given in evidence by the Police.

Did Mr Wilding bring the prosecution without reasonable cause?

[385] To repeat, Mr Wilding did not institute criminal proceedings against Mr Harrington. He laid a complaint of theft, and the Police inquiries lead to a charge being laid.

[386] I reject the submission that because TML owned the hay, only an authorised TML representative could have laid a theft complaint. I consider that Mr Wilding did not require the authority of TML to lay the complaint. First, he was a 40 per cent shareholder, and a director. There is nothing in the law that requires that the company in these circumstances must authorise the laying of a complaint. Usually only a person with an interest will lay a complaint, but it is easy to envisage circumstances in which Mr Hunt's submission could not be right. If, for example, a criminal act is committed by an employee of a company, and a person interested in that company provides information which in due course leads to that person's identification, and indicates that an offence has been committed, then the opposition of friendly associates of that person, with an interest in the company, could not alter the facts, or prevent the offending proceeding to prosecution. They could simply reflect their perspective, which may be held for personal reasons, perhaps concern about embarrassment to the company, or their alignment with that person, as is the case here.

[387] I also reject the idea that Mr Wilding *knew* that he did not have authority to lay the complaint as relevant, on the basis that it was never discussed by the Board, let alone approved. They did not have to discuss it.

[388] The facts as the Police understood them never altered. With no complaint against Mr Harrington as such, he came into the narrative from the Police perspective when he acknowledged taking the hay and gave an explanation to the Police which did not stack up after their own inquiry of Mr Chan. Another way of looking at it is that Mr Harrington never purported to justify taking the hay on the basis that he was a TML shareholder and director. His position rested entirely on the alleged say-so of Mr Chan. If he did not think it relevant when asked about it, it is not likely to have occurred to anyone else that it was.

[389] There is of course an underlying conundrum as to why Mr Harrington would do something like this and rest his position on such shaky ground, namely a discussion with Mr Chan, who was not the stock manager for TML, and when Terra Firma, his employer, gained the advantage of the hay. I have concluded on all the evidence that the relationships between the parties were so fractured that at times their conduct verged on the irrational. Mr Harrington exhibited something of this in a very surprising response to Mr Dale under cross-examination, when he said that Mr Ryan, who had given evidence called about the condition of the young bulls, may have had an attitude towards Mr Harrington, because Mr Ryan had tried to kill him. This astonishing evidence, which was not immediately qualified by him, turned out to be a reference to Mr Ryan driving him as a passenger in a car, in a way which he thinks put his, and thus their lives at risk. His answer was given with such vehemence that it left a strong impression that he may say or do things which did not bear close scrutiny, and that he could be motivated by emotion rather than reason in this bitter dispute.

[390] Nevertheless, this element is not established. Mr Wilding did not bring the prosecution without reasonable cause as he did not bring it against Mr Harrington and he had good cause to lay a complaint of theft. That did not change, whether or not Mr Wilding had "authority" from the Board.

Did Mr Wilding act maliciously?

[391] Mr Wilding did not target Mr Harrington. The Police located Mr Harrington and reached their own decision. None of the reasons for their decision were undone by later events. They took a decision how this set of facts should be addressed, and that it should be in the civil arena.

[392] Mr Wilding did not in my view provide "incorrect information or half truths" as Mr Hunt submits. If he was not motivated by malice when he laid his complaint, then Mr Hunt says that he was acting maliciously when he did not withdraw the complaint when called upon to do so. I have heard Mr Wilding's evidence, and have considered the facts. I do not consider Mr Wilding acted maliciously. Mr Harrington's involvement came out of the blue to Mr Wilding. Mr Chan seemed to contradict Mr Harrington's explanation. The notion that Mr Chan would give his approval to TML hay being taken to be used by Terra Firma, at a time of drought, seemed curious to say the least. When Mr Chan told the Police that he had no such discussion with Mr Harrington, that was a decisive consideration in the Police decision to prosecute, and Mr Wilding's understanding of the reason for prosecution. He was quite prepared to acknowledge that if Mr Chan had given his approval, unlikely as that seemed, that would alter his perspective of Mr Harrington's conduct.

[393] I do not consider that raising the matter in the context of Mr Wilding's application to have Mr Harrington removed as a director was other than making a reference to something which clearly reflected on the interests of TML, whatever the other directors thought and whether the prosecution was continued or not. The circumstances in which the hay was taken were of themselves of proper concern to any director of TML.

[394] I do not think that Mr Wilding had to bring to account that the other directors did not seek a prosecution or regarded all this as a "mere misunderstanding" between Mr Harrington and Mr Chan. He was entitled to his own view. His fellow directors were equally entitled to theirs.

[395] I thus reject the proposition that Mr Wilding acted maliciously. I conclude that all this was brought about by Mr Harrington's conduct, which viewed objectively, was foolish in the extreme, in the circumstances in which he took the hay, his failure to account for that action to William Wilding as TML stock manager, and his failure to offer any sort of explanation direct to TML or to put things right after the Police spoke with him. In short, he brought much of this on himself.

Did Mr Harrington suffer damage as a consequence of the prosecution?

[396] Although, for the reasons given, I do not find that Mr Wilding is liable in the tort of malicious prosecution, I refer to Mr Harrington's general damages claim for $75,000, exemplary damages in the sum of $25,000, and indemnity costs. He incurred costs, and no doubt he was concerned and embarrassed. Certainly matters reached the stage where Mr Harrington's reputation was at large, because there was an awkward moment in 2015 at the Conway Flat Community Hall when William Wilding commented in front of Mr Watherston and three or four others, that Mr Harrington had taken hay. The fact of this incident was known to some in the community and it was no doubt embarrassing for him. Had I reached judgment that the tort was established, I consider Mr Harrington would have been entitled to some small award of damages, and some contribution to costs which would turn on the point at which the tort was committed by Mr Wilding, which could only have been when he refused to withdraw the

complaint.

Malicious prosecution—Conclusion

[397] Mr Wilding is not liable for the reasons given.

Abuse of process

[398] Gilbert J has recently held that the tort of abuse of process exists in New Zealand, and is concerned with the improper use of the court's processes to effect an object outside their legitimate scope.[51] His Honour was concerned with the arrest of a person taken to Mount Eden Prison and kept there for one day, in reliance on s 5 of the Judicature Act 1908 which provides for the power to arrest a defendant about to quit New Zealand. The application was based on the absence of the respondent from New Zealand creating a material prejudice in the prosecution of a *civil claim*, and obtaining judgment. There were deficiencies in the information provided to the court with the application. Gilbert J referred to the recognition of the tort of abuse of process in *Grainger v Hill*.[52] Tindall CJ held that malicious prosecution involves proof that the proceeding was pursued maliciously and that it was pursued without reasonable and proper cause and terminated in the plaintiff's favour. The tort of abuse of process is concerned with the improper use of the court's processes to effect an object outside their scope. Accordingly, the elements of reasonable and probable cause, and termination in the aggrieved's favour, are not required.

[399] This distinction was recognised in the High Court of Australia in *Varawa v Howard Smith Co Ltd*,[53] and Gilbert J referred to the judgment of Isaacs J, that if proceedings are "merely a stalking-horse" to coerce the defendant in some way entirely outside the ambit of the legal claim, then that is an abuse of process.

[400] In a different setting, the High Court of Australia was concerned with the commencement of 30 proceedings, most of which were criminal prosecutions, against those who held positions of authority at the University from which the plaintiff academic had been dismissed. The Court held this was predominantly to pressure the University into reinstating him or agreeing to a favourable settlement of his wrongful dismissal claim.[54] That was treated as an abuse of process.

[401] The Privy Council confirmed the distinction between malicious prosecution and abuse of process in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*.[55] Lord Wilson referred to an improper purpose being to secure a defendant's downfall or some other disadvantage by use of the proceedings otherwise than for the purpose for which they are designed. Lord Sumption dissented, as he later did strongly in *Willers v Joyce*,[56] where the Supreme Court by majority held that the malicious use of legal proceedings brought without a reasonable basis was a deliberate misuse of the court's process, so the elements of the tort applied as much to the bringing of civil proceedings as to criminal proceedings. There were four strong dissenting judgments. Lord Sumption said the introduction of malice as an element of tortious liability is contrary to the longstanding principle in the law of tort that malice is irrelevant.

[402] I take the same view as Gilbert J, that there is a separate tort of abuse of process, which is founded on a collateral and improper purpose, in other words whether here the reference to the criminal prosecution in civil proceedings was for a purpose other than that for which the proceedings were brought, to seek to have Mr Harrington and Ms Adams removed as directors. A claim which is not made out does not of itself create liability, but where the claim made, evidence given, or a stance adopted is to effect a harm of some sort, which is not related to the relief properly sought in civil proceedings, that is equivalent to the malice associated with malicious prosecution.

[403] When Mr Wilding sought the interim injunction to remove Mr Harrington as a director, and in related proceedings brought by WHHL against him and Mrs Wilding under *CIV-2015-409-232*, he swore several affidavits. In his fourth affidavit of 4 May 2015, he referred to the breakdown in the relationships between the shareholders. He alluded to the outcome of the competing claims and said that it would be "necessary for my interests supported perhaps by [Mr Hong] to buy out the other shareholders". He addressed his reasons for seeking the appointment of independent directors. He referred to the litigation position of the parties and to the matter of "more serious concern", being Mr Harrington's employment with Terra Firma, a direct competitor of TML. Mr Harrington had been general manager of TML, Mr Wilding said that "with the help of Ms Adams" he had tried to orchestrate a takeover of TML by splitting the company assets. He alleged that by July 2014 Mr Harrington's behaviour and management of the stock had become untenable. This was a reasonably full recital of Mr Wilding's version of events in this court, and why interim orders were sought with regard to governance.

[404] On 14 July 2015, Mr Wilding swore a further affidavit, and said that since the application was filed there had been a significant development, namely the charges against Mr Harrington regarding the theft of hay, which Mr

Wilding believed was supplied to Terra Firma. He made that assumption because Mr Harrington was employed by Terra Firma and it needed feed, and the return of the hay proved him correct. Mr Wilding annexed correspondence and at para 4 of his affidavit, emphasised that he did not insist that Mr Harrington be charged, but he was very concerned about the loss of hay at a time when there was a feed shortage. He said:

> As has been pointed out in the correspondence I believe the charges were only laid by the police because the explanation that Mr Harrington gave proved to be untrue.

[405] He explained his reference to the prosecution because it illustrated the conflict of interest he alleged while Mr Harrington worked for Terra Firma. Mr Wilding was, in my view, entitled to express his position that on the face of it a theft had been committed, but whether the Police decided to go ahead with it or not was for them. The reasons for other shareholders and directors wanting to withdraw the complaint were nothing to do with whether an offence had been committed or not, and were for them, but as far as Mr Wilding knew, the explanation given for taking the hay had not stood up to inquiry.

[406] The heart of this cause of action for abuse of process is that Mr Wilding instituted and maintained civil proceedings against Mr Harrington to generally harm him, and in order to remove him as a director, and that the prosecution was "maintained" only for a collateral and improper purpose. The reference in the civil proceedings to the prosecution and more particularly the facts on which the Police proceeded was a factual reference, relevant to Mr Wilding's case that Mr Harrington was conflicted. The blurred line between the torts of malicious prosecution and abuse of process seems to me the pursuit of an unjustifiable collateral objective in the latter, that being evidence of malice of the improper use of the Court's processes. Mr Wilding's objective to have Mr Harrington removed as a director was obvious, and it was based on grounds which have already been considered. Here was a circumstance which, at the very least, constituted an arguable conflict of interest and Mr Harrington's conduct taking hay belonging to TML in at least questionable circumstances, and supplying it to Terra Firma, bore on his role as a director.

[407] Mr Wilding was entitled to see justice take its course. His actions associated with the prosecution, and reference to the prosecution in the civil proceeding, did not represent malice, or an "unjustifiable collateral objective". They were proper matters to raise at the time. He did not refer to the prosecution and the surrounding facts, without good and relevant cause.

[408] Senior Constable Dewes, with Sergeant Crosson, conducted the investigation and prosecution process, including its termination, in an exemplary fashion. They were thorough and fair, and in the end did the right thing in my view. This was a fine example of good policing.

[409] I found the claim in tort for abuse of process is not made out.

(7) Is TML liable to TMPL?

TMPL claims against TML

[410] The claims pleaded in the 4ASOC were not backed up by evidence which in my judgment came anywhere near meeting the onus on TMPL, nor were they mounted by the correct legal approach. The impression left the Court is that these claims were something of a make-weight, to create a liability on TML which would affect share value. Mr Wilding seemed to recognise the evidential difficulties during one of his many days giving evidence in the first phase of the trial when he said he might get someone "independent" to give evidence.

[411] The claim by TMPL for breaches of TML's leasehold obligations relates to the way TML has farmed TMPL lands. TMPL says that TML failed to fertilise the leased land as required. This is reflected in the need for fertiliser expenditure to bring the pasture to ordinary grazing and cropping standard. It also says there has been an inadequate sum spent on fencing and other maintenance. The TMPL claims as mounted are for:

(a) An alleged "shortfall" of $49 per ha in the application of superphosphate or other fertiliser, over 700 ha, equating to $34,300 per annum or a total of $205,800.

(b) 30 kilometres of fencing and 35 gateways are in need of serious repair or replacement at a cost of estimated $55,000.

(c) A failure by TML to pay rates which TMPL has had to pay, in the sum of $85,120.

(d) Alleged failure in general farm maintenance as to shelterbelts, wood lots, culverts, drains and water troughs, for which the estimated "cost of bringing this back to the condition as it was at the commencement of the lease" is pleaded as $45,000.

[412] Under cl 13 of the lease agreement applicable (for all TMPL properties), TMPL says that where the lessee is in default, it must pay the lessor's solicitors' costs associated with enforcing its rights under the lease, which includes this cause of action.

TML defence

[413] Mr Mackenzie raised several lines of defence for TML. He accepts that the terms of the Wadi and Rafa leases are implied by reference to the lease of Te Mania, although no formal deed, or agreement to lease, was executed. While s 24 of the Property Law Act 2007 (the PLA) precludes the enforcement of a contract for disposition of land unless in writing, the doctrine of part performance applies and Mr Mackenzie sensibly accepts that it has application to the Wadi and Rafa leases. Those leases are tenancies at will and always have been, as is the Te Mania lease the maximum term of which has passed.

Section 210 of the Property Law Act 2007

[414] This section provides:

> **210 Implied term of lease if no other term agreed**
>
> (1) This section applies to a lease if—
>
> (a) the lessee is in possession of the land, although the lessor and the lessee have not agreed, expressly or by implication, on the duration of the term of the lease; or
>
> (b) the lessee remains in possession of the land with the lessor's consent, although the term of the lease has expired and the lessor and the lessee have not agreed, expressly or by implication, that the lessee may continue in possession for some other period.
>
> (2) A lease to which this section applies—
>
> (a) is terminable at will; and
>
> (b) may be terminated, at any time, by the lessor or the lessee giving not less than 20 working days' written notice to the other party to the lease.

[415] Section 220 of the PLA provides for the effect of a short term lease:

> **220 Covenant implied in unregistered short-term leases**
>
> Every short-term lease that is not registered contains the covenant set out in Part 4 of Schedule 3 (lessee to use premises reasonably).

[416] Part 4, sch 3 in turn provides:

> **14 Lessee to use premises reasonably**
>
> The lessee will, at all times during the currency of the lease, use the leased premises in the way that a reasonable tenant would.

[417] Applying the orthodox test for implication of terms,[57] Mr Mackenzie accepts that TMPL and TML adopted the same approach to the obligations of the lessor and lessee for Rafa and Wadi, as they expressly agreed for Te Mania. TML was run as one operation across several properties, and Mr Mackenzie correctly concludes that the court is likely to find that the absence of written leases was through inadvertence by the company and its advisors

and not intentional.

Fertiliser

[418] Before addressing the evidence I turn to the approach at law. The calculation advanced for TMPL is said by Mr McKenzie to be wrong in principle, because the correct measure of loss, *if the lease has ended*, is the cost of reinstatement, subject to the lessee showing that the lessor's loss would be less than that on a diminution basis. In *Maori Trustee v Rogross Farms Ltd*,[58] the Court held that the rule in *Joyner v Weeks*,[59] applied. The measure of damages is the cost of putting premises into the state of repair required by the covenant in a terminated lease situation. If the lease is still in effect, as it is here although holding over, then the correct measure of loss is the diminution in value of the lessor's reversion.[60]

[419] That judgment was applied in *Proprietors of Maraetaha No 2 Sections 3 and 6 Block Inc v Williams*.[61] Mr Mackenzie says that the TMPL claim is not properly advanced, because the test is diminution in value and there is no evidence to that effect. It is not the costs of "putting right", although inevitably those costs would become part of a valuation assessment of the diminution in value of the reversion. As to that, Mr Flynn called for the plaintiff, is submitted by Mr Mackenzie to concede that the farm is doing well. Mr Mackenzie submits that TMPL's contention that Mr Harrington has breached the fertiliser obligation, either by preference of non-TMPL properties or otherwise, is not proven on the evidence. There is no evidence of the state of fertility of the farms, from which an inference can be drawn as to the performance or otherwise of the obligation to fertilise. TMPL says TML has not fertilised its land as the lease required and has made a saving which represents the loss to TMPL. Mr Mackenzie accepts that expressly or by implication the TMPL leases required a spend of 150 kg of superphosphate or other fertiliser per hectare per annum, but that the consequences of not doing so if proven, must be measured according to the principle discussed.

Evidence

[420] Mr Flynn was the fertiliser consultant and a shareholder with Mr Wilding in Conway River Lime Co. TML is run under biological farming practices. I accept Mr Harrington's advice that with Mr Flynn, he set the plan for the application of fertiliser and did so in the context of the TML budget. It was a shifting approach, targeting one area and then moving to another and before 2012 TMPL land was the focus. The question of TML's leasehold obligations to TMPL cropped up when Mr Wilding was asked to pay his current account.

[421] Mr Harrington says that the lease requirement was not met strictly in each year and that is not the nature of fertiliser application. He refers to the amount of money spent on TML land in 2010 and 2011, and lower applications in 2013 and 2014. 2014 was affected by one of the wettest autumns experienced but the following year, after he left, there would have been a fertiliser adjustment. Mr Flynn had substantial involvement after 2006. Mr Harrington says that TML was something of a shop window for Mr Flynn given the biological practices adopted, which Mr Wilding espouses. When Mr Flynn spoke publicly about TML in 2014 he said that the soil and pasture conditions were very good.

[422] Mr Flynn is close to the Wilding family and in business with them, through the Conway River Lime Co. His evidence was called into question for that reason, and Mr Mackenzie says, although without evidential foundation, that the fertiliser claim could have arisen as the result of Mr Flynn's own work. Otherwise, Mr Mackenzie makes the submission that Mr Flynn would gain financially if further spending on fertiliser to make up what TMPL says is a deficiency, was to come his way. I do not accept Mr Flynn allowed that to influence him. I heard from him, and accept what he says in that regard.

[423] A shortfall of fertiliser spend of $205,800 is claimed in the years 2010–2015, and that the total spend over six years on 1230 ha should have been $398,520 including GST, or $229,392 on the TMPL properties only. The evidence of the amount spent on fertilizer over 1230 ha is analysed in the years 2010–2015 as follows:

- 2010: $105,450.00 excluding GST (12.5% GST = $13,181.).

  Total inclusive GST = $118,631.00

- 2011: $79,767.00 excluding GST (12.5% GST = $9,970.875).

Total inclusive GST = $89,737.00

- 2012: $61,403.00 excluding GST (15% GST = $9,210.00).

  Total inclusive GST = $70,613.00

- 2013: $77,995.00 excluding GST (12.5% GST = $11,699.00).

  Total inclusive GST = $89,694.00

- 2014: $59,718.00 excluding GST (15% GST = $8,958.00).

  Total inclusive GST = $68,676.00

- 2015: $111,950.00 excluding GST (15% GST = $16,794.00).

  Total inclusive GST = $128,753.00

Six year total excluding GST	=	$496,292.00
Six year total including GST	=	$566,104.00

[424] Adding Lansdowne, and the three TMPL properties, the effective area farmed was between 1033 and 1230 ha, and Mr Mackenzie adopts the latter. The accounts do not show for which farms fertilizer was purchased, or to which land it was applied. At $54 per ha, the cost of fertiliser would be $66,420 per year, including GST, and for the three TMPL properties, 708 ha would have required $38,232 including GST per annum.

[425] Mr Mackenzie submits this establishes that the $13 per ha per annum alleged by Mr Wilding to have been spent on the TMPL properties cannot be right because that would constitute $15,990 per annum. Mr Mackenzie's calculations are taken from the accounts. If Wenlock is brought to account, together with the costs of spreading, that may alter the calculation. Wenlock comprised 120 ha and was leased until August 2012 and at $54 per ha the fertiliser cost as calculated was $6,408 per annum. Mr Mackenzie submits that there is a clear margin, even including Wenlock, which demonstrates that the lease obligation has been complied with.

[426] Mr Mackenzie addresses William Wilding's evidence that fertiliser spreading costs should be brought to account at $10 per tonne. He submits that makes no difference to the overall calculations. Based on the assumption of an equivalent fertiliser spread, Mr Mackenzie says that the evidence as a whole does not show the preference for other leasehold properties which TMPL alleges. TMPL says this sort of calculation belies the evidence "on the ground" as to fertiliser application to which this judgment returns.

[427] Mr Flynn accepted in evidence for TMPL that Mr Harrington knew best where the fertiliser went, and did not personally know where it was applied. Mr Harrington's evidence is that there was no preference given to properties not owned by TMPL and the fertiliser went where it was needed, and I accept that evidence.

[428] There is a further argument raised for Mr Mackenzie which he puts no higher than "another problem", that no notice was received under cl 5.11(b) of the lease, implied from the terms of the Te Mania lease, which reads:

> (b) In the event that the Lessor considers that the Lessee is not applying the appropriate type, quality or quantity of fertiliser or believes that the fertiliser is not being applied at the appropriate time of the year, the Lessor is to notify the Lessee in writing. In the event that the parties cannot resolve the matter by negotiation, either party can appoint a mutually acceptable farm consultant to determine the matter. In the event that the parties cannot agree

> on a mutually acceptable farm consultant, the President of Canterbury Federated Farmers is to appoint the farm consultant to determine the matter.

[429] That clause was plainly intended to head off any argument which may develop, as it has after some years, of an alleged breach of lessee obligation.

[430] The claim by TMPL for superphosphate and fertiliser expenditure claimed to result from breach of lessee obligation by TML has not been made out to the evidential standard required, in terms of the applicable law. The correct approach required proof of what was applied, the way the overall fertiliser programme worked in practice and that there is a residual diminution in value of the leased land, as the result of breach, which should be remedied.

Paddock book

[431] This was something of a false lead. The Te Mania lease required that a "paddock book" be kept. TML through Mr Mackenzie says that Mr Flynn held the records of what was sold to TML. A traditional form of book keeping sometimes called "the paddock book" was not maintained in this case, but the equivalent was submitted to be available through those records kept by Mr Flynn. It did not constitute a "paddock book" exactly because one could not, from the records, know where the fertiliser was spread. However, there is no causative link in this regard, rather an evidential gap for TMPL and TML, which would have been avoided had TML kept a paddock book, and that was the responsibility of Mr Harrington as manager until 2014.

Fences and gates

[432] TMPL through Mr Wilding and William Wilding gave evidence regarding the condition of gates and fences in need of repair and replacement, and says that the maintenance covenant under the TMPL leases has been breached. Some fences and gates are in very poor condition, reflected in the photographs before the Court and in the evidence of William Wilding and Mr Wilding. TMPL says that that is the fault of TML as lessee, but TML says it is the result of poor infrastructure, which infrastructure it had to maintain, but not to provide in the first instance.

[433] There was no independent evidence. William Wilding produced Exhibit 7, being a colour coded map of Te Mania. Mr Mackenzie says that that was purportedly offered as an expert opinion. In my view, William Wilding does not have to qualify himself as an expert, and he has not put himself up as such. He is giving evidence as someone who, although young, has worked extensively on properties where fencing and gates are of paramount importance, and he has grown up on Te Mania properties. Mr Mackenzie's further submission is, however, that William Wilding's evidence has not, with any precision, identified the specific state of the fences and gates, and that it is "extremely general" such that Mr Harrington is in difficulty in responding for TML.

[434] Mr Mackenzie submitted that William Wilding is a beneficiary in the Trust that owns the farms and sees his future there, so he has an interest. Having heard his evidence, I do not consider that has affected his evidence, as I found him to be credible and sincere, and doing the best he could to provide evidence of the condition of gates and fences. However, what was required was something altogether different, and more detailed, which would have allowed for proper evidential analysis against the terms of the lease.

[435] Mr Harrington says Lagoon Flat, Wenlock and Lansdowne required few repairs and little maintenance, as big infrastructural investments were made by the owners. This was not the case on TMPL properties. When TML was taken on, a lot of the posts were what Mr Harrington called "relics of the past". They needed to be upgraded but Mr Wilding either could not or would not replace them. The cattle yards at Te Mania had to be paid for in part by TML. Between 2005 and 2013, $187,000 was spent and over $25,000 put into a fund for Te Mania.

[436] Mr Wilding promised to inject $150,000 into Te Mania in 2012 for capital works, and Mr Mackenzie says that is some indication of what was needed on that property. He says the same principle applies and the proper measure by breach is diminution in the reversion value, and again that has been neither pleaded nor proven. Inevitably, the cost of repair or replacement should be part of that assessment, but it is not, and I think the evidence in this regard is inadequate by a significant margin. Mr Mackenzie submits that the court should not "guess" the state of the infrastructure. He says the necessary demarcation between the obligations of the lessor and lessee has not been made out on the evidence, and by inference that particularly relates to the condition of the infrastructure at the time TML took occupation.

[437] I do not consider there is any reliable evidence on which I could conclude that there has been a breach of lease by TML in respect of its obligation to repair and maintain. The evidence should have described the condition

of the properties, in detail, when TML first took occupation. Then the condition of the fences and gates would be assessed against that yardstick, and the maintenance and capital works undertaken examined more properly. I do not doubt that the condition of some gates and fences is poor, and they need repair and replacement. Some of that may be the responsibility of TML, but the proof is woefully lacking. I do not consider TMPL's claim is made out on the facts, let alone according to the applicable legal principles.

General maintenance claim

[438] General farm maintenance is said to be required in the sum of $63,667.94. For similar reasons as above, there is no sufficient evidence to support this claim.

Rates claim

[439] TMPL claims rates were and are payable by TML under the leases, and seeks approximately $90,000 from TML. Mr Harrington says an agreement was reached which allowed TMPL to graze sheep on land leased by TML as an offset, and Mr Wilding and Mr Harrington gave conflicting evidence in that regard.

[440] Mr Harrington says TML did not pay rates for two reasons, first because of an agreement that TML had paid excess rental rates above market, and secondly that stud Perendale sheep as well as thorough bred horses ran on TML leased land as a separate enterprise of Mr Wilding with a neighbour. Mr Wilding had said TMPL would look after rates, so these were offset against these benefits to the Wilding family. In any case, Mr Wilding was able to graze approximately 1,000 sheep on TMPL properties.

[441] There is no doubt that sheep were grazed, and that TMPL did not ask TML to pay rates over some years. The rates were significant. The obligation to pay the rates was set in the Te Mania lease and Mr Mackenzie submits that someone as conscientious with accounts as Mrs Wilding would have paid them for TML without second thought, if they were payable. The payment of rates by TMPL was only sought after relationships soured and a lot of the claims were more about "fairness", as Mr Wilding conceded, brought up when he was asked to repay his current account. I recognise that rates were payable but I conclude there was an offset for grazing agreed until the rates were paid annually. I therefore do not accept the TMPL claim for rates.

Saloon facility

[442] Mr Wilding accepts the saloon is an improvement upon TMPL property, and that TML is entitled to the use of those improvements. He says that a rental value should be ascribed to it. The question for the court is whether it is an item which should be treated as "sold" to TML, though it remains on TMPL land. I agree with Mr Mackenzie that there is no satisfactory evidence as to what the rental would have been, or what the purchase price should be. This is a "fairness" claim and not one at law. Any claim for rent falls for consideration in the context of overall judgment best left to TMPL and TML to sort out, where the shareholders are aligned. I do not make any adjustment for this for fair value.

Wadi—Rent

[443] On 21 February 2013, the Minutes record that the previous arrangement whereby TML paid for capital development of Wadi in lieu of rent was not working, and from 1 August 2012 an annual rent of $30,000 would be paid, which was the final issue to be resolved and took away ambiguity. The claim for unpaid rent for Wadi of $90,000 is rejected, as there was an arrangement, which negated that until 1 August 2012. Otherwise the Wadi purchase was enabled by TML, and the Wilding interests are the ultimate beneficiaries. That would negate a "fairness" claim.

Overall

[444] All TMPL claims fail.

(8) Should the first plaintiff, Timothy Wilding, be given the opportunity to purchase the shares in TML, or should the company be liquidated?

[445] Mr Wilding, with or without Mr Hong, is the only party to seek an order that he have the opportunity to buy the remaining TML shares from the defendants. All other shareholders are prepared to sell if the Court so decides. Standing in Mr Wilding's way is Mr Harrington, who seeks liquidation of the company. In coming to judgment, there

are a number of considerations to bring to account. I refer to earlier discussion of s 174 of the Act, and its application.

[446] As Mr Wilding is the only shareholder who seeks the opportunity to acquire the defendants' shares, his conduct in particular is for consideration given the arsenal of factors said to count against him. However, it is also necessary to have regard to the conduct of other defendants, including Mr Harrington as the sole party opposing Mr Wilding having that opportunity.

An overview

[447] The dysfunction within TML and its ungovernable state are derived from accumulating dissatisfaction and resentment over some years. TML has not produced consistent profits or grown its equity as the shareholders hoped.

[448] An underlying problem is the mismatch in the expectations of the parties. Mr Wilding undoubtedly saw the future of TML encompassing ownership of an internationally-renowned Aberdeen Angus Stud, but to achieve that, and in the numbers required, there needed to be common purpose, and adequate funding to grow a business which is subject to commodity price fluctuation and the vagaries of climate. This would take time and perseverance. The idea of the company making consistent profits which resulted in consistent dividends seems to me to have been farfetched given the ambitious growth plans for the company and the inherent risks in farming a drought prone area.

[449] A second, and in my view, structural problem, was the relationship between the Wilding family interests in TMPL, the interests of the defendants in WHHL, and the fact that these properties (together with others) were leased to TML, leaving it with no significant capital base, except the herd. Mr Harrington did not have a share in any lands, creating another imbalance. There were inherent conflicts in these interests demonstrated by parties from both sides being variously prepared to cut off TML from those lands. TML's security of tenure was a very real problem, as events have shown and in my judgment no party emerges with credit for the inattention to security of tenure.

[450] The list of grievances against Mr Wilding is long and much of that list has been canvassed above. Mr Hunt refers to the loss of trust evolving from the Wadi subdivision proposal which failed to make any profit. He refers to the circumstances in which the DOC licence was acquired by Mr and Mrs Wilding. The defendants believe that the Wilding family interests used TML as a bank as shown by Mr Wilding's strong reaction when what turned out to be a legitimate enquiry was initiated into his current account. Mr Hunt says Mr Wilding raised a concoction of spurious counterclaims as a justification for not doing so, and that was wasteful of resources. He refers to the hacking and use of emails between Mr Harrington, Ms Adams, Bee Teck and Mr Thwaites, and the attempts to remove Mr Harrington and Ms Adams as directors, and the grounds relied on. He refers to the threats to Mr Harrington's employment, and the allegation of stock mismanagement which developed into an allegation of deliberate maltreatment as part of an overall strategy to pressure Mr Harrington. He refers to the attempt to have the Board backtrack from the resolutions passed at a meeting of 18 September 2015 in respect of payment of Mr Harrington's ERA claim. He refers to the laying of charges with the police and refusal to withdraw them, allied to his attempts to have Mr Harrington removed as a director of TML, and the entering of a GO Beef contract despite the objections of other directors. He refers to the deliberate redaction of emails to present a different position to the other directors in respect of the Lansdowne lease.

[451] In turn, Mr Harrington's conduct has come under criticism, particularly his pursuit of TML's liquidation. That threatened the future of TML which I consider was collateral to the purpose of extricating the defendants from TML. He has faced the stock allegations which in this context I put aside. There was no misconduct, as such by him. I have found a point was reached when his overall performance fell away for reasons which I do not think have been explained in full to the court. I conclude that at some stage Mr Harrington was so affected by the bitter infighting, the constant carping in correspondence and at meetings, that his prime responsibility for the wellbeing of the animals was not met. I do not repeat my reasons. The harm done, however, I do not find measured in the way Mr Wilding alleges. I have concluded that there was no loss to TML, but there may well have been had there not been strong remedial steps. It is because of William Wilding and those who have held the fort in recent times, together with the inherent strength of Te Mania genetics, that this situation was fixed in short order.

[452] Against WHHL and its principals the alignment with Mr Harrington in the context of attempted liquidation is relevant. I find nothing else which might be relevant to this issue.

[453] There is a shorter course to decide whether s 174 is engaged, which the parties otherwise accept but for different reasons. The application of s 174 of the Act must have a jurisdictional base. The defendants, but for Mr

Harrington, would prefer that he purchase their shares so that they can all go their separate ways. Section 174 is broad in its scope, and may be invoked not just because of conduct which has *already* occurred, but that which is *likely* to occur. The findings in this judgment reflect my conclusion that Mr Wilding on the one hand, and the defendants on the other, bar Mr Hong, are incapable of conducting the affairs of TML in a way that is not unfairly prejudicial, unfairly discriminatory or oppressive to the others. That is evident at an operational level already, with Mr Harrington and William Wilding seemingly being unable to agree on most matters, as Mr Wing reported to the court. In my view, it is not just likely, but certain, that the affairs of TML will be conducted by all parties, in a way which would fall within the ambit of s 174. I therefore consider this is a jurisdictional basis for judgment. This answers the jurisdictional basis point, but there remains, in terms of the Court's overall discretion, the question of disqualifying conduct against Mr Wilding.

Mr Wilding

[454] I do not consider that there is any default *relevant to the state of the company or its shareholding* which should count against Mr Wilding having the opportunity to buy the defendants' shares. Until 2014 he did not have so much to do with the day-to-day running of TML. That was Mr Harrington's role. Mr Wilding's role was more overarching in his control of the TMPL lands and consideration of strategic issues for the stud.

[455] He allowed the Wilding personal affairs, including those of TMPL to intermingle with those of TML in a way which fully justified intervention, principally by Ms Adams, which with other accounting assistance led to Mr Wilding's payment of current account liabilities and those of TMPL of $310,000. This should never have taken so long. Mr Wilding in the end made the appropriate recognition of that, although he resisted the process strongly until that point. He put his family interests first in his intent that the TMPL properties would be sold, without any reference to the concern of others or effect that may have had on TML, which showed a disregard for TML and its shareholders. This is not, however, disqualifying conduct.

[456] I do not find that the fact that Mr and Mrs Wilding took up the DOC licence in their names should count against him. His evidence, which I accept, was that he took it up for the benefit of TML. For reasons given, I do not accept that he was then WHHL's agent. His motivation was to hold the licence for the benefit of TML at a time when its future was most uncertain.

[457] His conduct in being a party to the hacking of Mr Harrington's email address counts against Mr Wilding as it was unlawful and a breach of trust. It occurred in the context of an unpleasant and worsening personal relationship between Mr Harrington and Ms Adams on the one hand and Mr and Mrs Wilding on the other, and he took advantage of it, in the gathering corporate storm. He can only recognise this now and apologise, but it is a mark against him, as he well knows. This has caused me the most concern, as this conduct was so antithetical to his lawful and moral obligations. Knowing what his fellow shareholders and directors were thinking and planning, together with legal advice given them, gave him a very unfair advantage, and at the material times he made only a token effort to end the hacking.

[458] On the other hand, Mr Wilding fought for the very survival of TML against a determined attempt by Mr Harrington, supported by other defendants, to liquidate the company, when that was not an appropriate course for them to take. Had it not been for him TML would have passed into liquidation with all the adverse publicity and uncertainties associated with that. In the end I conclude participation in the hacking should not result in his disqualification from purchasing the shares, but only when I put the issue alongside other very important considerations which dictate whether the company should be liquidated or not.

Other considerations

[459] I do not think it is of decisive import that Mr Wilding is the third generation Wilding family member at Te Mania, with his son William now the stock manager. That is an incident of history. He chose to bring others into TML and retains the largest individual shareholding, which with the support of Mr Hong represents a 55 per cent stake. Because the parties are going their separate ways after this judgment, or hope to, the percentage of shares held by Mr Wilding, by himself or in concert with Mr Hong is not of moment to the judgment, but I do recognise that Mr Wilding would carry on the long tradition of the Te Mania stud, and no one else likely would. That is a factor in my view.

[460] Mr Wilding has given the Court an assurance that he will be able to find the money required to complete a share purchase, and promptly. Without that he would not be given the opportunity. Whether that involves Mr Hong is for Mr Wilding and the Wilding family. Mr Wilding said that he would have the means, based on the valuation evidence adduced to that date by Mr Munn. Mr Hunt questioned him in cross-examination, but I accept Mr Wilding's

assurance that he has the means, as I would have accepted that of Mr Harrington, supported by Ms Adams. He could only give that assurance recognising that the outcome he sought to reflect in the balance sheet and fair value, might not be successful. The acid test of this will be his response to the Interim Judgment and these Reasons.

[461] As I do not consider Mr Wilding has conducted himself in such a way as to disqualify him from the opportunity to purchase the shares, the continuum of the stud, and the use of Wilding family properties for that purpose, means that TML has a future for its staff and associated contracting parties, and the stud herd can be retained. In liquidation its future is uncertain, and its constituent parts may be broken up, with further uncertainty for the future of a famous name, and its immense value to the New Zealand stud cattle industry.

[462] The parting of the ways can be achieved with one party taking over TML and the others exiting for fair value. Mr Wing was asked why he thought the future of TML was "difficult to predict". Mr Wing has a sound grasp of TML, its history, its present position, and the first reason he gave for this view relates to the people concerned, and the division between them. Aside from that, even with its reduced herd, and adjusting for the properties it needs, and with the support of Heartland Bank, he says the company should break even and it has a future. I agree, subject to all the contingencies which were a hallmark of the evidence in this case. It is in a highly competitive market, but it is a leading stud breeder, and it has a fine reputation in New Zealand and elsewhere. Any reputational stain is largely the product of the division between the parties, and this judgment emphasises the Court's view that although the dysfunctional relationships and an imprudent approach by all involved to land tenure have blighted the past, they should not blight its future.

[463] I do not consider liquidation of the company should be ordered as sought by Mr Harrington. His attempted liquidation was an understandable, if provocative action, but it would lead to further uncertainty and a stain across the Te Mania name, which is not in the interests of the company, nor in my view, the ultimate interests of the shareholders.

[464] Finally, there is no evidence which demands that liquidation take place to protect the assets and there is no knowing what that would mean for the shareholders. Whereas this judgment, if executed by Mr Wilding taking up the opportunity given him to purchase shares, would see a smooth changeover and TML continue as the Wilding family, and any parties involved with it, should choose. A fair value reached on the basis that the company still trades, with bank support, and allowing a clean break between the shareholders, is a compelling reason to allow Mr Wilding to have that opportunity. I am concerned for the creditors. There are debts accruing, held over pending judgment. The security for TML is best achieved by continuing to trade, as Mr Wilding will do if he takes up the opportunity given him.

[465] TML is now a very different operation to that which it was when at the peak of its cow numbers, and now farms on a smaller base of the TMPL properties; Te Mania, Wadi/Mt Admiral and Rafa, the DOC licensed land, some railway land. The TMPL properties have been inextricably linked with TML. I consider that the person who had the initial vision for TML, and his family company which provided the properties which TML has been able to utilise, with the determined effort by William Wilding to revive the fortunes of TML on the ground, support the Wilding interests having the opportunity to acquire the shares of others.

Finality

[466] A factor which in the end is particularly influential to the outcome is the prospect of further litigation. If Mr Wilding is to acquire the shares, he would in theory have the opportunity to bring proceedings in the name of TML. This is why the parties want *all* issues between the entities in this litigation resolved, and washed up in judgment. Mr Wilding's first cause of action has been abandoned so all his claims are resolved within the second cause of action, and in the counterclaims, under s 174 of the Act.

[467] I record that Mr Wilding, through Mr Dale, advised the Court that he would not issue further proceedings in the name of TML and gives an undertaking in that regard. That has been addressed as a condition of the opportunity given him to acquire the defendants' shares, and reflected in the Interim Judgment.

Conclusion

[468] The remedy under s 174 of the Act is not punitive. Conduct may preclude either party having the right to purchase shares, but that would be rare in my view. The outcome should best advantage the shareholders as a whole. I have no doubt s 174 is engaged at the suit of Mr Wilding *and* the defendants. The conduct and attitude of all parties is such that TML is ungovernable, and unmanageable, because the parties are now largely unable to agree on anything, and a winding up order would inevitably result. Both sides in this litigation have contributed to

the likelihood, indeed certainty, that the affairs of TML *will* be conducted in an oppressive, discriminatory or prejudicial way, fatal to TML's future.

[469] If Mr Wilding is able to purchase the shares of the others, on terms which end all disputes between the parties, that is a much better outcome than liquidation with its uncertain outcome, and the potential for future dispute. A clean break is needed and by the Interim Judgment of 5 April 2017 that opportunity now exists.

(9) The valuation of shares for the purpose of judgment

[470] The idea that Te Mania stud, of national and international renown, would reflect in a high valuation of the underlying business, or its assets, whatever the valuation methodology, is not really the case. The assets of TML are substantially those of the stud. The tangible value of its long history is the development of a herd of substantial size and quality. In assessing a fair value, the WHHL defendants say that Mr Wilding has tried to achieve the lowest share price possible, including the way the 2016 bull sale was marketed, his conduct regarding stock valuation, and the semen valuation. I dismiss the marketing allegation on the facts. While there may have been more or better advertising, to attribute loss to Mr Wilding is without evidential foundation. There are more difficult valuation issues to resolve.

[471] The approach to fair value is discussed further but the point must be recognised that it is a fair value as between the parties as shareholders. The valuation outcome reflects that, and Mr Wilding has the opportunity to adjust the balance sheet to suit. For example, by the Interim Judgment his current account bears interest. With control of TML he can adjust that as he chooses. There are several such examples. Mr Hong would be part of that of course.

The approach to share valuation

[472] Two valuation experts, Mr Munn for the defendants and Mr Hagen for the plaintiffs, largely agreed on the approach, that of a notional liquidation. An earnings based valuation is unrealistic. The company has seldom made a profit, and TML has not generated enough earnings to justify such approach. TML has made further losses through the litigation period.

[473] The valuation adopted for this judgment is reflected in the *Schedule*. Adjustments to the balance sheet were sought by the parties, to which the valuers responded. However, the various claims and counterclaims addressed in this litigation were beyond their expert knowledge. They reflect in a "plug in" to the balance sheet reflected in the *Schedule.*

[474] There are over-arching principles to apply in this exercise. The judgment should be remedial, to fit the circumstances of the case, and the Court will fashion the remedy. A fair value must be reached. This is not an orthodox willing but not anxious vendor and purchaser test, and fair value does not have to be at notional liquidation value. There must be principled reasons for the judgments required but the Court retains an element of discretion, in order to achieve fair value.

The reduction in the value of net assets

[475] The net asset value reduced significantly between 31 March 2016 and 18 November 2016. An agreed valuation of the livestock reflected the significant reduction in the cow herd. Current liabilities reduced but accounts payable increased, reflecting the operating expenditure incurred by TML at the dates adopted for valuation. The overdraft has been held for some time now, and at judgment there are accounts payable, and Mr Wilding has provided further funding to keep TML afloat.

[476] The equity in TML reduced between 31 March 2016 and 18 November 2016, by some $1.17 per share with an overall decrease of net asset value after allowing for contingent liabilities and realisation fees of $790,000. I have made an adjustment in the *Schedule* for this aspect, as will be explained.

[477] Mr Munn said that the draft accounts at 31 July 2016, prepared by Mr Wing reflected another net loss for the financial year. He made assumptions as to a commission rate of nine per cent for the sale of stock, and that the realisation rates for plant and equipment did not move between 31 March 2016 and 18 November 2016. He adopted notional liabilities for employee redundancy and holiday pay, and he considers those relevant. The fee range for the costs to liquidate the company were the same. He applied a net figure for realisation fees and contingent liabilities rounded to $457,000 or 21 per cent of the net assets.

[478] Mr Munn adopted a value range from a low of $1,650,000 to a high of $1,700,000, and adopted a mid-point valuation per share of $2.48. Mr Munn said that the various claims and counterclaims can be introduced into his valuation, provided any judgment as to a sum payable *to TML* is assessed for its recoverability, and any sum payable *by TML* is recognised as a liability which must be paid. This consideration is important and I have adopted it. The approach for Mr Wilding is to adopt some of Mr Munn's approach. Mr Hagen expressed his view on the various valuation issues and that leaves for judgment the following matters.

Livestock

[479] The valuation was simplified by the sensible approach adopted by the parties mid trial rather pressed on them by the Court. It was agreed that valuers, Callum Stewart, National Genetics Manager of PGGW and Anthony Cox of Rural Livestock Ltd, should value the livestock and they did so as at 25 November 2016, fixing the value at $2,437,515. That value applies in the *Schedule*. A valuation post-weaning is addressed further.

Semen

[480] This remains problematical. The experts who were to give evidence for the plaintiff and the defendants, Mr Sergeant and Mr Donald, adopted very different perspectives of the semen valuation by a margin of some 3:1. Mr McIlroy reported as umpire, but there was immediate contest about some factual premises. On the eve of judgment extensive further evidence (if admitted) and memoranda were put before the Court. The dispute involves a difference of some $70,000 and for disposition by the Interim Judgment. Mr Wilding's figure is included, so the balance is in dispute, and will be determined in a "second phase" valuation process.

TML liability to TMPL

[481] TML is not liable to TMPL.

Lagoon Flat

[482] Neither WHHL nor the defendants are liable to TML.

Defendant directors' liability under heads other than costs

[483] There is no liability.

Go Beef

[484] WHHL, Beeteck and Mr Wong did not approve TML entering the GoBeef contract, but it was entered at Mr Wilding's instigation. If TML makes a loss from the venture, as Mr Harrington and Ms Adams say, but which I doubt, that will fall to Mr Wilding if he is to acquire the TML shares. Mr Jansen Travis disagreed but Ms Hopkins submitted that his evidence should be put aside as he has submitted to have misunderstood that standing feed would have been sold in January when there was little market for it and surplus feed should have been sold in December 2016 when there was a good market. It was submitted that he was not qualified as an independent expert and did not provide a brief of evidence, but I found his evidence persuasive. I am not prepared to treat the Go Beef contract as a loss to TML which should be reflected in the valuation, and for which Mr Wilding should compensate TML. The evidence of the outcome of the Go Beef contract is at best equivocal.

Calves at foot, grassing and cropping

[485] The Interim Judgment refers to this factor.

[486] Mr Wing said that if the Court is to value the shares as at 18 November 2016, which is the date I fix, then it should also recognise that up to weaning the calves at foot may increase in value, and cost will have been incurred in planting and setting things up for the rest of the season, for significant benefit to TML later. The WHHL defendants say they should not be penalised by adopting a date of valuation which is the product of finding Court time, and party availability. They say the stock valuation was undertaken at a low period in the annual cycle, and substantial cropping costs have been incurred, which will only show benefit for TML later.

[487] The stock valuers, Mr Stewart and Mr Cox, were not prepared to anticipate the value of the calves after weaning. When they gave their evidence in late 2016, the valuation had proceeded on an orthodox basis, with the cows valued as calves at foot. They were adamant that it was not possible at that time to value the calves as of

after weaning, and it would be a guess to attempt that. The case for Mr Harrington, supported by the other defendants aligned with him, is that the valuation of TML shares should include some element for calves after weaning which may increase the stock valuation. On the eve of judgment Mr Harrington's further affidavit was filed as to the value of such animals on the market. I do not bring it to account. No leave was given.

[488] I have determined a broader based, discretionary adjustment which is made to the *Schedule* for the following reasons.

[489] The valuation of the calves after weaning, asserted by the defendants, has given me considerable thought. Mr Stewart and Mr Cox would not look ahead and value these calves after weaning. The fact the valuers were not prepared to try to value the calves after weaning was fully explained and is accepted. They could now do so. There is a clear indication that this may produce a higher value for the stock overall. Yet to do so would require further evidence of the value of the cows at the same date, and to bring to account the valuation of the cows with the calves at foot. The valuers simply advised a value of the cows with calves at foot which reflected an orthodox valuation which, in turn, reflects the cows having produced calves with the prospects of those animals entering the production herd. Whether they did or not, and how many, were matters that the valuers were not prepared to consider. In short, the question of the valuation of the cows with calves at foot against the cows with calves weaned would require further evidence and submissions, which would further delay judgment.

[490] Another and broader consideration is that equity in the company fell significantly in 2016, and the company has been running with the increased costs of administration, including litigation. The evidence as at November 2016 pointed against an improvement in the company's position which may be ameliorated if stock prices show an uplift. It would be inappropriate to value the calves after weaning, and revisit the valuation of the cows, in a period during which there is uncertainty as to the company's financial position. The track record of TML otherwise indicates, if anything, a trend to the downward, which is reflected in advice given the court that Mr Wilding has put more money into TML, as the directors would not agree to increase the overdraft and it has needed cash, and deferral of payments.

[491] The Interim Judgment has been reached on the basis there should be some allowance to reflect the seasonal cycle. I do not discount the possibility that the revaluation of the cows with calves at foot and the weaned calves would produce a higher stock valuation. However, I will not speculate on what the figure may be, and the exigencies of the case, and what I consider a principled approach of addressing share value at November 2016 militates against any further evidence and submissions. In other reasons, the seasonal cycle is reflected, as indicated by the Interim Judgment, addressed under "*Spring planting costs*" below.

Liquidation costs and costs of sale

[492] Mr Munn said it was appropriate to adjust for all costs of realising net assets in the business when applying a notional liquidation approach and at the mid-point the net impact of adjusting for realisation costs was about $450,000 or 21 per cent.

[493] Mr Munn's position was that while conventional accounting practice would include those deductions, it is for the Court to decide fair value to meet the particular situation. The argument for the WHHL shareholders is that the purchasing shareholder should not achieve a windfall, because that is not a fair value, and sales commission has already been paid twice by TML in the 2016 calendar year. The defendants say that Mr Munn's deduction for realisation of $15,000–$40,000 for liquidation costs, and $234,376 sale costs, should not be included.

[494] I agree that the liquidation costs should not apply. There is no liquidation, and no prospect of that.

[495] The stock have the value attributed by Mr Stewart and Mr Cox. That value reflects stock bred for sale into stud and commercial heads, and culled animals to slaughter, and retained for breeding and fattening. The *actual* return to TML on any sale reflects commission. What and when sales are made is for TML and in this case for Mr Wilding, if he acquires the shares. I reflect the fact that some stock will be sold and some retained, by reducing the commission, as shown in the *Schedule*, for calculation. The commission rate should apply, but discounted by one half.

Spring planting costs

[496] The defendants say that TML has incurred $155,232.63 for spring planting. Mr Wing said the cost of the planting programme was one reason for the net asset value decreasing since his first brief of evidence. Mr Glennie for the defendants said that in his view TMPL should pay TML for the cost of the spring planting programme. As

TMPL is a party, then an order under s 174(3) of the Act is available at the discretion of the Court. The issue is whether any part of the $155,232.63 should be reflected in the share valuation. Not to do so is said to penalise the outgoing shareholders for expenditure to produce an asset which is of no value to them given the valuation date adopted.

[497] Mr Wing says the expenditure of $155,233.63 does not reflect internal costs. He says there is no valuation of feed on hand, or the spring crop costs, and they were not previously included in the accounts. This is a different setting, and the judgment is concerned with achieving a fair value. Mr Munn said without a valuation from a farm adviser he would not ascribe a *value* for feed on hand or the cost of spring crops. To assess how feed which is sown but not mature enough to be harvested or fed to stock, is valued, is regarded by Mr Munn as a very unusual situation. He says the fairest way may be to treat the "old" owners of TML as dealing with the lessor rather than a new owner of TML. A lease will normally stipulate a certain amount of feed and feed crop left at lease end and that is why transfers in the dairy sector are usually made in June. Mr Glennie is reluctant to value the crop based on potential yield. He would favour the "old" owners of TML receiving the actual costs of sowing the crops.

[498] I conclude that this is an expense which was incurred in the ordinary course of TML's farming operations. It is not for TMPL to adjust in favour of TML, as that is to introduce the lessor to the valuation. However, this is a cost to TML which comes at this stage of the farming cycle, and the benefit does not reflect in the balance sheet. I would allow more than two thirds of these costs on the evidence, as not to do so would fail to recognise the seasonal cycle of valuation. The same reasoning applies to the calves at foot. There is no exactitude in this but it is fair to the outgoing shareholders and to Mr Wilding, that there be adjustment which I fix at $200,000 in the *Schedule* notes *2 and *6. This represents an additional $90,000 in the value of the defendants' shares.

The fixed plant on TMPL lands

[499] The WHHL defendants say this should be fairly treated as an asset of TML. The share valuers deducted from the balance sheet $148,794 for plant, property and equipment attached to the TMPL lands, being the Rafa house extension at $44,756, the feedlot at $79,032, and cattle yards of $25,006. These assets were paid for by TML, and reflect depreciated values.

[500] The feedlot was bought by TML from Mr Wilding for $220,200. Mr Stone said that in hindsight it must have been thought appropriate to treat the feedlot as an asset of TML. The idea that the shareholders (TML) should buy the feedlot from Mr Wilding, but Mr Wilding not have to pay for that as part of the share valuation because it is on TMPL land, is to be submitted unfair. It was also submitted that TMPL should purchase the assets from TML, but the defendants say it is fair for these items to be treated as assets of TML.

[501] I conclude that Mr Wilding can adjust between TMPL and TML as he wishes for these items but recognition should be made in the TML share valuation for the fact TML paid for these items. Without further valuation guidance I have allowed the depreciated value in the valuation.

Date of valuation

[502] I am not prepared to adopt any part of Mr Munn's 31 March 2016 valuation in order to achieve what the defendants submit to be fair value. The evidence is simply not tested. The case has been mounted on a completely different basis, and during the course of litigation the parties agreed to a valuation by a particular methodology at a date in November 2016.

DOC grazing licence

[503] The DOC grazing licence has been valued at $14,000 by Mr Oxnam and this is to be treated as an asset of TML.

Interest on current accounts

[504] The outstanding interest on Mr Wilding and TMPL's current accounts should be assessed according to the November 2014 agreement to pay interest at the overdraft rate.

Lansdowne

[505] Just before Interim Judgment was delivered, TML settled with the Lansdowne lessor for $22,000 plus GST and three items of plant. This will reflect in the release of the balance of $50,000 held in trust for TML, plus any

interest. This may alter the plant figure in the balance sheet reflected in the *Schedule*, which therefore includes provision for an adjustment for monies now released from trust. This should reflect in the current assets, with adjustment for the plant items. This is referred to under "Lansdowne adjustment" in the Schedule Note [*3] and that is for the parties to agree, or revert to the Court.

Tax losses

[506] TML has accumulated tax losses. If it returns to profit they will likely be available. I do not value them, as they depend on sustainable profits, yet to be achieved.

E. Disposition and costs

Interim Judgment

[507] By a mechanism detailed in the Interim Judgment of 5 April 2017. Mr Wilding has been given the opportunity to purchase the shareholding of the defendants, bar Mr Hong unless he should so choose, at a share price which for the purpose of his election is reflected in the *Schedule* to these Reasons for Interim Judgment, and to the Interim Judgment.

Costs

[508] All costs have been reserved. Certain costs may influence the share price once finally determined. Some elements of judgment may impact on costs in favour of, or against TML. There may be costs orders which do not affect the share price.

[509] There are open letters of offer relevant to costs. There was an unsuccessful judicial settlement conference held on 1 July 2015, when Mr Harrington made an offer on an open basis to settle the proceedings, whereby his shareholding and that of WHHL and Mr Wong would be sold for $1,523,949, valuing TML at $3,430,000. Alternatively, that Mr Harrington purchase the shares of Mr Wilding and Bee Teck at the same valuation, after deducting the then current account debts of Mr Wilding and TMPL and the baled livestock debt because it would be difficult for TML to recover these debts from Mr Wilding/TMPL. Soon after, a letter asserted that Mr Wilding's claims would not succeed, and invited negotiation. Open correspondence followed between the parties leading up to a letter on behalf of Mr Harrington dated 23 June 2016, after Mr Dale had addressed the Court in opening. Mr Harrington proposed that the Court proceed to a fair valuation of the shares, and only valuation witnesses would have to be called. That settlement would put all other issues aside, including Mr Harrington's malicious prosecution claim. The proposal was open for acceptance until Mr Wilding was called as a witness. It was rejected on 27 June 2016.

Some observations as to costs

[510] The Interim Judgment holds that WHHL and the defendants do not have to compensate TML for the circumstances in which Lagoon Flat was withdrawn from TML's leasehold use. I have concluded WHHL was not in breach of any obligation to TML, nor are the other defendants, but had breach been proved, no loss was caused to TML.

[511] Mr and Mrs Wilding accept that they hold the DOC land in trust for TML. That has an ascribed value. The circumstances in which they acquired the licence were such that I do not provisionally consider that Mr Wilding should have costs in his favour.

[512] There are other costs which lie outside the ambit of the TML share valuation. Mr Wilding is, on the face of it entitled to costs against Mr Harrington in respect of the claims of a malicious prosecution and abuse of process, but that issue may also fall within the ambit of costs in the s 174 proceedings.

[513] The parties demonstrated little commercial reality in the valuation process until they had no option but to agree to an orthodox valuation process for the cattle, which resulted in a straightforward and final resolution of that bar the claim for adjustment regarding the calves at foot. The semen valuation should have been relatively straightforward, but has proved otherwise. There were complications in securing the umpirage of Mr McIlroy, then extensive further dispute. There are open offers of settlement to consider.

[514] The s 174 judgment responds to multiple allegations and counter allegations. All parties have had some

success, some failure. Relativity will be relevant to costs.

Mr Wilding's election—Mechanism

[515] This has been addressed in the Interim Judgment.[62]

Concluding remarks

[516] I record my broader perspective of the parties in the hope that they will recognise that an objective observer, in this case the court, can well recognise their individual qualities and their original good intent.

[517] Mr Wilding is a strong personality. Given his association with fellow investors who conduct their business affairs in a customary setting of courtesy, Mr Wilding's correspondence, including some generated through the trial, was on occasions over the top. The email hacking was inexcusable and wrong, yet he was fighting his corner, and he did so in a way which veered between courtesy and charm, accusation and pressure. Yet I am sure that he very much wanted TML to succeed for all. His financial position cut across his contribution to that. Harnessed with the goodwill and co-operation of the defendants, as first anticipated, he would have been a great force for the good of TML, and should now be so once again. He has the drive, the will, and the ability to secure the future of the Te Mania stud.

[518] Mrs Wilding was caught living in the middle of what was at first a very close friendship with Mr Harrington and his partner, and then disintegrating personal and commercial relationships. TML was at risk, and she did her very best. She was deeply hurt by emails sent to her. Her intent for TML was always to do the right thing, as Mr Smith said, and she bore the brunt of the conflict stoically.

[519] William Wilding came into this difficult setting as a young man, but I consider conducted himself in the litigation process and in management, with aplomb. He was sincere and truthful in his evidence.

[520] Bee Teck demonstrated that he is a man of considerable talent and ability, and I consider took the actions which have been criticised in this judgment only because he was at his wits' end. It was very difficult for him living at a distance in Singapore. His correspondence and his evidence was reasoned, although his response to the question of the Lagoon Flat lease was curious and I attribute that in part to a deep sense of grievance, and a sense he was trapped. However, he is clearly an honest man, and harnessed with the knowledge and skills available to Te Mania through Mr Wilding and Mr Harrington, would have been a great ally.

[521] Mr Wong played little part, and gave no evidence, but his correspondence was thoughtful and straightforward, and he clearly wanted the best result for TML until matters reached the point that he saw no way to go on.

[522] I have said that Mr Harrington is a man of considerable skill, and highly regarded. I am not surprised he went on stress leave in July 2014. Between him and Mr Wilding there lay an animosity, evident in the evidence given in court and in the correspondence, whereby everything he or Mr Wilding said or did seemed to attract the ire of the other. He is an honest and able man. He reached the point where the personal relationships, and the need to exit TML, become of so much concern to him that his dispute with Mr Wilding descended into acrimonious recrimination. This was entirely the product of the ruined relationship, and not a reflection on Mr Harrington, and the high regard with which I am sure he is still held.

[523] Ms Adams was a central figure in this case, and gave evidence which demonstrated her commercial knowledge, skills, and attention to detail. She stood with Mr Harrington through a very bitter period, and I have said that she gave him good sound advice which if taken and accepted earlier, would have saved the parties a great deal of angst, to say nothing of cost. I conclude she is honest and was seeking to do the best for Mr Harrington and the other defendants, and in what she thought were the best interests of TML as a whole.

[524] These final observations have been made because it would be unfair for anyone who reads this judgment, including the parties, to focus on specific incidents, and not to have these broader reflections available to them. The parties could have collectively gone on to achieve great things for Te Mania, but they fell out. It is as simple as that.

SCHEDULE

TML Balance Sheet as at 18 November 2016	**Notes***

With adjustments determined by the Court

("TBD" = to be decided)

				Notes*
Current Assets			**Agreed between parties**	**Judgment**
Accounts Receivable		4,137.00	Yes	4,137.00
Livestock on Hand	2,437,515.00		Yes	2,437,515.00
Less Commission on Hand	6.9% of above		No	TBD *1
Calves after weaning			No	See *2
Shareholders Advance Account: T Wilding		104,012.00	No	104,012.00
Te Mania Properties Limited receivable		113,417.00	No	113,417.00
Income tax receivable		565.00	Yes	565.00
Solicitors Trust Account		49,509.00	Yes	TBD *3
Semen		44,654,00 – 115,000	No	TBD 41,594.00 *4
Total Current Assets				
Non Current Assets			**Agreed between parties**	**Judgment**
Property, Plant and Equipment		144,412.00	Yes	144,412.00
Property, Plant and Equipment on TMPL Land		147,897.00	No	147,897.00 *5
Crops Planted		155,232.63	No	See *6
Farmlands Shares		1,090.00	Yes	1,090.00
Alliance Group Shares		17,724.00	Yes	17,724.00
Balance Agri-Nutrients Shares		18,241.00	Yes	18,241.00
Ravensdown Shares		10,474.00	Yes	10,474.00
Silver Fern Farm Shares		1,070.00	Yes	1,070.00
Farmpure Investment Account		0.00	Yes	
Bailed stock returned		8,629.00	No	Nil
DOC Licence		14,000.00	No	14,000.00
Interest on current accounts				TBD *7
Items *2 and *6				200,000.00
Costs awarded				TBD *8

Total Non Current Assets			TBD
TOTAL ASSETS			
Current Liabilities		**Agreed between parties**	**Judgment**
Heartland Current Account	292,031.00	No	292,031.00
Accounts Payable	207,737.00	No	207,737.00
GST Payable	-18,761.00	Yes	-18,761.00
Employee redundancy and notice period costs	11,012.00	No	Nil
Employee holiday leave owing	11,727.00	Yes	11,727.00
Costs awarded			TBD *9
Total Current Liabilities			
Non Current Liabilities		**Agreed between parties**	**Judgment**
PGG Wrightson Loan	450,000.00	Yes	450,000.00
TMPL — proportion of rates payable		No	Nil
Total Non Current Liabilities			
TOTAL LIABILITIES			
Net Assets		**Agreed between parties**	**Judgment**
Less Liquidation Costs	15,000-$40,000	No	Nil
VALUE			TBD

NOTES

*1 Notional liquidation value would include commission but not all stock will be sold as on a liquidation. One half of the commission on realisation is to apply. The Court understands the rate is agreed.

*2 The Court regards the valuation of the cattle as fairly fixed without further valuation, but recognises that costs incurred in the seasonal cycle and the timing of valuation, have an effect and this is recognised with *6 below.

*3 The settlement of Lansdowne is understood to reflect on this figure, and may also reflect in plant.

*4 The semen is included in Mr Wilding's value for Interim Judgment, but the disputed value will be determined and brought to account on the "second phase" valuation.

*5 This plant is at the historical expense of TML. The feedlot was treated as a TML asset. Depreciation values treated as fair value.

*6 The overall allowance made is based on judgment that this item is better addressed in the share valuation as it is a benefit to TML although on land TML does not own. It reflects in the overall financial position of TML and represents a seasonal adjustment.

*7 Interest is to be calculated at the rate agreed and previously applied in the accounts.

*8 Costs relevant to valuation.

*9 Costs relevant to valuation.

FOOTNOTES

1 The trial ran on technically until April 2017 and will resume if necessary regarding residual issues. The evidence and submissions regarding the valuation of semen are not concluded.

2 *Provida Foods Ltd v Foodfirst Ltd* [2012] NZCA 326, (2012) 21 PRNZ 546.

3 *FXHT Fund Managers Ltd (in liq) v Oberholster* [2010] NZCA 197.

4 Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2015) at 379.

5 Companies Act 1993, s 165.

6 *Morgenstern v Jeffreys* [2014] NZCA 449, (2014) 11 NZCLC 98-024 (footnotes omitted).

7 *Wilding v Te Mania Livestock Ltd* [2015] NZHC 2105.

8 *Sturgess v Dunphy* [2014] NZCA 266.

9 At [62].

10 At [137].

11 At [138].

12 At [135].

13 At [139].

14 At [144], citing *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 All ER 492 (HL) at 379.

15 At [148].

16 *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328, (2004) 9 NZCLC 263,694 (CA).

17 *Jordan v Chemical Specialties Ltd* (1999) 8 NZCLC 261,839 (HC).

18 *Latimer Holdings*, above n 16.

19 Companies Act 1993, s 241(4)(d).

20 *Re a company (No 004415 of 1996)* [1997] 1 BCLC 479 (EWHCCh).

21 *Sea Management Singapore Pte Ltd v Professional Service Brokers Ltd* HC Auckland CIV-2011-404-5315, 25 January 2012 at [3].

22 *Re F Hall and Sons Ltd* [1939] NZLR 408 (SC & CA) at 418, cited with approval in *Sea Management*, above n 21, at [4].

23 *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 13 ALR 561, (1977) 2 ACLR 307 (PC).

24 *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (HC).

25 *Strachan v Denbigh Property Ltd* (2011) 10 NZCLC 264,813 (HC).

26 *WH Holdings Ltd v Wilding* [2015] NZHC 1173.

27 *Wilding v Te Mania Livestock Ltd*, above n 7, at [2].

28 *Harrington v Te Mania Livestock Ltd* [2016] NZHC 785.

29 *Yan v Mainzeal Property & Construction Ltd (in rec, in liq)* [2014] NZCA 190 at [59], citing *Sandell v Porter* (1966) 115 CLR 666 (HCA) at 670 .

30 At [34].

31 At [36].

32 *Bristol & West Building Society v Mothew* [1996] 4 All ER 698, [1998] Ch 1 (CA) at 712.

33 *Re Peveril Gold Mines Ltd* [1898] 1 Ch 122 (EWCACiv).

34 *Morison's Company Law (NZ)* (online looseleaf ed, LexisNexis) at [9.6].

35 For example, Gower and Davies (Sweet & Maxwell, London, 2012) at [53.19].

36 *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] 1 All ER 414 at [80]–[82]; *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54, (2012) 247 CLR 129 at [53].

37 GW Hinde *Hinde on Commercial Leases* (3rd ed, LexisNexis, Wellington, 2015) at [11.158].

38 *Whitegum Petroleum Pty Ltd v Bernadini Pty Ltd* [2010] WASCA 229 at [32].

39 *Gardiner v Blaxill* [1960] 1 WLR 752, [1960] 2 All ER 457 (QB).

40 *Fair Investments Ltd v Mahoe Buildings Ltd* [1992] 3 NZLR 734, (1992) 2 NZ ConvC 191,327 (HC).

41 At 740.

42 Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [19.2].

43 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd (Note)* [1996] 1 NZLR 548 (CA).

44 GW Hinde, above n 37, at [11.158].

45 Butler, above n 42, at [19.2.1].

46 *Dewhirst v Edwards* [1983] 1 NSWLR 34 (NSWSC) at 49.

47 *Kearns v Milner* [2014] NZHC 2752, [2014] NZAR 1494 at [16] adopting *Martin v Watson* [1996] AC 74, [1995] 3 All ER 559 (HL) at 86. The fact that the Police was technically the prosecutor does not allow a defendant to escape liability if he or she was in substance the person responsible for the prosecution being brought or continued.

48 *Van Heeren v Cooper* [1999] 1 NZLR 731 (CA).

49 *Attorney-General v Withey* CA211/98, 20 July 1999.

50 *Rawlinson v Purnell Jenkison & Roscoe (No 3)* [1999] 1 NZLR 479 (HC).

51 *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 1147, [2015] 3 NZLR 734.

52 *Grainger v Hill* (1838) 4 Bing NC 200-212, (1838) 132 ER 769 (QB).

53 *Varawa v Howard Smith & Co Ltd* [1911] HCA 46, (1911) 13 CLR 35.

54 *Williams v Spautz* [1992] HCA 34, (1992) 174 CLR 509.

55 *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366.

56 *Willers v Joyce* [2016] UKSC 43, [2016] 3 WLR 477.

57 *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, (1977) 16 ALR 363 (PC).

58 *Maori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410, (1994) 2 NZ ConvC 191,946 (CA).

59 *Joyner v Weeks* [1891] 2 QB 31 (EWCACiv).

60 *Conquest & Booth v Ebbetts* [1896] AC 490, [1895–89] All ER Rep 622 (HL); *Sleeman v Colonial Distributors, Limited (Electronic Engineers, Limited, Third Party)* [1956] NZLR 188 (SC) at 192; and *Maori Trustee*, above n 58, at 415.

61 *Proprietors of Maraetaha No 2 Sections 3 and 6 Block Inc v Williams* [2013] NZHC 3244.

62 *Wilding v Te Mania Livestock Ltd* [2017] NZHC 649.

Reported by: Justin Carter, *Barrister*

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