IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA646/2023
[2024] NZCA 655

BETWEEN	JIANTAO BI Appellant
AND	CHAO ZHANG Respondent

Hearing: 4 November 2024

Court: Cooke, Fitzgerald and Jagose JJ

Counsel: R A Hearn and V A Nichols for Appellant
J V Ormsby and M J McKay for Respondent

Judgment: 12 December 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to file and serve an amended statement of claim is declined.

B The appeal is dismissed.

C The respondent is entitled to costs for a standard appeal on a band A basis with an allowance for two counsel, together with disbursements.

REASONS OF THE COURT

(Given by Cooke J)

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[1] The appellant appeals against the decision of the High Court dismissing his claims for relief under s 174 of the Companies Act 1993 (the Act) for minority shareholder oppression.[1] He contends that he was, and continues to be, unfairly treated as a minority shareholder. He seeks orders requiring the respondent to purchase his shares at fair market value as at the date that he was excluded from the operation of the relevant companies, without deduction for minority shareholding, and that the proceedings be remitted to the High Court to determine the fair market value.

Relevant background

[2] Although the appellant's appeal involves some challenges to the High Court factual findings, the key facts are not in dispute.

[3] The three primary participants have been referred to throughout this judgment by the names they used in the submissions to this Court and in evidence in the High Court: Freddy (the appellant), Jimmy (the respondent), and Michael (the respondent's uncle). Michael is an important figure in the dispute notwithstanding that he is not a party to this appeal, although he was a party to the High Court proceedings.

[4] The two relevant companies, Westcoast Mining Ltd (Westcoast) and Golden Coast Holding Ltd (Golden Coast) were incorporated on 30 November 2016 for the purposes of furthering the venture that is in issue in this proceeding. The relevant business activities of the companies involved gold mining on the West Coast

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1 *Bi v Westcoast Mining Ltd* [2023] NZHC 2736 [Judgment under appeal].

of the South Island. Westcoast was the operating company, and Golden Coast the holding company.[2]

[5] Freddy had lived in New Zealand for some time, and he moved to Greymouth in 2013 to work in the gold mining industry. In November 2016, an oral agreement was reached between Freddy and Michael to engage in the gold mining venture through the companies. In the High Court, Freddy alleged that the arrangement involved him contributing assets in the form of mining and exploration permits which, together with his experience and know how, had a combined agreed value of $5 million, and that Michael would contribute $20 million in equity over a period of time. Freddy would own 20 per cent of the shares, and Michael 80 per cent. Freddy would be employed as general manager of Westcoast and Golden Coast at a salary of $100,000 per annum. Freddy and Michael would each be directors of Westcoast and Golden Coast, as well as Golden Coast's wholly owned subsidiaries, although Freddy would be the sole executive director.

[6] These allegations were not upheld in the High Court. Osborne J held that the arrangement was in two stages, involving the following key terms:[3]

(a) Freddy would own 20 per cent of the shares in each of the companies and Jimmy the remaining 80 per cent;

(b) both Freddy and Jimmy would be the directors;

(c) Freddy would have a management role with an associated salary;

(d) Freddy would transfer the mining interests he owned into the companies;

(e) Freddy would pursue other high quality gold mining opportunities so that these could be taken up by the companies, and would not compete with the company;

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2 Golden Coast owned 100 per cent of the shareholdings in several other companies, but not Westcoast, which had shares held by Jimmy (80 per cent) and Freddy (20 per cent).

3 Judgment under appeal, above n 1, at [122]–[123].

(f) Michael would provide support to the companies, and to Freddy and Jimmy as a mentor; and

(g) in the event that the operation of the companies at stage one proved successful, there would be a stage two. Michael would then make available funding of up to $20 million, and in that event, Michael would hold 80 per cent of the shares and be a director, and Freddy would own 20 per cent and be a director.

[7] Importantly, the Judge rejected Freddy's contentions that Michael agreed to contribute $20 million, and that Freddy's contribution had an agreed value of $5 million. Osborne J held that any contribution by Michael of up to $20 million depended on the success of stage one.[4] He also held that the value of the assets that Freddy introduced in the form of the mining permits were represented in the accounts in the form of a loan by Freddy to the companies in the amount of $332,980.[5]

[8] In the period from May 2017 to March 2018, mining operations were carried out and some steps were taken to acquire assets, with Jimmy advancing money to fund the operations. However, various issues arose and, by 31 March 2018, the company had made net losses of over $1 million. That was notwithstanding the fact that, by that stage, Jimmy had advanced the companies over $5 million.[6] The Judge found that this level of Jimmy's financial contribution to the operations, without resulting returns, was beyond what was contemplated in the arrangement.[7]

[9] The parties then sought to make changes to address the poor performance. They changed the mine operations so that it ran two shifts per day in an attempt to increase production, and different equipment was used.[8] The High Court found that these steps did not address the performance of the companies, which could not prudently be allowed to continue to operate.[9] A deterioration of the relationship between Freddy on the one hand, and Jimmy and Michael on the other had also

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4 At [123] and [131]–[132].
5 At [99].
6 At [220].
7 At [222].
8 At [220].
9 At [239]–[242].

occurred.[10] Michael first queried whether operations should continue at a meeting in September 2018. Then at a board meeting on 6 October 2018, Freddy agreed with Jimmy that the mining operation would be immediately shut down. All three agreed to cease trading, essentially meaning that the trial phase had not been a success, and the venture was effectively at an end.[11]

[10] At a shareholders' meeting on 25 October 2018, Freddy was then removed as a director, and his employment also ended. Michael and Jimmy then recapitalised the companies. In January 2019, notice was given to the shareholders that Westcoast was seeking to raise further funds by an issue of shares through a subscription offer of 990,900 shares at $1.00 per share. Freddy was unwilling to participate, and a capital raising subsequently occurred without him, effectively diluting his shareholding.[12]

[11] The companies' difficulties were not limited to its financial performance. In January and February 2019, the companies received non-compliance notices from the Department of Conservation, and an infringement notice from the West Coast Regional Council in relation to the mining activities.[13]

[12] The recapitalisation also did not remedy the performance of the companies. In the course of the financial year ending 31 March 2020, Westcoast incurred a further loss of $573,833.[14]

The High Court judgment

[13] In dismissing the claims under s 174, the Judge relied upon his findings on the arrangements between the parties, the financial position of the companies, and the parties' dysfunctional and strained relationship. The fact that the first stage of operations had been agreed to be a trial period only, and that there was no unconditional promise by Michael to invest $20 million was important. It meant that

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10 At [242].
11 At [224].
12 At [225]–[228].
13 At [229].
14 At [230].

the venture had essentially reached an agreed end point when the companies ceased trading. In that context, the Judge held:[15]

> [239] The predicament facing the Companies during 2018 was impossible to ignore. With Golden Coast, as the operating company, continuing to trade unprofitably, and no willingness on the part of Jimmy (or Freddy) to extend (beyond the already substantial advances) further credit to the Companies, the Companies could not prudently be allowed to continue to operate. The closure of operations, at least for the time being, was required. Freddy himself agreed with that at the time.

[14] He also held:

> [242] The relationship between the parties (Freddy on the one hand and Jimmy and Michael on the other) had deteriorated to the point of dysfunction by September 2018. The interests of the Companies required functioning governance. It mattered not whether the matters that had led to the dysfunctional relationship were due to misconduct on the part of Freddy or not. The correct outcome of Freddy's claim does not turn on whether he had misconducted himself. It turns on the fact that, for a wide range of reasons that had developed through a period of some 18 months, there was, by September 2018, no prospect of continuing functional operation of the two companies, if Jimmy and Freddy remained as co-directors.

[15] The Judge also held that these difficulties were illustrated by Freddy's continued contention, also pursued in the litigation, that Michael was required to invest $20 million as equity notwithstanding the poor performance.[16] This background meant that the steps taken to remove Freddy as a director were justified and required in the best interests of the companies.[17] Osborne J held that the subsequent further capital raising, which had the effect of diluting Freddy's shareholding interest, was not unfairly prejudicial as the companies were "grossly undercapitalised" and that Freddy had the right to take up a proportion of the offered shares if he had wanted to.[18]

[16] Osborne J also dismissed a series of other claims and counterclaims that each of the parties had made against each other. These are not pursued on appeal, but reflect the dysfunctional relationship. The exception was a finding that Freddy had misrepresented his qualifications and credentials to Michael and Jimmy on the establishment of the venture.[19] The Judge concluded that if he had found Freddy had

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15 Judgment under appeal, above n 1.
16 At [243].
17 At [242]–[244].
18 At [246].
19 At [215]–[219].

been unfairly prejudiced under s 174, aspects of the way in which Freddy had misrepresented his experiences and qualifications would need to be brought into account as "potentially disentitling conduct on his part", and that Freddy would need to "bear substantial responsibility for the ensuing deterioration in the relationships".[20]

Arguments on appeal

[17] On appeal, Freddy has reformulated his claim for shareholder prejudice. He no longer pursues the factual allegations that were key aspects of his argument in the High Court. He accepts the High Court findings as to the terms of the arrangements between the parties, but contends that those arrangements still give rise to unfair prejudice.

[18] Freddy now argues that the companies were, in fact, profitable at the time they stopped trading. He argues that the "watershed moment" in their activities occurred from April 2018 with a change to operating the mine on two shifts per day, and the use of a further item of machinery. Gold recovery nearly doubled. He says that the business achieved a cash surplus in the period from April to September 2018. He says that the annual net profit for the group was approximately $250,000. He relies on the expert evidence given by the respondent's accounting expert, Mr Simon Carey, as to the profitability for that period.

[19] In relation to the closely related issue of balance sheet solvency, he argues that this depended on the capital value of the mining permits held by the companies, which, on Freddy's case at trial, were worth $5 million. He argues that the permits only needed to have a value of $1.4 or $1.5 million for the companies to have been balance sheet solvent, and that they plainly had at least that value.

[20] Freddy contends that Michael and Jimmy realised the mine was successful, and that they then moved to exclude him. They made a unilateral decision to cease trading in October 2018. Freddy says he had no choice about this, and that he had sought to stop the subsequent share capital issue by bringing an application for an interim

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[20] At [218].

injunction.[21] The effect of the companies ceasing trading, him losing his employment and position as director, and the recapitalisation of the companies effectively excluded him from the operation of what was now a successful business. Freddy further argues that the breakdown in the relationship did not by itself justify him being excluded from the companies' operations, and there was no loss of entitlement through his conduct.

[21] Freddy relies on the principle articulated by Lord Hoffmann in *O'Neill v Phillips*, accepted by this Court in *Birchfield v Birchfield Holdings Ltd* that, in circumstances of this kind, it was necessary for the minority shareholder to be offered fair value for their shares.[22] He says that: he did not, and has not, received such an offer; that he is unable to obtain fair value for his shares; and that he has been locked out of the companies' activities. He says that the finding by the High Court Judge that there was an offer by Jimmy to purchase Freddy's shares at fair value was unjustified, as such an offer was only made in the respondent's evidence, and that it did not amount to an offer capable of acceptance. He argues that the remedy of s 174 is required to address these circumstances.

Assessment

[22] Section 174 concerns oppressive, unfairly discriminatory, or unfairly prejudicial conduct towards a shareholder.[23] The overall purpose of the section was explained by Richardson J in *Thomas v H W Thomas Ltd.*[24] The Court should make an assessment of the circumstances giving rise to the issues before it in light of the overall scheme and purpose of the relevant provisions of the Act. The section is directed to abuse of power or "a visible departure from the standards of fair dealing".[25] This is considered objectively.[26] The fact that the conduct is within the powers of a defendant does not mean it is permitted if it involves such an abuse.[27]

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21 *Bi v Westcoast Mining Ltd* [2019] NZHC 860.

22 *Birchfield v Birchfield Holdings Ltd* [2021] NZCA 428, [2022] 2 NZLR 123 at [34]–[36], citing *O'Neill v Phillips* [1999] 1 WLR 1092 (HL) per Lord Hoffmann at 1107–1108.

23 Companies Act 1993, s 174(1).

24 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA). *Thomas v H W Thomas Ltd* dealt with the predecessor to s 174 in the Companies Act 1955, but the statements in that case are equally applicable to s 174: see *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [112]–[113].

25 *Thomas v H W Thomas Ltd*, above n 24, at 695.

26 *Latimer Holdings Ltd*, above n 24, at [113].

27 *Thomas v H W Thomas Ltd*, above n 24, at 692, citing *Re Empire Building Ltd* [1973] 1 NZLR 214 (CA) at 220 per Turner P.

[23] A key issue emerges from the way in which Freddy seeks to reformulate his claim for unfair prejudice on appeal. In the High Court, Freddy's allegation that Michael had promised to invest $20 million in the companies was an essential plank of his case — he argued he was being frozen out of the companies and that Michael had an obligation to make this substantial capital investment.[28] He now accepts the Judge's finding that this further investment was conditional on success in the trial period. The Judge's additional finding, also not challenged on appeal, that there was no agreement that his own contribution was valued at $5 million,[29] was a further reason why his claim as advanced was rejected.

[24] We see a difficulty with this reformulation of Freddy's case given the absence of a clear factual basis to support it, as we explain in greater detail below. But we also accept the argument of counsel for Jimmy, Mr Ormsby, that this reformulated claim would require amendment to Freddy's statement of claim. Before us, Freddy sought leave to file and serve a third amended statement of claim to the extent that it is necessary.

[25] Very good grounds and strong justification is required before leave to amend can be granted after parties have closed their cases at trial.[30] That is particularly so when a party seeks to advance what is a substantially new claim only on appeal.[31] We would only consider it to be appropriate to grant such leave after trial if the amendment was confined to an adjustment to reflect the true controversy between the parties as explored at trial.[32]

[26] We do not consider Freddy's proposed amendment to be of that character, however. It is a substantial change to the way the case is advanced. We also consider it significant that Michael is not a party to these proceedings on appeal, although he was a party in High Court.[33] That is important as Freddy's argument that the

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28 Judgment under appeal, above n 1, at [30].

29 At [91]–[99].

30 *Berryman v Toup-Nicolas* [1958] NZLR 1170 (CA) at 1175, citing *Loutfi v C Czarnikow Ltd* [1952] 2 All ER 823 (QB) at 823.

31 *Mahon v Waimauri Ltd* [2022] NZCA 96 at [61].

32 High Court Rules 2016, r 1.9(2). See, for example, *Salih v Almarzooqi* [2023] NZCA 645, [2024] 2 NZLR 27 at [7]–[15].

33 Michael was not obliged to be a party to the appeal, but he was required to be served with it under r 31(1)(b) of the Court of Appeal (Civil) Rules 2005.

companies were successful carries the potential implication that Michael could be called upon to further invest under the arrangement as found by the Judge.

[27] This means that leave to amend the statement of claim should not be granted. But, for the reasons we explain below, we do not consider that the reformulated claim is a sound one in any event, and the appeal should be dismissed for that reason.

[28] There are two key features of Freddy's reformulated claim that must be considered:

(a) The contention that the companies were successful at the time they ceased trading, and that the decision to cease trading was an element of unfair prejudice.

(b) The contention that Freddy was deprived of the ability to obtain a fair value for his shareholding, which amounts to unfair prejudice in the circumstances.

Were the companies profitable?

[29] Freddy argues that the companies were profitable at October 2018, and that a key aspect of the unfair prejudice is that the companies ceased trading as a consequence of the unilateral decisions made by Jimmy and Michael. This is contrary to the findings of the High Court that the companies were unprofitable, undercapitalised, and in a state of predicament at this time.[34]

[30] We see a number of difficulties with Freddy advancing this argument on appeal as it was never squarely advanced at trial and there is an insufficient evidential foundation supporting it.

[31] The allegation is not pleaded in the second amended statement of claim.[35] The second amended statement of claim dated 10 July 2020 contains allegations that the decision to cease trading was made by Jimmy and Michael, and that the company had

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[34] Judgment under appeal, above n 1, at [90], [239]–[240], and [246].

[35] Neither was it pleaded in the proposed third amended statement of claim.

no need for additional capital. No allegation was advanced that the companies were in fact profitable when they ceased trading, or that the cessation of activities was a breach of the arrangement between the parties.

[32] Neither was the allegation addressed in evidence. Freddy's accounting expert, Mr Craig Melhuish, did not directly address the alleged profitability of the company for the six-month period in his evidence-in-chief. His evidence concerned the value of the shares in the companies at 30 September 2018. The defendant's expert, Mr Carey, undertook a similar valuation exercise. Mr Melhuish's evidence in reply then responded on these issues. The experts also conferred and produced a joint report. The questions they were asked to confer on included "trading losses and trading cash losses for the years ended 31 March 2020, 2021, and 2022" but not the alleged profitability of the company for the six months to October 2018 in a direct way, as a going concern or otherwise.

[33] Neither did Freddy give evidence himself that the companies were profitable for that period. His affidavit in reply was limited to saying that he had no choice but to agree to the companies ceasing trading, and he said "I now know the company was operating profitably at that time" without elaboration.

[34] Other evidence relevant to this period can be identified within the cross-examination, and inferences may be drawn from the conclusions of the accountants on the value of the shares at 30 September 2018. But we do not consider that Freddy can advance this argument without it being squarely put in issue, and addressed by appropriate factual and expert evidence. This is required for reasons of procedural fairness.

[35] In advancing Freddy's argument, Mr Hearn relied on one column in one of the accounting analyses provided in evidence by Mr Carey in support of his valuation evidence. This suggested that Westcoast had made earnings before income tax in this six-month period of $544,284, although Mr Hearn acknowledged that Mr Carey had subsequently made an adjustment to the period to account for gold on hand reducing this figure to $228,269. In his submissions, Mr Hearn also then sought to account for the operating loss made by Golden Coast of $102,662 to 31 March 2019 which, if

solely attributable to this six-month period, reduced the operating profit for the companies overall for this period to $125,607.

[36] Mr Hearn's submissions are, in effect, an attempted substitute for the kind of accounting evidence that should have been presented if this allegation was to be pursued. We do not consider that such submissions are an adequate basis for the new contentions, particularly as the argument involved extracting bits of evidence from different sources. It is not evidence presented on oath by a properly qualified expert, or other witness, who is then available for cross-examination.

[37] There are also underlying issues that require direct evidence. Apart from the re-evaluation of the gold reserves, which was the subject of the expert evidence, there was also an issue over whether depreciation had been properly accounted for. Mr Melhuish appears to have accepted in cross-examination that the companies were not profitable for this period if depreciation was included in the cashflow figures he had used in his share valuation exercise. In any event, we do not consider we can fairly address these issues in piecemeal fashion without more direct evidence. The evidence is not clear enough for us to do so.

[38] There is also the related issue concerning balance sheet solvency. Mr Hearn accepts that the permits that Freddy had introduced into the companies would have to have a significant value before the companies could be regarded as balance sheet solvent at this time. Even that proposition involves counsel using various evidential sources, which we do not consider we are in a position to fairly address.

[39] But in any event, the accounts effectively recorded the value of these permits through Freddy's loan in the amount of $332,980. That value would appear to be an appropriate one given that Freddy had paid $300,000 to acquire the entities which held those permits. Freddy relied on expert evidence given at trial which valued the permits at a higher value, but no findings were made on that evidence by the Judge given the way Freddy had advanced his case, and we are not in a position to assess this evidence.[36] In any event the figure of $332,980 is what permits were effectively valued at in the accounts by agreement. Moreover, the value of permits arises from

[36] We were not provided with this evidence, or the challenges to it, in the case on appeal.

the ability to derive revenue from them, and we do not accept that a higher value can be attributed to these permits given the other evidence of the poor financial performance of these companies when exploiting the permits.

[40] We also consider that there is a lack of reality about the repackaged allegation. The fact is that the companies ceased trading in October 2018 because everyone agreed at the time that they had not been successful. Through to that time, Jimmy had introduced approximately $5 million into the companies, and he considered that the revenue derived did not provide a sufficient return on that investment. Freddy agreed with this decision at the time. The fact that Michael and Jimmy agreed the companies should stop trading was the consequence of their view that the companies were not successful. If they thought the companies had turned the corner it would have been contrary to their interests to cease trading. The companies had made substantial losses as at 31 March 2018, and again made losses even after recapitalisation when trading recommenced.

[41] For these reasons, we do not accept Freddy's arguments that the companies were profitable at the time they stopped trading. The implicit challenge to the High Court Judge's conclusion that it was appropriate for the companies to cease trading is dismissed. We consider Freddy's other related allegations fail as a consequence. We do not accept that the cessation of trading, or Freddy's consequential loss of employment and directorship involved unfair prejudice. Rather it evidences the lack of success of the venture in accordance with the trial period that Freddy and Michael had originally agreed upon.

Was an offer to buy Freddy's shares required?

[42] The above conclusions are not sufficient to address Freddy's arguments on appeal, however. Even if the companies were not profitable, unfair prejudice can still arise. In particular, Freddy relies on the principle from the judgment of

Lord Hoffmann in *O'Neil v Phillips*, which was accepted by this Court in *Birchfield v Birchfield Holdings Ltd*.[37] Goddard J in *Birchfield* said:[38]

> Where a majority shareholder wants to put an end to the association with the minority shareholder, "it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement". It will often be the case that removal of a shareholder as a director is unfairly prejudicial conduct:
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> > But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer.

[43] Freddy contends that is the situation here. He has been excluded from the management of the companies by being removed as an employee and director, and then his shareholding has been diluted. He is unable to extract the fair value of his shares, and in accordance with this principle, unfair prejudice arises and an order under s 174, that he be paid the fair value of his shares, should be made.

[44] One aspect of Freddy's argument involves a criticism of the Judge's finding that an offer had been made for Freddy's shares. The Judge found:[39]

> [245] I am further satisfied that the defendants' responsibilities towards Freddy as a minority shareholder, who no longer held the position of director, were appropriately met by Jimmy's offer to purchase Freddy's shares at fair value. It then became a matter for Freddy whether he wished to sell his shares or not. In the event he wished to sell, there were obvious difficulties in determining in late-2018 what was fair value. The potential complexity of the valuation exercise was reflected in the conflicting evidence which this Court heard at trial from two experienced valuers. While, by reason of the conclusions I have reached, it has not been necessary to examine here that valuation evidence, the gulf of opinion between the two valuers indicated the unreliability of any estimate Jimmy might have been prepared to put on the value of the shares at the time Freddy was excluded from company operations. Furthermore, the ultimate value of the shares could not be ascertained until there was resolution of Freddy's assertion that Michael was obliged to provide $20 million by way of equity for the Companies.

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37 *Birchfield v Birchfield Holdings Ltd,* above n 22, at [34]–[36], citing *O'Neill v Phillips*, above n 22.

38 *Birchfield v Birchfield Holdings Ltd*, above n 22, at [33], citing *O'Neill v Phillips*, above n 22, at 1107 (footnotes omitted).

39 Judgment under appeal, above n 1.

[45] The relevant offer to purchase Freddy's shares was made in the pleadings and evidence filed in the proceedings. We accept Mr Hearn's argument that these offers alone cannot be treated as meeting the requirement of making a fair offer. It was not an offer to purchase the shares at a particular price, or agreement to a procedure under which that price could be ascertained.[40] It was, as the Judge held, inextricably interlinked with all the arguments made between the parties in the proceedings, including the counterclaims which were dismissed.[41] So, we accept this criticism of the Judge's finding, at least so far as it goes.

[46] But we agree with the Judge's related point that any ability to agree to the purchase of Freddy's shares remained impossible while Freddy maintained his arguments that Michael was obliged to invest $20 million in the companies, and that his contribution to the companies in the form of the permits and his expertise had an agreed value of $5 million.[42] Those claims had to be resolved before the fair value could be identified. Such claims prevented Jimmy and Michael from making an offer to allow Freddy to extract the fair value of his shares.

[47] But there is a more important point. The principle articulated by Lord Hoffmann, and accepted by this Court, is that it will almost always be unfair for a minority shareholder to be excluded without an offer to buy the shareholder's shares or to "make some other fair arrangement".[43] Here, we consider there is such an arrangement. That is because Freddy's investment into these companies is reflected in his loan recorded in the accounts in the amount of $332,980. Freddy remains able to demand repayment of that loan, together with any further interest earned on it, from the companies. This gives Freddy the ability to extract the fair value of his investment.

[48] As indicated, Freddy argued at trial that the permits were worth more than that. He relied on expert evidence of Mr John Youngson, who put the total value of the permits in early 2020 at $2,903,504.[44] That was notwithstanding the fact that Freddy

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40 See *Birchfield v Birchfield Holdings Ltd,* above n 22, at [36]; and *Marryatt v PC Home Hire Ltd* (2002) 9 NZCLC 263,033 (HC) at [84].

41 Judgment under appeal, above n 1, at [245].

42 At [243] and [245].

43 *Birchfield v Birchfield Holdings Ltd*, above n 22, at [33], citing *O'Neill v Phillips*, above n 22, at 1107.

44 Judgment under appeal, above n 1, at [40].

had acquired permits in 2016 by purchasing the company that owned them for $300,000. Freddy's explanation for this lower price was that this was a distressed sale.

[49] We do not accept the argument that Freddy has established that the value of his investment is greater than the value of his loan recorded in the accounts. We are not in a position to assess the expert evidence on appeal. As we have already found, the amount that Freddy paid for the entity owning the permits is evidence of their value. Freddy then agreed to the value because this was the level of the loan to him recorded in the accounts. We do not accept that the expert evidence led at trial establishes that the permits were worth significantly more than this. The Judge did not make findings on this evidence, or the challenges to it given the way Freddy advanced his case and we have not been provided with any of this evidence on appeal. In any event such permits only derive value if profits can be made from exploiting them. The companies attempted to exploit value, and they were not profitable. That appears to have been so for the previous owner.

[50] The only additional dimension is the suggested value of Freddy's know-how and experience to the companies. Given that the venture failed, the Judge's findings that Freddy had misrepresented his qualifications and credentials,[45] and that there was a dysfunctional relationship between the three major players, we do not accept that any value can be attributed to this.

[51] For these reasons, we do not accept Freddy's argument that he is being excluded from the companies, yet also deprived of the ability to receive a fair value of his shareholding. The fair value of his shareholding has not been demonstrated to be higher than the amount of his shareholder loan, which he can recover by demanding repayment.

Conclusion

[52] Freddy's case at trial was that he had been unfairly prejudiced by being excluded from companies in which he invested in circumstances where his contribution had been agreed to be worth $5 million, and where one of the other

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[45] At [218].

participants had committed to investing $20 million. These allegations were dismissed by the High Court Judge, and Freddy does not further challenge those factual findings on appeal.

[53] Freddy has repackaged his claims on appeal, contending that the companies were in fact profitable when they ceased trading, and that he has been prevented from extracting the fair value of his equity. We do not accept either argument. Freddy has not persuaded us that the companies were profitable, or that the High Court Judge's conclusions in this respect were wrong. We do not accept that unfair prejudice arises from Freddy being excluded from the companies at that stage. Neither has Freddy persuaded us that he has been deprived of the ability to extract the fair value of his equity in the companies. He retains the ability to extract that value through his loan, represented by the amount of $332,980 together with any further interest earned on that amount.

[54] Moreover, these allegations were never properly advanced at trial either in the pleadings, or by way of evidence, and it would not be appropriate to allow such allegations to be advanced for the first time on appeal. We decline leave to file and serve a further amend the statement of claim to allow them to be pursued in those circumstances.

Result

[55] The application for leave to file and serve an amended statement of claim is declined.

[56] The appeal is dismissed.

[57] The respondent is entitled to costs for a standard appeal on a band A basis with an allowance for two counsel, together with disbursements.

Solicitors:
Corcoran French, Christchurch for Appellant
RVG Law, Christchurch for Respondent