

IN THE COURT OF APPEAL OF NEW ZEALAND

CA248/02

BETWEEN	JOWADA HOLDINGS LIMITED Appellant
AND	CULLEN INVESTMENTS LIMITED First Respondent
AND	PACIFIC RETAIL GROUP Second Respondent

Hearing: 28 April 2003

Coram: McGrath J
Fisher J
Rodney Hansen J

Appearances: R B Stewart QC for the Appellant
A S Ross and E S Scorgie for the Respondents

Judgment: 5 June 2003

JUDGMENT OF THE COURT DELIVERED BY McGRATH J

Introduction

[1] This is an appeal against the refusal of summary judgment in a contractual claim for an advisory fee of \$886,727 (*Jowada Holdings Ltd v Cullen Investments Ltd and Pacific Retail Group* CP2581MOZ, Auckland, 1 November 2002). The appellant, who is plaintiff in the High Court, claims that the respondents are required to pay the fee following the respondents' successful takeover of Bendon Group Limited during March and April 2002.

[2] The appeal raises questions concerning the interpretation and application of a contract between the parties. There are areas of factual disagreement reflected in

their affidavits filed in support of and opposition to the summary judgment application. It was largely on that account that the Master decided that it was inappropriate for the Court to determine the appellant's entitlement in a summary judgment application. The appellant challenges that decision.

Background facts

[3] In mid 2000 Josephine Grierson, an economist, and David Hayde, a chartered accountant, decided to set up an investment business. Their long term aim was to manage funds for their clients, charging fees, but they decided that they should, early on, undertake a relatively high profile transaction in order to establish a commercial reputation.

[4] Ms Grierson and Mr Hayde identified Bendon Group Limited (Bendon) as an under-performing company with an established market share in the lingerie trade. The company had a cashflow which would be available to service the debt that they envisaged would be incurred in the course of its acquisition. It also had some \$20m surplus cash. They saw Bendon as an attractive target for a leveraged buyout. Importantly they devised a structure for the acquisition using the amalgamation provisions of the Companies Act 1993. They believed that their method would overcome a tax problem that would arise if there were a direct distribution of the surplus cash to shareholders.

[5] After their own initial researches Ms Grierson and Mr Hayde approached Mr Wayne Walden, chief executive officer and a substantial shareholder in the Farmers Deka Group, which was Bendon's largest customer. Mr Walden was seen as having knowledge of Bendon's operations and their shortcomings. He could give valuable assistance in the speedy rectification of those shortcomings following a takeover. Mr Walden was receptive to the approach and indicated his willingness to invest both time and money in the proposal. Ms Grierson and Messrs Hayde and Walden worked out that they would need about \$20m of equity to fund the proposed takeover with the balance of approximately \$65m to be funded by debt and surplus cash in Bendon. They expected to be able to raise \$10m of the equity themselves and decided to look for an equity partner to provide the remaining \$10m.

[6] Ms Grierson had previously worked for an unrelated company alongside Mr Phil Newland. In December 2000 Mr Newland was working for Cullen Investments Limited, a substantial New Zealand investment company, which is the first respondent in the appeal. As a result of a chance meeting, when Mr Newland inquired if there was anything that he and Ms Grierson could work on together, she and Mr Hayde met with Mr Newland on 28 February 2001. After obtaining Mr Newland's agreement to sign a confidentiality agreement, Ms Grierson told him of the idea of a leveraged buyout of Bendon Group and indicated that her group were looking for a lead investor. It is common ground that Mr Newland expressed enthusiasm for the idea although he also said that he was sceptical that it could be put into effect.

[7] Ms Grierson and Mr Hayde outlined their proposal to Mr Newland saying that they believed there was an opportunity to buy 100% of Bendon without exposing any assets other than those of Bendon itself when giving security for the funding of the acquisition. The risk of the transaction would be confined to the actual equity the parties contributed. For the lead investor that would be half of the \$20m equity. They also explained the essential features of their plan. They were to obtain access to Bendon's cash reserves of approximately \$20m, to proceed by way of an amalgamation which would require holders of a minimum of 75% of the voting shares in Bendon to agree with their proposal, and to find a lender who would be prepared to advance the substantial portion of the purchase price secured against Bendon's assets. The equity contribution of \$20m would come from the buyers. It was common knowledge that the institutional shareholders in Bendon at the time were AXA (4.5%), Tower Asset Management (15.5%), UBS (8.5%) and AMP (26%). AMP accordingly had the capacity on its own to veto any amalgamation transaction.

[8] Mr Newland agreed that the opportunity described to him was worth investigating further and Ms Grierson's uncontested evidence is that after the confidentiality agreement was signed she and Mr Hayde made available much of the work already done on the transaction. They did not however spell out in detail the structure they had devised. There was a further meeting between Ms Grierson, Mr Hayde and Mr Newland on 9 March 2001 to discuss the proposal in more detail and the strategy for acquisition. Following this meeting further information was sought

by Mr Newland. At this time preliminary discussions were also taking place between Ms Grierson and a merchant bank to establish the feasibility of raising debt on the proposed basis.

[9] Ms Grierson and Mr Hayde by this time had formed the appellant, Jowada Holdings Limited, as their vehicle for this transaction. They negotiated an agreement with Mr Newland as to a fee that would be payable to the appellant if the proposed takeover transaction proceeded without the appellant being offered the option to participate by way of equity investment. Although the letter recording this agreement is dated 29 March 2001 it is common ground that it was not concluded until signed on behalf of the first respondent by Mr Newland on 5 April 2001. We shall refer to it as the 29 March agreement. It is set out in full later in this judgment.

[10] Given its pivotal position a question which had to be resolved was whether AMP was interested in selling its parcel of shares in Bendon. It was agreed that Mr Newland should make an approach to AMP, which he did, but its representatives made it plain that they were not interested in selling at the price range suggested. A similar preliminary approach on 16 May 2001 to Tower Asset Management was more promising. Tower indicated it would prefer to sell rather than remain in Bendon following the proposed takeover and that an acceptable price would be \$2.10.

[11] On 25 May a subsidiary of the appellant made a more formal approach to each of the institutional investors offering \$2.10 per share. A promising response was received from all but AMP. Its position accordingly remained a major impediment to proceeding by way of an amalgamation. Thereafter although there was some continuing contact between Ms Grierson and Mr Newland through to July 2001, there was no contact at all from August through to November. An issue in this litigation is whether the 29 March agreement ceased to have effect at this time.

[12] On Friday 1 December 2001 Mr Venter, chief executive of Bendon, made a public announcement of a management buyout proposal involving the purchase of all of the assets of Bendon at an effective price to shareholders of \$1.80 per share. It was subsequently revealed that AMP was behind this bid. Because the offer was to

purchase all Bendon's assets the transaction required consent by special resolution of 75% of voting shareholders of Bendon. AMP, however, would not be able itself to vote on the proposal.

[13] By this time Mr Newland was the group managing director of the Cullen Group of companies. He was concerned at the emergence of Mr Venter's bid. He and Ms Grierson met at 4pm on 3 December 2001 to discuss it. Although there are substantial differences over what was said at that meeting it is common ground that the idea of forming a joint venture between the appellant and the first respondent to pursue the idea of taking an interest in Bendon was addressed and that Mr Newland was to have draft heads of agreement prepared. A heads of agreement document was subsequently prepared and signed by Ms Grierson but not signed on behalf of the first respondent which presented a different version on 20 December. Ms Grierson has said she found that draft unacceptable, because of a provision apparently terminating the first respondent's responsibility to pay a fee to the appellant if the first respondent proceeded without it. Mr Newland has accepted that he "was angry about her claim to the effect that there was some right to a fee in the event that the transaction did not go ahead". He has also said that in his view the 29 March arrangements had come to an end and that it was becoming increasingly likely that a "full blown hostile takeover bid for Bendon" would be required, for which the appellant would be unlikely to be able to raise the necessary funds to participate. Mr Newland has said he felt Ms Grierson was trying to position her interests so that in that event they would be able to claim a fee.

[14] These statements of the principal players' different perspectives are significantly embellished, in strong terms, in the affidavits particularly those submitted on behalf of the appellant. Plainly we are unable to make findings on those disputed matters. All that we need record is that neither the proposed heads of agreement nor a subsequent draft shareholders' agreement were finalised by the parties. It is impracticable for the Court in particular to address the assertions by Ms Grierson regarding the motives and conduct of Mr Newland. We emphasise that we make no assumptions, let alone findings, concerning those matters.

[15] What is however clear is that the first respondent decided at this point to make a full bid for Bendon's shares. As already indicated the success of the Venter bid to acquire Bendon's assets was dependent on getting a 75% majority shareholder vote in its favour, with AMP under NZ Stock Exchange Listing Rules being unable to vote its own 26%. Mr Newland saw the opportunity in these circumstances to block that Venter bid by acquiring around 20% of the company's share capital.

[16] He met with Ms Grierson and Mr Hayde on 10 January and told them that he had decided to acquire Bendon with a \$60m equity bid. There was debate over whether the bidder could be confident that \$20m surplus cash in Bendon would be available. Attempts to persuade him to stick to the level of a \$20m equity investment as previously discussed were unsuccessful.

[17] On Friday 11 January 2002 Mr Newland wrote to the appellant, on behalf of the first respondent, proposing terms for its participation in an acquisition of Bendon. In essence he proposed co-investment of a sum between \$15m and \$24m by the appellant out of a total investment of not less than \$60m. It will be necessary to examine the terms of this letter later in this judgment

[18] On 14 January 2002 Ms Grierson replied saying that the appellant's interests could not meet the "new terms of investment proposed". Its directors were still however keen to stay in the deal on a leveraged basis. She proposed that the appellant instead contribute \$10m towards a \$40m bid for acquisition of a majority shareholding in Bendon. She also said that she was keen to investigate further possibilities.

[19] On 16 January Mr Newland proceeded to acquire for the respondents the shares held by Tower and an option on those of AXA. This gave the respondents an interest in Bendon that could stop the Venter asset purchase offer proceeding. A meeting took place on 17 January 2002 concerning which Mr Newland and Ms Grierson have different versions of what was said. Mr Newland became angry when Ms Grierson started taking notes. He said he thought she was doing so for the purpose of setting up a legal claim. It is inappropriate for us to attempt to make any further findings on the conflicting evidence concerning other aspects of this

discussion. Ms Grierson and Mr Hayde wrote a four page letter to Mr Newland on 17 January complaining that the terms and conditions of the 11 January letter were such a dramatic departure from the capital structure the parties had planned that it was impossible for the appellant to comply with them. They also complained that the appellant had not been offered participation in the acquisition of the Tower shareholding or the option over that of AXA.

[20] On 18 January 2002 the second respondent, Pacific Retail Group Limited, which is associated with the first respondent, announced that it would make a full takeover offer for Bendon. An offer of \$1.90 per share was made on 9 February 2002 for all of the ordinary shares in Bendon not already owned by the respondents. It was conditional on the second respondent receiving acceptances that, taken with those already held, would give it more than 50% of the voting rights in Bendon. The offer also signalled an intention to enter into funding arrangements involving Bendon giving a guarantee as well as security over its assets if a holding of 90% of the company was acquired. On 27 March 2002 the second respondent announced that it had gained over 90% acceptance for its offer for shares in the Bendon Group giving it the right compulsorily to acquire the remaining shares. The appellant submits, on the basis of news media reports, that the acquisition structure it had devised was then used by the second respondent to complete the acquisition. According to those reports it contributed equity of \$20m, making use of Bendon's surplus cash of a further \$20m and raising debt funding of \$18m. Mr Newland is silent on the truth of the reports but points out that there was no assurance of obtaining 100% ownership at the outset of the takeover. He does acknowledge that the acquisition was completed by the second respondent with debt funding secured against its balance sheet. He says this was a departure from the stand alone funding arrangement proposed by the appellant.

The proceeding

[21] On 28 June 2002 the appellant issued the present proceeding against the first and second respondent. Mr Hayde had previously transferred his shareholding in the appellant to Ms Grierson. In its statement of claim the appellant pleaded that the

29 March 2001 agreement bound the first respondent to pay it an advisory fee of \$886,727 calculated on the basis set out in the agreement, in the event that the first respondent proceeded with the proposed takeover of Bendon without offering the appellant the option to participate. The letter of 11 January 2002 was said not to be an offer to participate which complied with the terms of the 29 March agreement, because it did not contain a specific proposal for investment and was not an offer capable of acceptance. Alternatively, if the letter of 11 January did comply with those contractual terms it was in breach of other express or implied terms: first that the parties to the agreement would act in good faith in dealings with each other, secondly that any offer to the appellant to participate in the takeover would be on terms capable of acceptance, and thirdly that the appellant would be given a reasonable opportunity to consider the terms offered which, fourthly, would provide an investment rate of return.

[22] The appellant also applied for summary judgment. That application was opposed on the basis that there was no liability under the contract to make any payment and because, the respondents said, there were further defences available to the appellant's claim. The first of these was that any agreement recorded in the 29 March 2001 letter had come to an end prior to the second respondent acquiring a controlling interest in Bendon. Secondly the opportunity given to the appellant to participate in investment in Bendon had discharged any obligations of the first respondent. Thirdly the appellant "had no genuine belief" in its entitlement to the fee claimed.

The Master's judgment

[23] The application for summary judgment was heard by Master Faire who delivered a reserved judgment on 1 November 2002. The Master identified the key issue as being whether the acquisition that might entitle the appellant to a fee under the 29 March agreement had to proceed by way of the amalgamation provisions of the Companies Act 1993 rather than any different method. The Master expressed the view that if there were doubt as to the precise requirements of the 29 March agreement the issue should go to a fuller inquiry than was possible on a summary

judgment application. He referred in this respect to what he clearly saw as a pertinent observation by Mr Hayde in his affidavit to the effect that the 29 March agreement was “on the basis of it being a co-investor – in a company to be amalgamated with Bendon”. The Master said that the ultimate question was whether it was necessary to go into the background facts in order to ascertain the meaning of the document. This turned on whether the words were susceptible of more than one meaning in which case the Court would have to look into the surrounding circumstances to ascertain the parties’ true intention.

[24] The Master decided that it was possible that a reasonable person would read the requirement in the 29 March agreement that the transaction had proceeded as applying to a particular type of transaction only, namely one involving amalgamation procedures. The word *transaction* had been used rather than words such as *purchase* or *sale*, which indicated a focus on the result of activity. Transfer of ownership was not necessarily denoted by the word *transaction*. It was also inherently unlikely that the parties had intended that any future acquisition of shares would justify payment of the fee. Clarification of that question required an examination of the background material available at the time of the contract to ascertain the view a reasonable person would take as to whether the contract covered a transaction such as that entered into by the second respondent. The application for summary judgment accordingly failed. As the Master saw it the separately argued defence that the 29 March agreement had come to an end in 2001 raised the same question namely whether the contract was tied to a particular form of transaction.

[25] It was not necessary for the Master to consider the defence based on the 11 January 2002 letter proposing participation, although he did observe that he had reservations about how that could be seen as constituting “an option to participate by way of equity investment”. The letter was not a precise proposal, nor did it define the particular share of the investment that could be made by the appellant. The first respondent could have put up a precise proposal meeting the terms of the 29 March agreement at any time prior to completion of the purchase of the shares but did not do so. Nor did the Master think that the third defence of a lack of genuine belief by the appellant of its entitlement to claim added a separate basis for opposing the

summary judgment. He declined the summary judgment application accordingly on the basis of the first ground of opposition.

Submissions of the parties

[26] In this Court Mr Stewart QC for the appellant, who did not appear in the Court below, put the appellant's case on the basis that the agreement of 29 March was binding on the parties as at January 2002, when the second respondent launched the takeover bid for Bendon. Although that bid took the form of an offer for the entire share capital not held by the first respondent, rather than a proposal for amalgamation as earlier discussed, Mr Stewart submitted that it fell within the scope of the 29 March agreement because the first respondent and its associate the second respondent had "proceed(ed) with the transaction without offering Jowada the option to participate by way of significant ... equity investment" as required by the 29 March agreement. He submitted the appellant was accordingly entitled to an advisory fee calculated in terms of the agreement. The proposal made to the appellant on 11 January 2002 did not meet the contractual obligation because, first, it did not have the formal attributes of an offer in sufficiently precise form to be capable of acceptance, secondly it was a sham in that it was made on the basis of an acquisition structure which the first respondent had no intention of using and thirdly, the terms proposed had effectively precluded the appellant from participation. Finally, Mr Stewart submitted that, in any event, the first respondent was obliged to make a further offer to Jowada once it was decided that the second respondent would proceed with the acquisition of Bendon on a fundamentally different acquisition structure to that proposed on 11 January 2002, being a structure essentially similar to that originally proposed by the appellant.

[27] Mr Ross for the respondents advanced three defences. First, he said that the 29 March agreement did not apply to the transaction at all because the entitlement to a fee was premised on and limited to an acquisition by an amalgamation based technique. That argument of course was the basis on which the Master had decided that the proceeding was inappropriate for summary judgment. Secondly Mr Ross argued that the 29 March agreement had been abandoned once the parties

encountered the impediment of AMP's unwillingness to sell its holding in Bendon at an acceptable price. The third defence was that if the 29 March agreement remained in existence in January 2002, the 11 January letter constituted a valid offer, meeting the terms of the 29 March agreement, which accordingly was discharged. Mr Ross emphasised that the 11 January letter set out the nature of the transaction proposed, it indicated a potential place for the appellant to participate with an investment of 25% to 40%, and invited an indication from the appellant as to whether it wished to proceed.

Summary judgment considerations

[28] In order to obtain summary judgment under Rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a *prima facie* case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence Rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and unexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* (1987) NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.

[29] This present appeal is concerned with a contract based claim in circumstances where both parties seek to rely on evidence of circumstances said to form part of the relevant context in which the contract is to be interpreted. Their evidence is in conflict. That, however, does not preclude the Court from giving summary judgment in a contract claim if it is satisfied that resolution of the factual matters in dispute is not necessary to provide the Court with such contextual background as is necessary to resolve the claim. This is simply an application of the principle that where, despite differences on factual matters, the lack of a tenable defence to a cause of action is plain on the material before the Court, and the Court is sure on that point, summary judgment will normally be entered. In such circumstances there is no reason why a contract should not be interpreted and applied in summary judgment proceedings: *Pemberton v Chappell* at pp 4 and 8 CA; *Haines v Carter* [2001] 2 NZLR 167, para 128 CA.

[30] Once the Court has been satisfied that there is no defence Rule 136 confers on it a discretion to refuse summary judgment which is of a residual kind. While the types of cases in which the discretion will be exercised to refuse judgment cannot be exhaustively defined, the most common instance is where there would be an unfairness in proceeding immediately to judgment, for example if the defendant were unable to get in touch in the time available with a material witness who it was reasonably thought might be able to provide it with material for a defence: *Bank Für Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541, 548 (CA). In that case Cairns LJ also said that harsh or unconscionable behaviour of the plaintiff might require a matter to proceed to trial so that any judgment obtained was in the full light of publicity. Generally, however, where the ground relied on in seeking summary judgment goes to the substance of the litigation, the interests of justice would not permit refusal of judgment unless they provided a basis for it to be refused at the substantive hearing: *Inner City Properties Ltd v Mercury Energy Ltd* (1990) 13 PRNZ 73 (CA). It should not be thought that a plaintiff who has shown that there is no arguable defence will be denied judgment except in rare circumstances.

The issues

[31] The three issues in the present appeal raise questions concerning the interpretation of the 29 March agreement, whether it was subsisting in January 2002, and, if it was, whether the first respondent's proposal of 11 January satisfied its contractual obligations under the 29 March letter. In each instance the respondents have based their arguments in support of the Master's refusal of summary judgment in part on the factual differences raised by the affidavits filed in support of and opposition to summary judgment and in part on questions of contractual interpretation. Mr Ross put emphasis on the contextual significance of the disputed evidence, its importance to the correct interpretation of the 29 March agreement and to whether the parties had thereafter abandoned it, and generally in relation to the meaning of the terms of the proposal of 11 January 2002. The dispute over the contextual evidence, he said, was material to the meaning of the contract and whether in the circumstances it relieved the respondents from the obligation to pay a fee.

Was the fee obligation triggered?

[32] The 29 March agreement took the form of a letter sent by Ms Grierson and Mr Hayde on behalf of the appellant to Mr Newland, which he signed to signify acceptance on behalf of the first respondent. Although it is lengthy it is necessary to set out the letter in full in order to understand the appellant's contractual claim and the respondents' basis for opposing it:

Phil Newland
Cullen Investments
PO Box 91269
Auckland

29 March 2001

Straps

It is a pleasure working with you regarding the possible takeover of Straps, an opportunity which David Hayde, and I have re-introduced to Cullen Investments ("Cullen").

As discussed with you, we would like to formalise the relationship between Cullen and Jowada Holdings Limited (“Jowada”, the vehicle we are using for this transaction) beyond the level already encompassed in the Confidentiality Agreement.

While it is the parties’ intention to work together as a team on the deal, to co-invest equity on equally favourable terms and, if necessary, to raise further capital, the possibility that they do not proceed together has to be taken into account.

As agreed yesterday, if for any reason Cullen decided to go ahead and do the deal either alone or with other parties on terms which effectively excluded Jowada from a significant role in the investment, then Jowada must be fairly compensated.

For the sake of clarity, it is important to bear in mind that Jowada has potentially three main roles with regard to the Straps deal:

- introductory and advisory
- capital raising
- equity investment

In addition, it is envisaged that after the transaction is completed there will possibly be another role for directors of Jowada to be directors of Straps or its successors.

For simplicity, this letter will deal with the advisory role only in the situation where Cullen proceeds with the deal but does not co-invest with Jowada. The other roles, including Jowada’s advisory role in the situation where Cullen and Jowada do co-invest, will be dealt with separately.

As regards our advisory role, we identified the opportunity, re-introduced it to Cullen, outlined an acquisition strategy and are happy to continue to assist you both in coming to your investment decision and in bringing the transaction to a successful conclusion.

We have conducted detailed financial, strategic and operational analyses of the company including but not limited to:

- 10 year profit and loss, cash flow and balance sheet projections under a wide range of operational and financial scenarios
- analysis of a range of potential capital structures
- calculation of potential returns to investors under a range of scenarios
- discussions with potential debt, equity and mezzanine providers
- preparation of a business plan detailing how to bring about operational improvements in the company
- interviews with key management
- discussions with industry experts
- discussions with institutions who are potential vendors of shares in Straps

The work we have done has gone beyond the level of publicly available information and it has required considerable skill and persistence to get to this point.

We envisage an ongoing role building on the work already done and including such actions as:

- *Jowada/Carlyle will at all times act professionally and in the best interests of Cullen.*
- continued financial analysis
- continued development of the operational business plan for Straps
- continuing discussions with institutional shareholders
- refining the capital structure
- working with legal advisors to produce an effective acquisition structure
- liaison with key management of Straps when that becomes appropriate
- negotiations with debt and mezzanine providers

The proposal is that in the event that Cullen or its affiliates or associates proceed with the transaction without offering Jowada the option to participate by way of *significant but in no event controlling* equity investment then Jowada will be entitled to an advisory fee calculated as a percentage of the transaction value on the following basis:

1. If Cullen, its associates or affiliates gains control of under 51% of the shares of target, the fee will be 0.5% of the transaction value.
2. If Cullen, its associates or affiliates gains control of between 51% and 90% of the shares of target, the fee will be 1% of the transaction value.
3. If Cullen, its associates or affiliates gains control of over 90% of the shares of target, the fee will be 1.5% of the transaction value.

These rates exclude GST and are only payable on the acquisition of the shares.

For example, if 90% of the shares are purchased using 100% equity, and the balance is compulsorily acquired at a total cost of \$60m, then the fee payable would be \$900,000.

If all the shares were acquired with a mixture of debt and equity, the fee payable would be the same.

If however, 75.1% of the shares are acquired at a total cost of \$45m, and no further shares are purchased within a reasonable time period, then the fee payable would be \$450,000. However, we expect that 100% control would need to be achieved within a short time period in order to make the deal work and anticipate working with you on putting together a funding package to achieve this. *For the avoidance of doubt if Cullen does not proceed for any reason or/and if Cullen proceeds but is not successful in acquiring at least 51% then no fee shall be payable.*

We trust that these arrangements are satisfactory to Cullen Investments and look forward to progressing the potential acquisition. Please signify Cullen's acceptance of these terms by signing below.

We look forward to working with you.

Your sincerely

The italicised passages are hand-written amendments to the typed letter. The deletion is set out as it is shown in the letter.

[33] The respondents' contention that the 29 March agreement applied only to the appellant's amalgamation proposal requires, in the words of Lord Hoffman, "ascertainment of the meaning which that document would convey to a reasonable person having all the background knowledge available to the parties in the situation they were in at the time" of the contract: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912. Lord Hoffman later in his speech went on to say:

The meaning which a document (or any utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax....

The judgment was followed by this Court in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.

[34] The 29 March agreement opens with a reference to the parties' work together "regarding the possible takeover of Straps" clearly referring to a company. The structure of the letter is that the first eleven paragraphs are preambular. The key words expressing the first respondent's obligation to pay a fee and the circumstances in which the obligation arises appear in the following paragraph commencing "The proposal is that...". In the second paragraph there is a reference to the appellant company being the vehicle used by its two principals "for this transaction". In its context "this transaction" refers back to "the possible takeover of Straps". So do subsequent references to "the deal" in each of the third and fourth paragraphs. This context also indicates that, when in the fourth paragraph, in the preambular part of the letter, it is stated that the appellant must be fairly compensated if the first

respondent goes ahead and does “the deal” on terms excluding the appellant “the deal” is synonymous with the possible takeover of Straps. Two references to “the transaction” follow in the next 3 preambular paragraphs, the first concerning a possible role for Jowada’s principals “as directors of Straps or its successors” after “the transaction is completed”, and the second to their willingness to assist “in bringing the transaction to a successful conclusion”. In between there is a further reference to “the deal”. Here the words “transaction and deal” are used interchangeably. The letter then refers to work done by the appellant to date and the ongoing role envisaged. That concludes the preamble. The twelfth paragraph follows, it expresses the first respondent’s obligation to pay an advisory fee and the circumstances in which it is relieved of it.

[35] The first condition precedent to the obligation to pay the fee is that the respondent (or an associate) “proceeds with the transaction”. Reading “proceeds with the transaction” together with the passages previously discussed, in the context of the letter as a whole, those words have the same meaning as “(proceeds with) the possible takeover of Straps”. There is nothing in the words themselves, or their context in the 29 March agreement, to suggest their reference is confined to a particular form of takeover mechanism, such as the reverse triangular amalgamation proposed by the appellant which at that stage had not been fully revealed to the first respondent. The broader meaning of the key words is also consistent with “Straps” simply being the code word for the target company, which is its apparent role in the opening sentence and in two other places in the letter. There was extrinsic evidence, and it was not disputed, that the target company was Bendon.

[36] The passages in the twelfth paragraph setting out how the fee is to be calculated in terms of percentages of transaction value provide strong contextual reinforcement for the more general meaning of “transaction”. The entitlement arises if the respondents gain control of more than 51% of shares in the target company. That is inconsistent with the transaction which gives rise to the fee being confined to a particular form of transaction, such as an amalgamation, which would require approval of 75% of shareholders.

[37] Overall there is nothing in the 29 March agreement pointing to the narrower meaning of the provision giving rise to entitlement to an advisory fee for which Mr Ross contends. On the other hand there are further general references in the letter to analyses of a wide range of scenarios and potential returns under them which point to the wider application of the 29 March agreement. The ordinary general meaning of the words “proceed with the transaction,” supported by the internal indications in the letter accordingly strongly indicates that the parties’ intention was that the fee was payable if the first respondent or an associate went ahead with a takeover of any kind rather than one of the particular form devised by the appellant.

[38] The submissions of Mr Ross, however, require us to go on to consider whether the respondents’ affidavit evidence, if accepted, would provide the basis for tenable argument that the background knowledge available to the parties at the time was such that a reasonable person might have taken a different meaning from the text of the 29 March agreement. Master Faire considered that they did. He was particularly concerned at what Mr Hayde said, after he had sold his shares in the appellant, in an affidavit which was filed by the respondents. Mr Hayde’s evidence was that he and Ms Grierson had devised a structure incorporating the amalgamation provisions of the Companies Act 1993 to obtain a tax effective distribution of the surplus cash. He also said that the appellant had entered into the 29 March agreement with the first respondent “on the basis of being a co-investor in a company to be amalgamated with Bendon”. Ms Grierson did not address the latter assertion in reply. This suggested to the Master that there should be a fuller inquiry into the question of the scope of application of the 29 March agreement than that involved in a summary judgment application.

[39] The particular matters of background knowledge available to the parties, which the respondents rely on, include the parameters of the acquisition proposal put forward in general terms by Ms Grierson and Mr Hayde on 28 February 2001 and thereafter. Mr Newland described it as an opportunity to buy 100% of Bendon contributing equity of approximately \$20m without exposing any assets other than those of Bendon in giving security for the funding. It involved obtaining access to cash reserves within Bendon of approximately \$20m and persuading holders of 75% of its voting shares to agree with the proposal which involved amalgamation of

Bendon with the bidding entity. There was no risk of having to finance a partial acquisition. The total cost would be in the region of \$60m.

[40] Execution of the 29 March agreement, however, had preceded disclosure to the first respondent of the details of the appellant's proposal. Ms Grierson herself accepted that as late as 30 April Mr Newland had not been informed of the amalgamation process they had in mind. This, Mr Ross argued, indicated that it was the amalgamation technique which the appellant sought to protect, under the 29 March agreement, involving the clever way of using Bendon's cash with agreement of only 75% of its shareholders without the risks of being left with a partial acquisition. The appellant's concern over the confidentiality of the technique explained the lack of reference to amalgamation in the 29 March agreement and the irrelevance of certain provisions in relation to fee calculation to a transaction effected by amalgamation. This may well be true but we are satisfied that it is not a consideration that would cause a reasonable reader of the 29 March agreement to come to an interpretation of the key words which differs from that discussed above. Nor does the observation of Mr Hayde as to the basis of the appellant's entry into the 29 March agreement take the matter any further. The parties expressed that basis themselves in a lengthy preambular part of their agreement and what Mr Hayde says is not contradictory of that.

[41] We are also satisfied that we know sufficient of the factual matrix in which the parties entered into the 29 March agreement to determine the dispute over whether it gave rise to contractual obligations only if the first respondent, or an associate, proceeded with a transaction in the nature of the plan devised by Ms Grierson and Mr Hayde.

[42] The contextual evidence that the respondents say is available is incapable of supporting the narrower view of the condition precedent for which they contend, given the contract terms and those background circumstances which are apparent. The factual matters relied on by the respondents do not indicate that the 29 March agreement is reasonably and objectively capable of having a meaning that is more narrow than the ordinary meaning of the document read as a whole. The Court would not be assisted by a trial of the questions of fact in dispute. We are satisfied that it

can only mean that the parties agreed that the fee would be payable if a takeover of Bendon by the first respondent proceeded in any manner which resulted in an acquisition of more than 51% of the shares. The first respondent bound itself to pay the stipulated fee if a takeover transaction proceeded whether in the specific form the appellant had devised or otherwise. We accordingly proceed to the second issue.

Abandonment

[43] The respondents submitted that, even if the terms of the 29 March agreement applied to their takeover transaction the agreement had, by then, been abandoned by the parties. The reason was the disinclination of AMP to sell its shareholding when Mr Newland met its representatives in May 2001. His affidavit evidence was that, to his mind, this development was the end of any prospect of proceeding along the lines which the appellant had proposed. He also said that after he had told Ms Grierson of the outcome, his dealings with the appellant “then ceased, by mutual agreement” and that they “parted ways”. This is a matter of dispute as Ms Grierson’s evidence is that discussions continued over how to address the AMP’s attitude. There is disagreement also over Ms Grierson’s evidence that she kept Mr Newland informed of other various dealings by her with institutions during the period between late May and the end of November 2001.

[44] The principles governing abandonment of contract have largely been developed in the context of arbitration clauses, in circumstances of inaction by one or both parties in pursuing a claim before arbitrators. The leading case is *Paal Wilson & Co AS v Partenreeders Hannah Blumenthal* [1983] 1 AC 854. The appellants had purchased a ship from the respondents under a contract which provided that disputes should be referred to arbitration. The appellants sought to arbitrate a claim arising from problems with the vessel, but for various reasons seven years elapsed without the claim being brought on for hearing. One issue considered in the House of Lords was whether the contract to arbitrate had been abandoned. The House of Lords was unanimous in emphasising the requirement of consensus before that was established. Lord Brandon said the question was whether the parties’ conduct was of such a character as to lead to the inference that they had impliedly

consented with each other to abandon the agreement. Abandonment was a tenable proposition which, in such circumstances, might be established in two ways:

The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief. The first method involves actual abandonment by both A and B. The second method involves the creation by B of a situation in which he is estopped from asserting, as against A, that he, B, has not abandoned the contract...(p913)

Whether these criteria are met is a question of fact.

[45] There is no basis in the respondents' affidavits for drawing the inference that there was actual agreement by the appellant to abandon the contract reflected in the 29 March agreement. Mr Ross acknowledged that he could not point to any exchange of commitments by the parties to that effect. The issue accordingly is rather whether the appellant is estopped from asserting it has not done so. On that question Lord Diplock said:

Where the inference that a reasonable man would draw from the prolonged failure by the claimant in an arbitration procedure is that the claimant is willing to consent to the abandonment of the agreement to submit the dispute to arbitration and the respondent did in fact draw such inference and by his own inaction thereafter indicated his own consent to its abandonment in similar fashion to the claimant and was so understood by the claimant, the court would be right in treating the arbitration agreement as having been terminated by abandonment. (p916)

[46] Lord Brightman, at p924, similarly spoke of "tacit abandonment by both parties" based on an inference drawn from primary facts that the parties had mutually agreed to rescind the contract to arbitrate. The sellers had to show the buyers had so conducted themselves as to entitle the sellers to assume and that they did assume, tacit agreement to abandon. As in that case the party whose actions the other had relied on was still taking steps to pursue the claim it was held that, on the facts, the contract to arbitrate had not been abandoned.

[47] The considerable difficulty of establishing consensual abandonment was referred to by Lord Mustill in *L'Office Cherifen des Phosphates and another v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 All ER 20:

The concept of a consensual abandonment is sound in theory but largely useless in practice, given the difficulty of extracting a consensual termination of the agreement to arbitrate from a situation in which, ex hypothesi, neither party has done anything. (at p97).

The same difficulty arises in establishing that a party is estopped from asserting it has not abandoned a contract where the party's inactivity alone is relied on.

[48] While Mr Newland's evidence, if accepted following a trial, might establish his assertion that he had no dealings with the appellant for a lengthy period leading up to 1 December (when it is common ground that they resumed discussions after Mr Venter's announcement), as indicated, there is nothing in what he says that indicates any exchange of commitments by the parties to discharge the 29 March agreement. The respondents' argument of abandonment rests on the proposition that abandonment is to be inferred from the lack of significant communication between the parties concerning their arrangements over the six month period following the AMP's refusal to sell, or a very substantial part of that period. The respondents' criticisms of the appellant's manner of dealing with institutions in relation to its obligation to act in the first respondent's best interests are beside the point and we put them to one side. Even if, as he states, Mr Newland was totally unaware that the appellant was pursuing initiatives with Bendon shareholders that would be an inadequate basis for the Court to find there was an arguable case of abandonment by estoppel. It would be unreasonable for Mr Newland to have concluded that the appellant had abandoned the agreement because of lack of communication over that period. The submission that it is arguable that the 29 March agreement was abandoned accordingly fails.

The 11 January 2002 letter

[49] It is now necessary to set out in full the first respondent's letter of 11 January 2002 which is said by the respondents to contain an offer to the appellant "to

participate by way of equity investment” that met the terms of the 29 March agreement. The letter of 11 January reads:

ACQUISITION OPPORTUNITY – BENDON GROUP LIMITED

I refer to our meeting yesterday morning and, as requested, write to confirm the proposed terms upon which we would invite you or your nominee (“Jowada”) to co-invest with us, or any associate or affiliate of ours, in an acquisition of part or all of Bendon Group Limited (“Bendon”). While the nature of such transactions by definition must remain fluid, we have tried to give a candid view of how we see this transaction unfolding from here both in terms of strategy and structure, so as to assist with your decision to invest.

Our strategy will be for the bidding entity (“Bidco”) to bid for 100 per cent of the shares in Bendon. We estimate that will require a total investment of not less than \$60m. A bid would be conditional on receiving acceptances for at least 90 percent of the outstanding shares, but in light of AMP’s involvement in the competing MBO we think it is likely that we will need to waive this condition and close the offer having received between acceptances from 50%-74% of the company’s shares.

We think it is critical to act quickly in light of the fact that the competing MBO offer is due to be consummated by shareholder approval at an EGM in early to mid February. Against this background, and given that Cullen Investments Limited is very reluctant to leverage against its own balance sheet to facilitate a leveraged acquisition, the most feasible route forward at this time is to assume the bidder must self fund any bid. Notwithstanding that, we would likely consider leverage opportunities (and distributions of capital from the target) in due course, depending on the needs of the target’s business as determined by its board.

Accordingly, we would propose that you co-invest with us on the following basis:

- (1) Provide from 25% to 40% (we will need to sort out between us a final percentage in that range that will work for both of us) of the purchase price by way of equity investment in Bidco (eg if we acquired 100% for \$60m we may require \$20m from you in return for a 33% stake in the target).
- (2) Your unconditional commitment, and proof of funds, would be required prior to our giving Notice of our intention to bid. This Notice could be given as soon as Monday or Tuesday next week.
- (3) Funds would need to flow prior to the bid being declared unconditional. You are aware of the timing options for this, although by our calculation it is unlikely this would be earlier than the end of February but potentially could be sooner.
- (4) Board representation of Bidco would be on a proportional basis reflecting our respective shareholdings.

As per our existing understanding the contents of this letter and the existence of the initiatives referred to herein (together with all previous correspondence) is strictly secret and confidential between us.

Please confirm your acceptance of the above terms by signing where indicated below and returning to me.

Yours sincerely,

Phil Newland
Group Managing Director

We accept the above terms:

.....
Josephine Grierson

.....
David Hayde

Authorised signatories for Carlyle Venture Capital, Jowada Holdings Limited and Pegasus Equity Limited.

This letter was on the first respondent's letterhead. It was signed by Mr Newland as Group Managing Director.

[50] The Master was inclined to take the view that the generality of the 11 January 2002 letter, was such that it fell short of being a formal offer to the appellant, capable of acceptance, which in his view was required by the 29 March agreement. There is some force however in the argument of Mr Ross that its terms were sufficiently specific for the appellant to decide if it wished to become involved in a takeover on those terms. Mr Ross submitted that once the appellant's responses of 14 and 17 January made plain it did not, nothing further was required of the first respondent under the 29 March agreement and it was relieved of its obligation to pay an advisory fee. It is unnecessary to resolve this question. The real issue on this branch of the case, is whether the substance of what the first respondent proposed to the appellant on 11 January amounted to an "option to participate (in the transaction) by way of significant...equity investment" within the meaning of the 29 March agreement.

[51] On this branch of the case there are allegations by the appellant that the proposal of 11 January was a sham, unreasonable and lacked good faith because it involved bidders funding a bid of \$60m themselves, rather than using the techniques proposed by the first appellant, involving only a \$20m total equity commitment. The appellant also contends that it was required to respond to the proposal, with confirmation of its ability to participate, within a few days which was an

unreasonably short time. These allegations are strongly resisted in the respondents' affidavits which point to a number of factors including, importantly, the risks in proceeding other than by a fully funded bid for 100% of the shares in Bendon not already held and doing so immediately. The possibility of raising debt against Bendon's balance sheet, and using its surplus cash, could be considered later if practicable. The respondents also make their own allegations as to the capacity of the appellant to participate in a hostile takeover bid.

[52] Clearly the appellant's general contentions as to the impropriety of the conduct of the first respondent, whether its 11 January proposal was made in good faith, and the first respondent's countering allegations, to the extent they are relevant, cannot be resolved in the summary judgment process. In seeking summary judgment the appellant is precluded from relying on these allegations and this judgment should not be read as making any comment on the merits of them whatever. We instead turn to the question of whether the substance of what was proposed in the letter of 11 January met the terms of the 29 March agreement.

[53] The context in which the 11 January letter is to be read includes the preambular section of the 29 March agreement, including the statement that the parties contemplated they would work towards joint investment in Bendon on equal terms but with the appellant's interest being a minority one. The possibility that the first respondent might proceed on its own, or with parties other than the appellant, was however envisaged. The appellant had provided advisory services and had outlined an acquisition strategy. The parties also envisaged a possible further continuing role for the appellant, part of which would involve working with legal advisers to produce an effective acquisition structure. It is in this context that the contractual commitment was made by the first respondent, to pay an advisory fee if it proceeded with a takeover of Bendon without offering the appellant the option to participate.

[54] For its own reasons, which on this summary judgment application we must accept were not motivated by an intention to exclude the appellant, the first respondent decided to proceed, and to propose co-investment, on the basis that the transaction would be an entirely self-funded 100% takeover bid, having first

acquired a blocking stake by purchasing AMP's holding. The first respondent did not, in its proposal, preclude using Bendon's cash reserves or its assets as security to fund the takeover. It simply said that it would "likely consider leverage" and capital distribution opportunities in due course "depending on the needs of the target's business as determined by its board".

[55] In the commercial context of the case it is appropriate for the Court to take a practical view of the terms of the letter of 11 January, having regard to the commercial realities of the first respondent's situation when sending it. We are satisfied that this Court knows enough of the relevant factual background to interpret the 29 March agreement in its context and to determine whether the 11 January proposal meets its terms. We have no doubt that, considered objectively, the letter was written to present a proposal to make a significant equity investment, but one which would have the practical result of discouraging the appellant from doing so. There was no attempt, for example, to reassure the appellant that the respondents would in due course do all things possible to access Bendon's cash for the purposes of completing the transaction, while seeking a commitment from the appellant to cover its position pending ascertainment of whether this was practicable. The letter of 11 January rather indicated that, even if the appellant's strategy were available it might not in the end be applied by the bidders at all. The proposal, objectively considered, was put in a way that maximised the appellant's exposure to being locked in without the prospect of any leveraging opportunity to obtain release of Bendon's cash reserves at all. The first respondent was effectively requiring the appellant to commit to come up with its full share of between 25% to 40% of the purchase price while reserving its own capacity to proceed if the offer were successful, with a mere 20% equity contribution using opportunities the appellant had devised.

[56] The 29 March agreement implicitly required from the first respondent, if it were to be excused from payment of the advisory fee, the offer to the appellant of an option to participate with it in the takeover transaction on proportionately equal terms. Two passages early on in the letter make this plain. In the third paragraph there was a preambular reference to it being the parties' intention "to co-invest equity on equally favourable terms" according to their respective shares of co-

investment as determined by the first respondent. In the fourth paragraph the letter said that “if for any reason Cullen decided to go ahead and do the deal...on terms which effectively excluded Jowada from a significant role in the investment, then Jowada must be fairly compensated”. The 29 March agreement accordingly required the first respondent to reflect in the option all elements of the commercial opportunity that the respondents themselves intended to take up. If the first respondent were to be relieved of the obligation to pay the advisory fee it was not entitled to put forward a proposal which exposed the appellant to risks not faced by the first respondent, or the second respondent, or which excluded the appellant from opportunities they would enjoy. As the first respondent was proposing an acquisition that would give it control of Bendon, and therefore control of access to its cash, it was insufficient for the first respondent to indicate to the appellant that it would need to fund its own contribution to the acquisition without access to Bendon’s cash. Given its proposed control the first respondent should have committed itself and its associate to facilitating such access for the joint benefit of the co-investors once control was obtained. It did not do so. It follows that the first respondent is not relieved from its obligation under the contract to pay the fee concerned.

[57] There is an additional reason why the first respondent was not relieved from its contractual obligation to pay the appellant an advisory fee. In the end the respondents did not complete their acquisition in the manner specified by the first respondent on 11 January 2002 and rejected by the appellant. Instead, having secured acceptances giving it 90% of the share capital of Bendon, the second respondent proceeded by a different route reverting to a leveraged investment. Mr Newland acknowledged that debt funding was obtained which was secured against the second respondent’s balance sheet. Introduction of debt funding itself was a significant departure from the scheme that formed the basis of the proposal put to the appellant on 11 January 2002. It was not open to the respondents under the 29 March agreement to change the acquisition structure from that previously proposed without offering the appellant the option of equity investment participation in the different leveraged arrangements. The fact that they had first cleared the way for the different structure by obtaining substantial acceptance for their offer is not in point. Under the 29 March agreement their obligation to pay the stipulated advisory fee

continued, unless and until they offered the appellant the option of equity investment participation in the transaction which completed the acquisition.

Residual discretion

[58] Mr Ross said that the appellant's affidavits had made extensive criticism of the propriety of the conduct of the first respondent, and in particular Mr Newland, in circumstances where, he submitted, it was plain that the matters in issue were disputed. He said that the appellant's wide ranging assertions were an inappropriate basis for it to seek summary judgment. He submitted that the appellant's conduct of the application should disqualify it from seeking summary judgment. The case was one in which it was appropriate for the Court to exercise its residual discretion under Rule 136 to refuse summary judgment even if the Court decided no defence was available. The first respondent was entitled to respond to what had been said against Mr Newland and that could only be done at a trial.

[59] We have sympathy for the respondents' concerns but have made it clear in this judgment that none of the passages concerned in the appellant's affidavits have been accepted or relied on in the findings we have made. The area of dispute could not provide a basis for refusing judgment at a trial in favour of the appellant on the issues of contractual interpretation and application which we have addressed. Applying the principles we have earlier set out we decline to exercise the residual discretion to refuse to enter summary judgment.

Conclusion

[60] In summary the appellant has shown, to the extent required on a summary judgment application, that the 29 March agreement was not abandoned and remained fully binding on the parties at all relevant times. The appellant has also demonstrated that the agreement provides for the payment of a fee if the first respondent or an associate undertakes a takeover of Bendon obtaining 51% or more of its share capital. It has also shown that by making its successful bid for Bendon in association with the second respondent, the first respondent proceeded with the

transaction and became liable to pay the appellant the prescribed advisory fee, unless it offered the appellant an option to participate by way of a significant equity investment. The only offer made was that of 11 January 2002 which did not meet the requirements of the 29 March agreement as it failed to provide an opportunity for the appellant to invest on terms equally advantageous to those enjoyed by the respondents. Furthermore, the takeover proceeded in a form which significantly differed from that proposed to the appellant. It follows that the appellant is entitled to the advisory fee prescribed by the agreement. The amount of the fee is not in dispute. It is 1.5% of the total transaction value and amounts to \$886,727 plus GST. It is unnecessary in these circumstances for the Court to determine any other aspect of the case. These findings are sufficient to establish the appellant's entitlement to summary judgment against the first respondent. Counsel did not explore the position of the second respondent separately but in case that is a live issue we shall reserve its position and give leave to the parties to file written submissions if a decision on its liability is required.

[61] The appeal is allowed against the first respondent. The proceedings are remitted to the High Court for determination of the terms of the judgment to be entered against the first respondent. The terms will need to include a final figure for the judgment sum (inclusion of the words "plus GST" being inappropriate in a judgment), and details as to interest and costs in the High Court.

[62] We have considered the parties' submissions on costs in this Court and see no reason for departing from our usual approach. The appellant is accordingly entitled to costs in this Court against the first respondent of \$5000, together with reasonable disbursements and travelling expenses of its counsel to be agreed on or failing agreement fixed by the Registrar.

Solicitors:

Grove Darlow & Partners, Auckland, for appellant
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