

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA366/2013
CA717/2013
[2015] NZCA 265**

BETWEEN JOHN GILBERT STURGESS
 Appellant

AND ROBERT MARK PATRICK DUNPHY
 AND ORS
 Respondents

CA367/2013

BETWEEN JET TRUSTEES LIMITED AND ANOR
 Appellants

AND ROBERT MARK PATRICK DUNPHY
 AND ORS
 Respondents

Court: Randerson, White and French JJ

Counsel: Appellant in CA366/2013 and CA717/2013 and Second
 Appellant in CA367/2013 (in person)
 P G Skelton QC for First Appellant in CA367/2013
 M D O'Brien and B Ward for First, Second, Seventh and Eighth
 Respondents in all appeals
 J F Anderson for Third to Sixth Respondents in all appeals

Judgment: 22 June 2015 at 10:00am

FINAL JUDGMENT OF THE COURT

A We make a final order dismissing all appeals.

**B We order that Mr Sturgess as the appellant in CA366/2013 and
 CA717/2013 and as Second Appellant in CA367/2013 pay to the first,**

second, seventh and eighth respondents, two-thirds of the costs payable on a complex appeal band B basis and usual disbursements.

C We order that Mr Sturgess as the appellant in CA366/2013 and CA717/2013 and as Second Appellant in CA367/2013 pay to the third to sixth respondents, two-thirds of the costs payable on a complex appeal band A basis and usual disbursements.

D We order that Jet Trustees Ltd as the first appellant in CA367/2013 pay to the first, second, seventh and eighth respondents, one-third of the costs payable on a complex appeal band B basis and usual disbursements.

E We order that Jet Trustees Ltd as the first appellant in CA367/2013 pay to the third to sixth respondents, one-third of the costs payable on a complex appeal band A basis and usual disbursements.

F We certify for second counsel for the first, second, seventh and eighth respondents in each appeal.

G We make no order for costs for or against John Sturgess and Associates Ltd as the second appellant in CA367/2013.

REASONS OF THE COURT

(Given by Randerson J)

Background

[1] On 24 June 2014 this Court delivered an interim judgment relating to a dispute between shareholders in Greymouth Petroleum Holdings Ltd (the Company) and related entities.¹ The Court dismissed the appeals and the cross-appeal subject only to any further issues related to the form of relief in relation to orders 1 and 3 made in the High Court.

¹ *Sturgess v Dunphy* [2014] NZCA 266 [Interim judgment].

[2] Orders 1 and 3 in the High Court provided:

1. The first defendant (Jet Trustees Limited) and the second defendant (Mr John Gilbert Sturgess) (together and separately “the Sturgess interests”) shall sell their shares (“the shares”) in Greymouth Petroleum Holdings Limited ([“]GPHL”) and in or in respect of all other companies and related entities owned legally or beneficially by the shareholders of GPHL (together an[d] separately “the Greymouth Group”), being in aggregate 13.856 per cent of the total of shares issued by those companies, at the fair market value (“the FMV”) determined by the arbitration (“the arbitration”) currently being undertaken by the parties to the 5309 proceeding and on such other terms or at such other price as might otherwise be agreed in accordance with clause 8 of the parties’ Shareholder Agreement.

...

3. If no sale of the shares has been effected prior to the commencement of the FMV arbitration hearing, the Sturgess interests must, within 10 working days following the determination of FMV, give a sale notice offering to transfer the shares to GPHL (for itself and as agent for all Greymouth Group companies and related entities) at FMV and clauses 8.5 to 8.10 and 8.12 of the Shareholder Agreement shall apply as appropriate with the necessary modifications.

[3] The Court ordered a stay of execution in respect of orders 1 and 3 since, at the time of the hearing of the appeals, an arbitration was proceeding to settle the FMV of the shares but this had not been completed.²

[4] By minute of 25 June 2014 a timetable was set for further submissions in relation to orders 1 and 3.³ The orders were subsequently extended to provide:

- (a) Appellants’ submissions to be filed by 7 August;
- (b) Respondents submissions to be filed by 21 August;
- (c) Any reply submissions to be filed within a further three working days;
- (d) Any request for an oral hearing to be made by 26 August.

[5] The arbitrator’s award determining FMV was issued on 30 July 2014. The appellants filed submissions on 7 August 2014 as directed. No submissions were made seeking a modification to orders 1 and 3. Rather, the appellants accepted that the stay of execution on orders 1 and 3 ought to be lifted. They also indicated they

² Interim judgment, above n 1, at [159].

³ *Sturgess v Dunphy* CA366/2013, 25 June 2014 [Minute (No 3) of the Court].

were intending to give sale notices under the terms of the Shareholder Agreement as envisaged by order 3. Importantly, all appellants said:

These sale notices will give the respondents the full measure of the remedy they sought and received in the High Court.

[6] On 14 August 2014 this Court discharged the stay on orders 1 and 3.⁴

[7] The respondents filed submissions on 21 August 2014 noting that the appellants had withdrawn any remaining aspect of their appeal against orders 1 and 3. It was indicated that, with certain reservations, the Company intended to give notice that it wished to acquire the appellants' shareholding. The appellants had three days to reply in terms of the timetable fixed but did not do so.

[8] By minute of 25 August 2014, this Court said:⁵

[2] We are of the view that nothing now remains of the appeals. The submissions are directed to implementation of the High Court orders. We accordingly propose to direct that the issues identified in the parties' submissions should be taken up in the High Court.

[3] If issues remain as to costs in this Court, the parties may file memoranda.

[4] Should any party maintain that the remaining issues must be dealt with in this Court, they may ask the Registrar to convene a telephone conference. That conference will need to be held this week, as the Coram will not be available for at least six weeks from the beginning of September.

[9] In the passage of time since then sale notices have been given by the appellants under the Shareholder Agreement and there have been unsuccessful negotiations between the appellants and the respondents to settle terms upon which the Company or the other respondents would purchase the appellants' shares. It also appears that attempts have been made by Mr Sturgess to sell his two per cent minority shareholding in the Company on the market. There have been rulings made by the High Court with regard to the validity of sale notices given under the Shareholder Agreement and a further judgment on quantum issues which is under

⁴ *Sturgess v Dunphy* CA366/2013, 14 August 2014 [Minute (No 5) of the Court].

⁵ *Sturgess v Dunphy* CA366/2013, 25 August 2014 [Minute (No 6) of the Court].

separate appeal to this Court.⁶ The High Court was also asked to deal with certain issues arising from the arbitrator's award on FMV.

[10] On 15 May 2015 the first, second, seventh and eighth respondents sought an award of costs. Shortly afterwards, the third to sixth respondents also sought costs.

[11] On 25 May 2015 Mr Sturgess, now representing himself, filed a memorandum. In that memorandum, he raised a number of issues:

- (a) He invited this Court to make a buyout order for his two per cent shareholding at FMV.
- (b) He sought discovery in relation to the appointment by the High Court of a director to represent the group 2 shareholders.
- (c) He sought an order that the High Court judgment be set aside and a new trial ordered.
- (d) He sought an order for stay of any Court of Appeal costs on a cross-claim described as the 5309 cross-claim.

[12] Following a telephone conference before Randerson J on 11 June 2015 the respondents have now filed submissions on the further orders sought by Mr Sturgess. Their essential submission is that there are no outstanding issues requiring the attention of this Court. Mr Sturgess had an opportunity to raise any challenge to orders 1 and 3 but did not take up that opportunity when it was afforded to him. It is now too late to raise the issue. The respondents also submit that there are no other remaining issues requiring the attention of this Court.

[13] Jet Trustees Ltd (one of the appellants in CA367/2013) has advised through counsel, Mr Skelton QC, that Jet Trustees Ltd does not seek to raise any further issues for determination by this Court.

⁶ *Greymouth Holdings Ltd v Jet Trustees Ltd* [2015] NZHC 306; CA159/2015.

Conclusion on remaining issues

[14] We are satisfied there is no further issue for determination by this Court in relation to orders 1 and 3.⁷ An opportunity was given to the appellant to raise any such issues under the timetable we have set out at [3] above. That opportunity was not taken up. It was not until some nine months later that Mr Sturgess belatedly sought to resurrect arguments concerning the sale orders. It is now too late for him to do so. We understand his anxieties about achieving a sale of his shares but, subject to any requirements of the Shareholder Agreement, we see no legal impediment to his disposing of his shares should he wish to do so. If there are any remaining issues regarding implementation of the orders of the High Court, then they should be resolved in that forum.

[15] Mr Sturgess' reliance on the leave reserved in our interim judgment is misplaced. We envisaged there would remain only a brief opportunity for any outstanding issues to be raised (as reflected in the tight timetable directed). The opportunity to seek such leave has long since expired.

[16] As to the remaining issues, (b) and (c), the dismissal of the appeals (save in respect of orders 1 and 3) means that it is now too late to seek such relief from this Court. As to (d), we will shortly deal with the issue of costs but we see no reason to order a stay of costs ordered by this Court since there are no other outstanding issues in this Court.

Costs

[17] The first, second, seventh and eighth respondents seek an award of costs for the substantive appeal against the appellants for a complex appeal on a band B basis. They also seek an uplift of 50 per cent. The third to sixth respondents seek costs as for a complex appeal on a band A basis.

[18] Mr Sturgess submits that costs should be awarded for a standard appeal on a band A basis with no uplift. It is submitted on behalf of John Sturgess and

⁷ Miller J was a member of the panel hearing the substantive appeals but is on leave at present. French J has taken his place for the purpose of this final judgment since Mr Sturgess has asked for an urgent decision.

Associates Ltd that costs should lie where they fall save that some allowance should be made for the disbursements incurred in resisting cross-claims brought by the first, second, seventh and eighth respondents that were abandoned at the commencement of the hearing of the appeals. Jet Trustees Ltd submits that its role was much more limited and that costs should be fixed on a standard appeal on a band A basis. It also submits that no uplift is justified.

[19] Mr Sturgess raised a very wide range of issues and failed in all respects. John Sturgess and Associates Ltd was closely associated with Mr Sturgess' personal interests but this did not lead to any material increase in the costs overall. Jet Trustees Ltd was separately represented. While the issues Jet Trustees Ltd raised were more limited than those raised by Mr Sturgess, they were nevertheless substantial.

[20] We have no doubt that the range and complexity of issues in these appeals fully justify an award of costs to the first, second, seventh and eighth respondents on a complex appeal on a band B basis. However, we are not satisfied there is any warrant to increase costs as sought. We take into account in this respect the submission made by Mr Sturgess that cross-appeals by the respondents were abandoned at the commencement of the hearing. We are also satisfied that an award in favour of the third to sixth respondents on a complex appeal on a band A basis is justified.

[21] We consider that costs should lie where they fall with regard to John Sturgess and Associates Ltd.

[22] As between Mr Sturgess personally and Jet Trustees Ltd, we accept that it is appropriate to apportion the costs on a two-thirds/one-third basis. We envisage one set of costs to cover all three appeals.

[23] The parties referred to the costs award made in our judgment of 28 February 2014 dealing with some preliminary issues.⁸ In that judgment, we ordered that Mr Sturgess must pay costs to the first, second, seventh and eighth respondents as for

⁸ *Sturgess v Dunphy* [2014] NZCA 45.

a standard application on a band A basis with usual disbursements.⁹ That order remains in force. The costs orders we now make relate to the substantive appeals.

Result

[24] We make a final order dismissing all appeals.

[25] We order that Mr Sturgess as the appellant in CA366/2013 and CA717/2013 and as Second Appellant in CA367/2013 pay to the first, second, seventh and eighth respondents, two-thirds of the costs payable on a complex appeal band B basis and usual disbursements.

[26] We order that Mr Sturgess as the appellant in CA366/2013 and CA717/2013 and as Second Appellant in CA367/2013 pay to the third to sixth respondents, two-thirds of the costs payable on a complex appeal band A basis and usual disbursements.

[27] We order that Jet Trustees Ltd as the first appellant in CA367/2013 pay to the first, second, seventh and eighth respondents, one-third of the costs payable on a complex appeal band B basis and usual disbursements.

[28] We order that Jet Trustees Ltd as the first appellant in CA367/2013 pay to the third to sixth respondents, one-third of the costs payable on a complex appeal band A basis and usual disbursements.

[29] We certify for second counsel for the first, second, seventh and eighth respondents.

[30] We make no order for costs for or against John Sturgess and Associates Ltd as the second appellant in CA367/2013.

Solicitors:

Anderson Creagh Lai, Auckland for First Appellant in CA367/2013
Bell Gully, Wellington for First, Second, Seventh and Eighth Respondents
Francis J Hardy, Wellington for Third to Sixth Respondents

⁹ At [37].