

IN THE HIGH COURT OF NEW ZEALAND

M NO 79/81

NAPIER REGISTRY

IN THE MATTER

of the Companies Act 1955

AND

IN THE MATTER

of DEEP SEA TRAWLERS
LIMITED a duly
incorporated company
having its registered
office at Napier

M NO 81/81

IN THE MATTER

of the Companies Act 1955

AND

IN THE MATTER

of OVERLAND INVESTMENT
COMPANY LIMITED a duly
incorporated company
having its registered
office at Napier

Hearing: 21 May 1984 - 23 May 1984

Counsel: D J White and M J Waite for Petitioner
J R Wild for New Zealand Guardian Trust
Company Limited (Special appearance
and withdrew)
A R Galbraith for Defendant

Judgment: 21 June 1984

JUDGMENT OF JEFFRIES J

Before the court are two petitions dated 30 June 1981 by Finn Edward Jenssen of Napier, company director (hereafter called "Finn"), as petitioner, for orders of the court to wind up Deep Sea Trawlers Limited and

Overland Investment Company Limited, respectively. The only objector is Finn's brother, Jens William Jenssen of Napier, company director (hereafter called "Jens"), so it is not only a commercial dispute but, regrettably, a family one as well.

The Jenssen brothers are not strangers to this court as they were before it in April 1982 during four days in a dispute over shareholding in two of their companies, namely, Overland Investment Company Ltd (a subject company in these proceedings) and Deep Sea Fisheries Limited. Finn was the plaintiff in both actions which by consent were heard together. Briefly, Finn alleged in both actions Jens had acquired greater shareholdings in each company than he was entitled to. I delivered one judgment, which decided both cases, and it is sufficient to say Finn succeeded in the Overland case, and failed in the Deep Sea Fisheries case. See Jenssen v Jenssen and Deep Sea Trawlers Ltd; Jenssen v Jenssen and Jenssen (Unreported, Napier Registry, A.83/80 and A.38/81 - 24 August 1982). Following those decisions both Finn and Jens lodged appeals to the Court of Appeal but apparently neither has taken any further steps to bring the appeals to hearing. Because it was a family dispute involving men who had emigrated to New Zealand from a distant country, and on account of the cases themselves, it appeared to me necessary to precede the individual decisions on each action with a general account of relevant family and commercial history. Each counsel appearing on these petitions informed the court that account was accepted as accurate and therefore for the purposes of the hearing of the petitions was adopted. It

was also agreed all exhibits available in the former actions were to be used for this hearing. Because of the foregoing I take the liberty of reproducing for this judgment the general part of the previous judgment.

"Part I - General

The Jenssens are Norsemen, with the sea in their blood, although that was not their occupations in their homeland before coming to New Zealand. Contact with New Zealand was established by Jens William Jenssen, now aged 59 years, (whom I will throughout refer to as "Jens") in a way which was fortuitous, as shall be seen. The other brother, Finn Edward Jenssen (whom I shall call "Finn"), is 3 1/2 years younger than Jens. In 1948, in Norway, Jens established a factory of his own. He owned besides the factory, a house on the coast and a sawmill. In 1953 he had built for him from timber from his own mill a vessel he called Jenco I. In August 1954, with his wife, he sailed Jenco I down the Atlantic Ocean, through the Panama Canal into the Pacific. His original destination was Australia. Whilst at Tahiti he received a postcard from a friend he had known in Norway who had travelled to Napier, and it was of Hawke Bay. The friend's name was Hans Mattias Andersen (from his signature this appears to be the correct spelling) and to Jens the Hawke Bay coastal area looked somewhat of a fairyland after the steep rocks of home. He changed course and headed directly from Tahiti to Napier, arriving on July 4 1955. By trade Jens was a plumber, but the wages at Napier were not attractive. His friend Hans was a fisherman, and after going out in his boat and seeing for himself what could be

made decided, for the first time in his life, to become a fisherman.

He outfitted Jenco I for crayfishing and in 3 1/2 months earned approximately 7,500 pounds. From that highly successful beginning he went on with other members of his family, as shall be seen, to establish a large and successful group of related companies based upon fishing and boats. There are some 13, or more, interlocking companies concerned with almost every aspect of the fishing industry. It is understood the Jenssen family are almost the exclusive owners of these companies.

Jens unquestionably was the pathfinder and was well established in the fishing business before his father and mother and brother arrived in New Zealand. His mother and father arrived first in 1956 for a holiday but liked New Zealand so much they never returned to Norway. Jens' father, Jens Daniel, died intestate in November 1981. His mother is still alive.

Finn was born in 1926 at Skien, Norway, and was educated there, leaving school at the age of 14 1/2 years to become a plumber's apprentice. He became a master plumber at the age of 25 years employing up to 14 men. He ran this business for 7 years from 1951 to 1958. He built up sufficient assets to enable him to emigrate to New Zealand with his wife and 3 young boys in 1958. His brother Jens had then been in New Zealand for 3 years, and his father and mother for 2 years.

The foundation of the Jenssen family success, starting from Jens' arrival first in New Zealand was 3

fishing trawlers, each named Jenco. They were owned in different shares, and on this issue there is agreement. Jenco I was built for Jens alone and in it he sailed to New Zealand and started his fishing business. It has always been understood he is the sole owner of Jenco I. Before Finn left Norway in 1958 arrangements had been made by Jens and his father for the building there of the second trawler named Jenco II. About this trawler's ownership there was trouble right at the start. According to Finn the original arrangement was that all three would share equally in the boat, but Jens wanted full authority to control it. Father disagreed and offered Finn a half share which he took with his father and had the boat built. Jens in his evidence did not agree this was the true version. Also before Finn left Norway he arranged for the third trawler, Jenco III, to be built. This boat was owned in equal one-third shares by the Jenssens. The internal family books kept by the father were for each of the Jenco trawlers. Jencos II and III were in Jens' name officially for the sound reason he was better placed to import the trawlers into New Zealand. Apparently the trawlers were registered in Jens' name in the early days for the fishing licences.

From his demeanour in the witness box, coupled with much other evidence, I have concluded Jens is a strong willed, dominant personality. Undoubtedly he is a very hard worker. He is intelligent with a shrewd grasp of legal, and particularly company, principles. Throughout I think he always understood the fundamental issues in each transaction. He certainly has now a superior grasp of spoken English language compared with

his brother Finn, and it follows superior to his father when he was alive. Jens, from the beginning was the business manager who dealt with the officials and professional advisers. From the start of the business as a family concern his knowledge of the language made this imperative. Besides that I think there were other reasons. When partnerships (I use the term loosely) are formed for business, individuals tend to gravitate over a period of time to fixed roles. They are selected by choice, circumstances, proclivities, skills, talents and for a host of smaller, or less significant reasons. An aspect of this tendency is for the roles to be even more fixed, and to an extent more isolated, in family businesses because, perhaps, of the underlying trust one has with a blood relation. It was Jens who occupied the front of the house and dealt with the commercial world. It was the father who was the bookkeeper within the family settling as between the three of them the financial score. This collateral accounting system had apparently little to do with the official accounts. Finn, it appeared to me, held the least official position within the family, but contributed by his hard work and industry. By virtue of their positions Finn had to do the most trusting, and Jens the least. However, I think it would not be correct to portray Finn as a man possessed of lesser understanding of commercial realities. He had for 7 years conducted a reasonably sized plumbing business in Norway, as a relatively young man. He had employed 14 men at one time. He might have been deficient in the language, especially in the early days, but he well knew five beans are five beans in Norway or Napier.

The family operating as a unit in the fishing industry lasted for about 23 odd years from about 1956 (first with the father) to 1979. The first company was Deep Sea Fisheries Limited (hereinafter referred to as "D.S.F.") and it is the subject of one of the actions, and will be described in more detail hereafter. In evidence Finn said his knowledge of English on arrival in 1958 was "pretty good". It may have been for social intercourse, but for business Jens would have been superior. Finn says in the early years he was very much involved in the management of the companies. The court has no reason to doubt that. It would appear the sixties were for the family a period of rapid growth in their business. Very often cracks do not appear until growth changes to consolidation. Finn said difficulties (never throughout the case actually specified) really started in the early 1970's. By October 1979 Finn ceased to be actively involved in the family companies. He wanted out of the whole business, and other actions pending are to facilitate that. The difficulties, or problems, existed solely between Jens and Finn. Their father knew of them but himself had had a stroke in the mid seventies and wished to concentrate on care of his aged wife. He was unable to resolve them, but signed a letter which will be referred to hereafter.

Mr John C.K.Fabian, who practised law in Napier, acted for the family until his appointment to the Magistrates' Court Bench in 1968. He also has since died, but letters were produced in evidence and will also be referred to in due course. From about 1960 the family accountant was Mr A.H. Oldershaw. He was called to give

evidence by Finn, the plaintiff in both cases. Two other witnesses who had performed legal work for the Jenssens were also called."

Some of the foregoing account is not strictly relevant to this judgment but by its inclusion no harm is done. Both brothers gave evidence again, and, predictably enough, I wish to change nothing concerning my observations on them. There are some factual changes which are important and have a bearing on the issues before the court. At the time of filing of the petitions the father, Jens Daniel Jenssen, a shareholder in Deep Sea Trawlers, was alive. He died intestate in November 1981 but it was not considered necessary for his estate to be represented at the first hearing. Since then The New Zealand Guardian Trust Company Limited has taken out letters of administration in the estate. Further consequences of this are referred to below. His wife was a beneficiary on the intestacy but she died on 12 March 1984. She left a "home made" will in which her estate was bequeathed to Jens's wife, Mrs Elsa Jenssen. Finn has given notice of challenge to the will by lodging a caveat.

Before leaving the general part of the first judgment I observe it was written for those cases but I venture to suggest it takes on additional significance two years' later when the court must decide whether to wind up the companies on the two grounds specified and detailed hereafter.

Amendment of Deep Sea Trawlers' Petition

As mentioned above the brothers' father, Jens Daniel Jenssen, died after issue of the petition for Deep Sea Trawlers. Mr White, for the petitioner, in opening sought the leave of court to amend paragraph 5 of the petition which states:-

"Your petitioner is a contributory to the Company in that he holds 666 of the shares in the Company, the balance of the shares being held by Jens William Jenssen of Napier, Company Director, as to 668 shares and Jens Daniel Jenssen of Napier, Company Director, as to 666 shares."

by including the words "the estate of" before the name "Jens Daniel Jenssen" and seeking the discretion of the court to dispense with readvertising. Mr Galbraith objected immediately to the application to dispense with readvertising on the ground the estate ought to be represented. Mr White countered that The New Zealand Guardian Trust would consent and Mr J.R. Wild appeared later in the morning, as counsel for that company giving an undertaking it would file a consent under seal to the amendment and to the hearing proceeding. Further he advised the court The New Zealand Guardian Trust wholeheartedly supported the petitions for winding up on the ground it could not in the present state make any progress with administration of the estate. The consent under seal has been filed. I indicated to counsel I would reserve the point to be decided after hearing all the

evidence. I exercise my discretion to dispense with readvertisement as I can see no disadvantage to any party but further postponement of resolution of the fundamental issues in dispute.

Further Background

Before examining in detail the two petitions and their grounds it is necessary to say more on the whole commercial activity of the Jenssen family which was not required to any great extent for the 1982 actions. The challenge for the court is to give sufficient further background to make the decisions intelligible without burdening the judgment with unprofitable detail, which most certainly abounds. Moreover, both counsel and the court concur that the facts of this case are unusual and therefore the authorities are of less exact significance.

I think it is best to begin with Jens's affidavit of April 1982 filed for Deep Sea Trawlers' petition, but having general application. With some of this background Finn is in agreement. Jens said it is impossible to understand the operations of the Jenssen group of companies without appreciating the shareholding, trading and relationships within the group of which there are some 16 companies. As an aside the observation is made there are far too many separate companies, which plethora has contributed to the group's problems. The beginnings are satisfactorily covered by the earlier extract from the 1982 judgment.

For the 20 year period from mid 1950's to the mid 1970's, as a broad generalisation it can be said the

Jenssen family, with assets, prospered and grew. The father and his two sons undoubtedly worked very hard and lived very frugally. In all but the most unfortunate circumstances an almost certain formula for material success. Jens expressed the family policy as creation of assets that would increase in value rather than obtaining cash profits that would be spent. They expanded from simple fish catching and marketing into building fishing vessels, operating a fish shed, and later into provedoring. Reflecting the commercially buoyant conditions it seems the period of greatest expansion was the 60's decade. As might be expected the early 1970's, first with drastic fuel price increases and some fish price control, brought appreciable commercial adversity. It is worthwhile noting Finn puts the emergence of tension with Jens at about this time. From say 1975/76, when the disputes surfaced, to October 1979 being the date of the final rupture when Finn entirely withdrew from all active involvement in the group companies, the relationship spiralled downwards. I am satisfied 1979/80 heralded the onset of the really serious crisis in the group from which it has never recovered.

Something must now be said of the particular activities of the separate companies in the group. Two companies are wholesale fish merchants, namely New Zealand Fisheries Ltd and Deep Sea Fisheries Ltd. The former is a public company (not listed) with a Jenssen family shareholding, either direct or indirect of 75.9%. There is a shareholding of R.E. Black Ltd (outside the group) in N.Z. Fisheries which is said to be in trust for Deep Sea Fisheries which would raise the family holding. The

latter is owned 100% by the Jenssen family directly. One of the 1982 actions concerned Deep Sea Fisheries Ltd and Finn was held not to be an equal third shareholder for ordinary shares with Jens and his father, as he maintained he had always thought to be the position. There is evidence this company is failing fast and that its bankers have taken very recent action by freezing accounts and calling on guarantors. Also its export certification and fish packing house licence have been withdrawn. Two winding up petitions were presented in respect of it, but probably have been withdrawn because the debts have been paid. Its Australian subsidiary has been wound up as set out hereafter.

Deep Sea Trawlers Ltd, which is a subject company in these proceedings, is owned almost equally as set out in paragraph 5 of the petition reproduced above except that Jens owns two more shares over and above the holding of Finn, or the estate. That company owns fishing vessels Deep Sea I, Deep Sea II and Deep Sea III, with its income and expenditure on the vessels recorded through Deep Sea Fisheries Ltd.

The other subject company, Overland Investment Co. Limited, was also a company involved in the 1982 actions which resulted in a decision that the shareholding was as follows:-

Deep Sea Trawlers Ltd	23,000 shares
Jens William Jenssen	5 "
Finn Edward Jenssen	5 "

That was the result for which Finn contended and he was successful in that action. Overland was incorporated in 1964 as a non trading investment company. By virtue of equal shareholding in Deep Sea Trawlers there is equal shareholding in Overland as far as the brothers are concerned. For most of the Jenssens' companies, including the investment company, Overland, but excluding Fosters and N.Z. Fisheries, a Mr A.H. Oldershaw was the secretary until his resignation in June 1981. There are four other companies all beginning with the name Fosters, and are as follows:-

Fosters Ship Chandlery Limited
Fosters Ship Provedores Limited
Fosters Buildings Limited
Fosters Manufacturing Company Limited

The four companies were acquired by the Jenssens in the early 1970's and all companies are subsidiaries of Overland. Apart from Fosters Buildings Limited the three other companies are trading. Advances by Fosters Ship Chandlery Ltd and Fosters Ship Provedores Ltd are challenged in a separate action and form part of Finn's complaint about the manner in which Jens has conducted the affairs of the companies. The Fosters companies had as their secretary Mr P.D. Wilson, until he resigned in September 1981. Fosters Ship Provedores is now in receivership.

After Messrs Oldershaw and Wilson resigned, a Mrs J.I. Morris became secretary for all the important companies, apparently with the exception of New Zealand

Fisheries, but she herself resigned as from 3 February, 1984. I think the following is indicative of the previously expressed view that the crisis for the group began in about 1979/80 when Finn withdrew entirely. There is evidence stemming from Mr Oldershaw, who had performed services for the Jenssen family as an accountant almost since the beginning of their commercial activities as a family, of extreme frustration and dissatisfaction over his treatment as a professional adviser. He made complaint, understandably, that he had professional fees outstanding for many years representing quite large sums and that he was not getting full co-operation, especially from Jens over supplying of basic accounting and financial information. Attached to one of the affidavits of Finn is a long letter addressed to the Jenssen men signed by Mr Oldershaw dated February 24, 1981 in which he set out these complaints and attempted to lay down a formula for future provision of professional services. Whether or not as part of his growing distrust of his brother's conduct of the companies affairs Finn very much took Mr Oldershaw's side. As another symptom of the deterioration in the group various creditors in the early 1980's started to take legal action. In fact two companies in the group are now in receivership. It would serve no useful purpose to set out details of those actions. As might be expected the Inland Revenue Department also became dissatisfied because tax returns were not being filed by companies in the group, apparently for the simple reason that yearly financial statements had not been produced.

I am satisfied that Jens became alarmed at the position and for that reason placed, in 1982, the

accountancy affairs of the group in the hands of a leading firm of chartered accountants in Wellington, Price Waterhouse. It seems the work on the group was performed by Mr G.I. Gould, of the firm. Mr Gould appeared under subpoena from Finn to give evidence and produce statements of account which are referred to hereafter. Itself not of a great weight, but in the context of this case worth mentioning, the engagement of Price Waterhouse was the unilateral decision of Jens taken without consultation with Finn who did not agree with a Wellington firm performing the work.

Again the challenge to the court is to summarise and generalise accurately. There were three aspects of Mr Gould's evidence which seemed of importance. First, he acknowledged authorship of a report headed "Private and Confidential" addressed to Jens dated 20 July 1982 which surveyed the financial position of the group to 31 March 1982. It is recorded the firm's instructions did not include an audit. Secondly, arising out of Deep Sea Trawlers' financial statements for the year ending 31 March 1980 it was revealed there are inter company transactions to the sum of \$103,338 which are termed "unreconcilable" by Mr Gould. More will be said on this aspect. Thirdly, the financial statements of the more important companies in the group had last been made available to all shareholders for the year ended 31 March 1979. Mr Gould, from the witness box, produced the draft financial statements for the two subject companies of these proceedings, the four Fosters companies, and two other subsidiary non trading companies for the years ending 31 March 1980, 1981, 1982 and 1983. On the issues

the court has to decide it is relevant to state Finn said he had not received the July 1982 report until Melbourne in April this year (see below) and the draft financial statements until seven days before this hearing began, namely, 14 May 1984. Surely a telling illustration of distrust and isolation of these two from each other. I think it is appropriate to add here that I accept the evidence of Finn that he has not only been denied information which should have come his way automatically but moreover he has been obstructed in his attempts to obtain it.

It is not necessary to make close findings of fact on the evidence, but Mr Gould's evidence was of importance to the case. Exactly when his firm received the first instructions is not clear but they were to prepare the report of July 1982. It was Jens who commissioned that report and it was to him it was passed although the firm intends to debit Deep Sea Trawlers for their fees. After the report the firm was retained, about October 1982 to prepare the annual financial statements of some of the companies for four years, 1980-1983. There was evidence of pressure from the Inland Revenue Department and banks for these accounts to be made available.

"Unreconcilable differences" in the accounts of Deep Sea Trawlers

Attached to the draft accounts of Deep Sea Trawlers for the year ended 31 March 1980 under the heading "Statement of Accounting Policies" is note (f) which is reproduced:-

"(f) Related companies

Balances represent loans and advances together with current accounts for transactions between and on behalf of the respective companies within the group controlled by the Jenssen family. At 31 March 1979 there were unreconcilable differences over the aggregated related companies in the group amounting to \$103,338 of which \$85,775 related directly to this company."

Although questioned about this in the box Mr Gould could not throw further light upon the enigma. He simply claimed the specific information was not available and that it might be necessary to go back quite a number of years to obtain it. The differences existed as at 31 March 1979, and his firm did not prepare the financial statements for that year. The court can take the matter no further but the revelation of the existence of the "unreconcilable differences" to the extent of over one hundred thousand dollars in a subject company for a winding up order must be regarded as an important weighting factor against the company's continued existence.

Issue of share capital in Deep Sea Trawlers

There was one matter of inter company dealing which did assume prominence at the hearing of the petitions and it was a proposal put into effect in July 1981 whereby Deep Sea Trawlers proposed to meet a very large debt to the public company, N.Z. Fisheries Ltd. After Finn had issued his petitions (the grounds on which

are set out hereafter) a meeting was called in response sometime in July 1981 of Deep Sea Trawlers apparently at the instance of Jens' son, Jens Ryder Jenssen. Notice of the meeting probably was given to Finn but, despite reference in documents to be mentioned, it seems he never attended the Deep Sea Trawler meeting. Some days later a meeting of N.Z. Fisheries was held. At the conclusion of the hearing of evidence counsel for Finn informed the court it was agreed that Finn attended that meeting at its beginning but left when he was dismissed as a director. It was agreed by counsel Finn was not present when the decisions about to be detailed were made. There is independent evidence contained in paragraphs 6 and 22 of Finn's affidavit sworn on 20 October 1981 he was unaware the proposal concerning Deep Sea Trawler's debt to N.Z. Fisheries had been advanced to the extent it had. It is clear enough he knew in July 1981 of the proposal but not of the action on it.

In essence the proposal, as recorded in the minute produced was to increase the capital of Deep Sea Trawlers by \$160,000 (1,000 shares valued at \$160 each) and offer them to N.Z. Fisheries "in an endeavour to offset the current account between the two companies". (Exhibit GG). The minute was signed by Jens and his father, but no one else. The minute of the N.Z. Fisheries meeting (Exhibit HH) records the offer was accepted and that Jens and Finn abstained. The minute was signed by Mr M.A. Sturm as chairman of N.Z. Fisheries and by Mr B. Bridger (a son-in-law of Jens) and Jens Ryder.

This incident need not be dwelt upon excepting to this extent. First, it was altogether a stratagem

earmarked by ad hocery and panic. Probably Jens's hand was in the idea although his son claims it as his. Of itself it must go into the scales as evidence of Finn's complaint of disregard for his interests and in support of the just and equitable ground. Secondly, the minutes are inaccurate on some aspects but Exhibit HH does say this:-

"Deep Sea Trawlers Ltd due to deadlock"

Thirdly, the adjustments to the accounts of Deep Sea Trawlers and N.Z. Fisheries Ltd were made for the year ended 31 March 1982, but there was no backing for the transactions such as an objective valuation of Deep Sea Trawlers' shares. Fourthly, the pre-emptive provisions in the articles were not followed and therefore the transaction is invalid.

Winding up in Melbourne of Deep Sea Fisheries (Pty) Ltd

Mention was made earlier of a hearing in Melbourne in April of this year and it is appropriate to give some further details for it makes its contribution to this court's decision. Deep Sea Fisheries (Pty) Limited was incorporated in Victoria in 1968 as a fish and frozen food wholesaler and distributor. It was in effect a wholly owned subsidiary of Deep Sea Fisheries Ltd. It has not traded for some time. Finn presented a petition to the Supreme Court of Victoria to wind up the company upon the grounds it was unable to pay its debts and that it was just and equitable that the company should be wound up. Apparently there was evidence of serious financial difficulties in the past but no hard evidence the company

was unable to pay its debts. The determination of the case was on the just and equitable ground. In a judgment which depended almost entirely on a careful fact analysis of the prospects of that company trading again successfully in Victoria Starke J held the ground was made out and the winding up order declared. The judge carefully avoided all unnecessary comment on the New Zealand situation for fear of saying anything to compromise the position here. Whilst mentioning the unfortunate nature of the personal relationship existing between Jens and Finn he did not give it prominence in his decision. The judge himself seemed to have no doubt the companies in the group could accurately be described as partnership companies, and with that view I respectfully agree. Finally, with the winding up of this Melbourne company a wholly owned subsidiary of it, New Zealand Frozen Goods Limited, will fall.

The failed settlement

Finally, on the general fact background, unusually, but appropriately, reference is here made to attempts by the parties to reach a settlement and thereby avoid the hearings. The word appropriate is used because at the stipulation of Jens's solicitors, who actually initiated the settlement proposals, the negotiations were specifically unprotected so that evidence about them could be given in court. Briefly, the proposal was both Jens and Finn would sever their connections with the group by resigning as directors, and administration, together with much needed reconstruction, would be conducted in future by an entirely independent board. This proposal was

accepted by Finn and he signed a deed of settlement which gave effect to it. Jens's son also signed but at the last moment Jens himself refused. His reasons given in the witness box for refusing were unconvincing. In the box he put up a counter proposal to leave the companies when his parents' estates are finalised and his solicitors have since submitted a signed undertaking to the court to that effect. I am afraid that proposal is not considered by the court to have sufficient substance to dissuade it from making the winding up orders. The event which would bring it to action could be years away.

The Petitions

The petitions themselves are reached. The grounds of the petition for Deep Sea Trawlers are as follows:-

"7. IN managing the Company on a day to day basis JENS WILLIAM JENSSEN has acted in the affairs of the Company in his own interests rather than in the interests of the members of the Company as a whole and/or in a manner unfair or unjust to your petitioner in the following respects:

- (a) Your petitioner has received no income by way of salary, dividends or directors' fees from the Company, or any of its subsidiaries, since 1979;
- (b) The Company has made unauthorised and unsecured interest free loans to other companies in which JENS WILLIAM JENSSEN

and members of his family are the shareholders, full particulars whereof will be provided in the affidavit of verification;

- (c) These unauthorised and unsecured interest free loans were made when the Company was facing a liquidity crisis;
- (d) Since 1979 your petitioner has been unable to obtain information relating to the financial affairs of the Company, or its subsidiaries, from the respective Company secretaries;
- (e) The respective Company secretaries have not been able to prepare the accounts for the Company, or its subsidiaries, for the years ended 31 March 1980 and 31 March 1981 because the books of prime entry and other necessary information have not been made available to them.
- (f) The Company secretary has threatened to resign because proper accounting records have and are not being kept by JENS WILLIAM JENSSEN.
- (g) Fosters Ship Chandlery Limited and Fosters Ship Provedores Limited, which are subsidiaries of the Company also managed by JENS WILLIAM JENSSEN, have made

unauthorised and unsecured interest free loans to Napier Steam Laundry Limited, a company in which JENS WILLIAM JENSSEN is the majority shareholder, full particulars whereof will be provided in the affidavit of verification; and

- (h) There is a complete deadlock between your petitioner and JENS WILLIAM JENSSEN as to the affairs of the Company and the third director and shareholder, JENS DANIEL JENSSEN, is not prepared to intervene to resolve the deadlock.

8. IN the circumstances it is just and equitable that the Company should be wound up."

The "just and equitable" ground of paragraph 8 is identical in the Overland petition but there are some differences in paragraph 7 of the Overland petition which states as follows:-

7. IN managing the Company on a day to day basis JENS WILLIAM JENSSEN has acted in the affairs of the Company in his own interests rather than in the interests of the members of the Company as a whole and/or in a manner unfair or unjust to your petitioner in the following respects:

- (a) Your petitioner has received no income by way of salary, dividends or directors' fees from the Company, or any of its subsidiaries, since 1979;

- (b) The Company has made unauthorised and unsecured interest free loans to JENS WILLIAM JENSSEN personally and to SALON EILEAN LIMITED, a company in which the daughter of JENS WILLIAM JENSSEN holds shares, full particulars whereof will be provided in the affidavit of verification;
- (c) Since 1979 your petitioner has been unable to obtain information relating to the financial affairs of the Company, or its subsidiaries, from the respective Company secretaries;
- (d) The former Company secretary was not able to prepare the accounts for the Company for the years ended 31 March 1980 and 31 March 1981 because the books of prime entry and other necessary information were not made available to him;
- (e) The Department of Inland Revenue has threatened to prosecute the Company for failing to lodge its income tax return for the year ended 31 March 1980;
- (f) The Company has received a summons from the District Court at Napier for failing to pay a fine for late presentation to the Companies Office of its annual return for the year ended 31 March 1979;

- (g) The Company has not filed an annual return to the Companies Office for the year ended 31 March 1980;
- (h) The Company secretary has resigned and no new Company secretary has been appointed;
- (i) The District Registrar of Companies has threatened to prosecute your petitioner if a new Company secretary is not appointed; and
- (j) There is a complete deadlock between your petitioner and JENS WILLIAM JENSSEN as to the affairs of the Company."

The grounds for both petitions are two-fold:

- (a) Jens has acted in the affairs of the companies in his own interests rather than in the interests of the members of the companies as a whole and/or in a manner unfair or unjust to Finn.
- (b) It is just and equitable that the companies should be wound up.

The grounds for the petitions are contained in ss 217(da) and (f) of the Companies Act 1955, as amended. Both petitions make it clear there are two separate grounds, in the alternative.

Although the petitions were issued nearly three years ago it was not disputed the question is to be decided as at date of hearing rather than date of filing. See Re Fildes Bros [1970] 1 All E.R. 923 at 928; Re Deep Sea Fisheries Pty Ltd (Unreported, Supreme Court of Victoria, 1981 No. Co. 12083, 1 May 1984, Starke J.) and The Just and Equitable Ground, Callaway, pp53-54.

Section 217 (da) was inserted into the principal Act by the Companies Amendment Act 1980 which came into force on 1 April 1981. The section, as far as the court is aware, has not yet been considered by the High Court in New Zealand. It is almost identical with New South Wales legislation. See Companies Act 1961 (NSW) s 222(1)(f). There are two limbs in which the second incorporates the not unfamiliar concept, occurring more frequently in legislation, of acting in a manner which appears to the court to be unfair or unjust. The first limb is narrower and contrasts a director's actions in the affairs of the company in his own interests rather than the interests of the members of the company as a whole, impliedly to the latter's disadvantage. However, this limb is not without its difficulties which are illustrated by the possibility "the interests of the members of the company as a whole" may not be easily identified if they are heterogeneous. In such a situation the facts would assume importance. The analysis on the section is, with respect, adequately covered for our purposes by Bowen, C.J., in Re Cumberland Holdings Ltd 1 A.C.L.R. 361 at pp 374-375. The order winding up the company was ultimately reversed in the Privy Council but no criticism was levelled at the manner in which the learned Chief Justice construed the section's meaning.

Mr White in argument conceded that some of the particulars of paragraph 7 in each petition had been either performed, or overtaken by events. Also he argued that these particulars overlapped with submissions related to the just and equitable ground yet to be dealt with. The concluded opinion of the court on both limbs of s 217(da) is that whilst some actions initiated, caused, or promoted by Jens (e.g. the \$103,338 "unreconcilable differences" and the issue of share capital in Deep Sea Trawlers to discharge a debt to another company in the group) give reason for justifiable concern about the management of the group companies they still do not reach the necessary level of personal selfishness, or unfairness, or unjustness so as to impress upon the court the need to act on that ground. There is another reason connected with the just expressed view and it concerns the state of evidence about the alleged inter company transactions (particularly loans) engineered by Jens and complained of by Finn. The impression the court gets is that many of the transactions were without proper authority and create some suspicion, at least, they might have been in his own interests as opposed to those of members of the company as a whole. However without a much more detailed examination of each separate transaction, which was not done, the court refuses to make an order on that ground.

The court turns then to the just and equitable ground of s 217(f) which was the principal one relied on by the petitioner. In a judgment of mine, some years old now, Re Kiwitea Saw Milling Company Limited (Unreported, Palmerston North, M.156/77 - 4 August 1978) I noted the

width of the discretion but the care necessary in its exercise because a contract should not lightly be set aside. The court was then, and is still, very much influenced by the following passage from Lord Wilberforce's speech Ebrahimi v Westbourne Galleries & Others [1973] A.C. 360, from p.379:-

"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as

equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

I turn back to examine more closely the facts for the decision whether to order the windings up must necessarily depend largely upon them. See Re Tivoli Freeholds Ltd [1972] V.R. 445 and 468-469.

The court regards the group companies basically as partnership companies with the partners first comprising father and two sons, but now only the sons. I have already mentioned this was the view of Starke J of Victoria when he examined the family companies, and it is mine. There is therefore an intimacy and special need for trust as the "partners" are now reduced to two. See Re Yenidje Tobacco Company Limited [1916] 2 Ch. 426; Tench v Tench [1930] NZLR 403; In Re The Nelson Suburban Bus Company Limited [1944] G.L.R. 501, and Ebrahimi v Westbourne Galleries Ltd [1973] A.C. 360. As emerges from the extract of my 1982 judgment the brothers were then far apart but the possibility of some reconciliation, at least to the extent the businesses could be salvaged, did not appear excluded. Since then the state of the personal relationship has worsened. One brother has, and the other is about to, enter the seventh decade of their lives and there has been displayed up till now iron determination over many years, which the court must say in the course of facing its responsibilities lies very much more with Jens than Finn. By the latter's actions to date he has shown a degree of reasonableness and willingness to find some solution even at heavy financial cost to himself. I refer here to his recent unsuccessful attempts to sell his share of the operation, but do not feel it necessary to say more on that issue.

With those observations the court examines probably the most important area of dispute, whether or not there is a deadlock so as to prevent the proper operation of the companies. See Re Yenidje Tobacco Company Limited (supra) and Re F. Hall & Sons Ltd [1939] NZLR 408. Mr Galbraith argued that deadlock had only been pleaded under the s 217(da) and could not be argued under the just and equitable ground as Mr White had done. I do not accept that argument as deadlock is the one word that best covers the situation into which these brothers have got themselves. As long ago as 1981 both Jens and his son were using the word to describe the situation. Deadlock is an interesting word in sound and meaning. It appealed to Charles Dickens as an appropriate name for leading characters in a novel concerning a suit in Chancery. The dictionary meaning is that of a standstill, or inaction, resulting from the opposing aims of different people. The impasse is the result of clash. Mr Galbraith argued the companies are not in deadlock because the shareholding in Deep Sea Trawlers means disputes can actually be decided regardless of the final outcome of the father's shareholding. The court rejects that argument as too refined to meet adequately this situation. An impasse can arise without the presence of exact equality. Taking the mid 1970's as the beginning of serious disruption in the family business almost 10 years have passed and the protagonists continue to face each other in bellicose stances and mutual denunciation. Jens, since the inception of the business, has occupied the higher ground and a noticeable characteristic of his overall attitude for the past 5 years has been negative defence. When in the last few weeks he did initiate a settlement proposal

he withdrew it at the very end. Finn in keeping with this de facto exclusion has had to adopt the aggressor's role because no other is available. The negative stronger faced by the positive weaker has created its own balance of power between these two, and that, for these issues, is deadlock.

Having made the foregoing observations which were necessary to make the finding of deadlock in the companies to go on to deal separately with lack of trust or confidence between the two brothers seems superfluous. How could a deadlock arise such as I have described without a deep seated, entrenched lack of trust and of confidence?

Not without regret, because it could have been different, the court intends to order the winding up of both companies as it is just and equitable so to do. However, to permit the parties to consider this court's view the orders will not be made formally until the 15th day following the day of publication of this decision. If both parties (i.e. the two brothers) notify the Registrar before that day they do not desire orders to be made the court will accede to their wishes.

The question of costs is reserved.



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