IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-00977

BETWEEN	GREYMOUTH GAS KAIMIRO LIMITED GREYMOUTH GAS PARAHAKA LIMITED GREYMOUTH GAS TURANGI LIMITED GREYMOUTH PETROLEUM TURANGI LIMITED Plaintiffs
AND	SWIFT ENERGY NEW ZEALAND LIMITED Defendant

Hearing: 3 April 2009

Appearances: M D O'Brien for the Plaintiffs
J Shackleton for the Defendant

Judgment: 27 April 2009

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on 27 April 2009 at 9.30 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel/Solicitors:
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Interim Injunction

[1] The plaintiffs seek an interlocutory injunction in the following terms:

> An order prohibiting the defendant from paying the purchase price or any part of it to its ultimate parent company or any other affiliated company or paying it out of the jurisdiction, or making any other arrangement which is not appropriate to ensure an ability to repay the funds should that be necessary, pending resolution of the dispute by arbitration or otherwise.

[2] In the context of the contractual relationship between the parties the interim injunction is designed to ensure that US$5 million, being the first tranche of a purchase price payable by the plaintiffs to the defendant, remains in New Zealand and is not, for the time being, paid to Swift Energy Co, the defendant's parent company in the United States.

[3] On 25 February 2009 Duffy J heard the interim injunction application on an urgent basis. She made an order in the following terms:

> … restraining the defendant, pending further order of the Court, from dealing with the payment to be made upon presentation of Irrevocable Unconditional Letter of Credit no.2 pursuant to the Agreement for Sale and Purchase of Assets between the plaintiffs and defendants dated 2 May 2008 in any way other than by deposit in a New Zealand registered bank with a Standard & Poor's credit rating of AA or better. The defendant shall be entitled to transfer the funds deposited from any one such bank to any other such bank as it may select from time to time.

[4] I understand that since Duffy J's order the relevant sum of US$5 million has been held on deposit through the trust account of the defendant's solicitors in Wellington.

[5] It is common ground between the parties that the order made by Duffy J was to be regarded as temporary until such time as the merits of the plaintiffs' interim injunction application could be full argued. Hence this hearing.

Background

[6] The plaintiffs (Greymouth) and the defendant (SENZ) entered into an agreement on 2 May 2008 whereby Greymouth agreed to purchase SENZ's 80% interest in a petroleum exploration permit. The agreed purchase price was US$15 million. That purchase price was payable in three equal tranches of US$5 million by Irrevocable Unconditional Letters of Credit (IULC). The IULCs, stipulated as being numbers 2, 3, and 4, were to be delivered by Greymouth to SENZ on the completion date of the contract (25 August 2008), and were to be presented by SENZ to the IULC's surety (the Bank of New Zealand) for payment 6, 18, and 30 months respectively after the contract's completion date. These arrangements were contained in clause 3.4.1 of the May 2008 contract.

[7] It was the first IULC (No.2) which SENZ was entitled to present for payment on 25 February 2009, which was the subject of Duffy J's interim order.

[8] Clause 3.4.2 of the parties' contract provided that neither Greymouth nor Petrochem Limited (who appears to have been a previous owner of Greymouth's 20% interest in the exploration permit and was guaranteeing Greymouth's performance of the May 2008 contract) would:

> … commence proceedings of any kind whatsoever to interfere with, delay, hinder, or prevent the surety in each of the three [IULCs] from paying out to the seller on presentation of the [IULCs].

[9] The contract also contains (clause 14.3) a standard arbitration clause in terms of which disputes over the contract are to be referred to an arbitrator. Counsel inform me that the clause has been invoked in respect of the parties' current dispute but that an agreed arbitrator has yet to be appointed.

[10] Unfortunately for the parties the royalty holder of the exploration permit, GXL Royalities Limited, challenged the parties' agreement. The challenge had two litigation limbs, neither of which has yet been determined. The first challenge took the form of judicial review of the consent which had been given by the Minister of Energy to the sale of SENZ's interest in the exploration permit. The second challenge constituted civil proceedings against SENZ and Greymouth seeking a

declaration that the sale of SENZ's permit interest was unlawful because of an alleged non-compliance with the royalty deed.

[11] Faced with this situation the parties negotiated an arrangement so that their 2 May 2008 agreement could be unwound in the event of a finding that the sale by SENZ of its permit interest to Greymouth was unlawful, ineffective, or invalid. Their agreement to meet this contingency is contained in a letter dated 25 August 2008, endorsed by both parties, which provides:

> Swift agrees that if the sale and assignment by Swift of its interest in the permit to the Greymouth companies is unlawful, ineffective or not valid, the Greymouth companies may, by giving written notice to Swift, require Swift to return without interest all or such part of the purchase price and/or all Irrevocable or Unconditional Letters of Credit (plus GST if any) it has received from the Greymouth companies and Swift shall do (*and shall make appropriate arrangements to ensure it is able to do so*) and the parties shall forthwith resume the participating interest each party held in the permit before completion. (Emphasis added)

It is the italicised words in the 25 August 2008 letter which lie at the heart of the injunction application.

[12] It is common ground between the parties that the August 2008 letter represents an agreed variation of the May 2008 contract. Thus the arbitration clause applies to it and clearly extends to any dispute over the italicised words.

[13] Before they executed the 2 May 2008 contract the parties had negotiated and agreed on the terms and format of the IULCs which were to be used to make the three tranches of the purchase price. The form of the IULCs was scheduled to the parties' contract.

[14] The stipulated surety of all three IULCs is the Bank of New Zealand at Auckland. The Greymouth companies are the account party. SENZ or its nominee is the beneficiary. The expiry time (relevantly here 25 February 2009), is also stipulated.

[15] Relevantly the IULC provides:

- The account party and surety "are jointly and severally held and bound to the beneficiary for the maximum amount and bind themselves … jointly and severally for the payment of that sum".

- The IULC "will be available in whole or in part upon presentation …[at an Auckland branch of the Bank of New Zealand of]… a certificate", the form of which is embodied in the IULC.

- The certificate is to be addressed to the Bank of New Zealand.

- The date and the amount covered by the IULC was to be inserted in the certificate. The beneficiary (SENZ) was to specify the beneficiary's account number to which the specified sum was to be paid.

- The surety could, notwithstanding the terms of the IULC pay to the beneficiary at any time the maximum sum less amounts previously paid.

- The IULC was subject to the Uniform Customs and Practice for Documentary Credits (2007 revision), International Chamber of Commerce, Paris, France publication No. 600.

- Subject to the previous provision, the IULC is governed by New Zealand law.

The Dispute

[16] The parties' dispute arises solely out of Greymouth's perception that the economic recession in the United States, coupled with a significant decline in the share price of Swift Energy Co on US stock markets, might impede SENZ's ability to repay the US$5 million should the May 2008 agreement have to be unwound.

[17] But for Duffy J's interim order the proceeds of IULC No.2 due on 25 February 2009 would have been paid to an account in the name of SENZ with J P Morgan Chase in the United States. The IULC's certificate had already been

prepared to that effect. It is Greymouth's contention that payment of the proceeds of the IULC to SENZ out of the jurisdiction, or indeed by SENZ to its parent company, Swift Energy Co, does not fall within the ambit of "appropriate arrangements to ensure it is able to do so" in the event of the US$5 million having to be repaid to Greymouth if the May 2008 contract were to be unwound.

[18] By early February 2009 Greymouth had become concerned about SENZ's ability to repay should it be called upon to do so. SENZ had effectively disposed of all its New Zealand assets although that was something well within the contemplation of the parties. SENZ's interest in the exploration permit, which had been sold to Greymouth, was a substantial asset. SENZ had made no secret of the fact that it was divesting itself of its New Zealand assets. Of greater concern to Greymouth was the decline in the value of Swift Energy Co's shares from US$50.36 in early May 2008 to US$9.08 on 23 February 2009. The market capitalisation of the company had declined over the same period from US$1.53 billion to US$309 million.

[19] Greymouth had written to SENZ asking about the nature of the "appropriate arrangements" it had made. SENZ's reply was not specific. It failed to reply to a follow up letter. To that extent SENZ might be seen to have provoked the interim injunction application.

[20] Greymouth's concerns remain unchanged. An affidavit was filed by Mr A R Isaac, a forensic accountant, who has reviewed relevant materials including the affidavits filed in this proceeding. This review has also included materials relating to Swift Energy Co (SEC) in the United States. Mr Isaac's conclusions were:

- SEC reported a US$260.5 million loss for the December 2008 year which included a US$452.7 million loss for the last quarter of that year.

- There has been a significant drop in the prices for oil and natural gas from late in the third quarter of 2008 which has had, and may continue to have, significant negative impacts on SEC's cash flow and liquidity.

- The 2008 financial year loss coupled with difficult trading conditions "may make it difficult for SEC to maintain its bank facilities on the same terms and conditions".

- Current economic conditions in the United States raise "the possibility" that some members of SEC's bank group might not be prepared to provide their proportionate share of any funding required by SEC.

- SEC might find it difficult to stay inside minimum financial ratios (which it was doing on 31 December 2008) particularly if undrawn bank loans credit were reduced in any way, which would be a distinct possibility in the current economic climate.

- Excluding SEC's current credit lines, its current ratio is 0.51:1.

- The drop in SEC's share price reflected market concerns about SEC's future trading proposals.

- A US$5 million revolving line of credit between SEC and SENZ "will only be of benefit to the creditors of SENZ if SEC is able to make funding available".

[21] Since Duffy J's interim order SENZ has filed further affidavit evidence through Mr J P Mitchell who is based in Houston, Texas, and is the senior vice president "commercial transactions and land" of SEC. SEC wholly owns Swift Energy International Inc which in turn owns SENZ. Mr Mitchell was closely involved in the May–August 2008 negotiations between the parties.

[22] Mr Mitchell sets out what the current arrangements are so far as SENZ's continued obligation to repay is concerned. He takes the view that SENZ is under no obligation to disclose those arrangements to Greymouth, but is doing so to assist the Court. The arrangements are:

- A daily check was being made of SEC's cash flows to ensure there were sufficient moneys available to repay Greymouth the US$5 million if the need arose.

- SENZ has a revolving line of credit arrangement with SEC in terms of which SEC has agreed to make available to SENZ on a revolving basis an amount of up to US$5 million.

- SEC's credit facility as at 31 December 2008 consisted of a US$500 million revolving line of credit with a US$400 million borrowing base.

- The revolving loan of credit agreement between SENZ and SEC was, on its face, originally limited to providing up to US$5 million for its "working capital". That agreement has now been replaced by a subsequent amended revolving line of credit agreement which authorises the use of loan proceeds "for any legal business purpose".

- As at 31 December 2008 the Swift group of companies enjoyed total revenues from continuing operations of US$820.8 million.

- The Swift group had net cash provided by operating activities of US$582 million and assets totalling in excess of US$1.5 billion.

Discussion

[23] Mr O'Brien stressed that Greymouth sought the protection of an interim injunction only until the projected arbitration involving the parties had been completed. In his submission the revolving credit facility outlined in Mr Mitchell's affidavit (supra [22]) was inadequate and fell short of being "appropriate arrangements to ensure" SENZ was able to repay the moneys if necessary.

[24] Counsel submitted there was a serious question to be tried. SENZ not only had a contingent obligation to pay the US$5 million. It was also obliged to ensure it

had the ability to repay. Although the first obligation was contingent, the second obligation was immediate and operative.

[25] The balance of convenience favoured granting an interim injunction. If, for some reason, SENZ and/or SEC were unable to meet the contingent obligation then Greymouth stood to lose US$5 million. The fact that SENZ would, if the May 2008 agreement was unwound, resume ownership of its 80% in the exploration permit "did not provide sufficient comfort". Mr R M P Dunphy gave affidavit evidence to the effect that, despite Greymouth having paid US$15 million for the permit interest, its value was uncertain and there was no guarantee anyone else would pay as much. Moreover, it was unacceptable for Greymouth to be kept out of its money for any period of time in the event of a declaration of invalidity.

[26] Mr O'Brien further submitted that damages would be an adequate remedy for SENZ if its interpretation of the 25 August 2008 words was upheld at arbitration. The status quo should be preserved.

[27] The effect of Duffy J's interim order was to fetter the proceeds of an IULC. There is ample authority suggesting courts are reluctant to interfere with IULCs through remedies such as injunctive relief. Unsurprisingly counsel parted company on this issue. Mr Shackleton submitted IULCs were virtually sacrosanct. Mr O'Brien did not disagree, but submitted an injunction in this case would interfere, not with the IULC itself, but merely with its proceeds.

[28] In *Introco Ltd v Notis Shipping Corporation (the "Bhoja Trader")* [1981] 2 Lloyd's Rep. 258, the English Court of Appeal declined to uphold a Mareva injunction involving an irrevocable letter of credit in a situation where the money under the letter of credit was payable to a bank account at Piraeus in Greece. The Court of Appeal expressed the view that had the letter of credit provided for the cash to be payable in London, then a Mareva injunction could have been issued.

> It is the natural corollary of the proposition that a letter of credit or bank guarantee is to be treated as cash that when the bank pays and cash is received by the beneficiary, it should be subject to the same restraints as any other of his cash assets. Enjoining the beneficiary from removing the cash asset from the jurisdiction is not the same as taking action, whether by

> injunction or an order staying execution, which would prevent him obtaining the cash. [at 258]

[29] The Court of Appeal referred to what is described as "the well-established principle" that a Court would not, in the absence of fraud, interfere with a person's right to call on the bank to make payment under its guarantee:

> Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the lifeblood of commerce. Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand. [at 257]

[30] In *Cruickshank v Westpac Banking Corporation* [1989] 1 NZLR 114 Sinclair J, in a case where Westpac had wrongly refused to honour an irrevocable letter of credit, referred to letters of credit in a commercial context as being "sacrosanct":

> Letters of credit of the type with which this action is concerned have a status all of their own. They are documents in common use in a commercial and business world particularly in international, and to a lesser degree, domestic transactions. They are regarded by the commercial and business world as sacrosanct and are documents frequently negotiated so that eventually the person who is to be paid in accordance with its terms may be far removed from the person in fact named in the original transaction. Those factors must be borne in mind when one comes to consider such documents. It is a well recognised principle in contracts for the sale of goods where irrevocable letters of credit are established for payments due under such contracts, that the issuing bank of such a letter of credit has an absolute obligation to pay irrespective of any dispute which may exist between the parties in relation to those goods. [at 121]

[31] The special nature of IULCs is recognised in *Halsbury's Laws of England*:

> The buyer [of a documentary letter of credit] is not entitled to an injunction restraining the seller from dealing with, or the bank from paying under, the letter of credit on the grounds of any breach of contract by the seller, other than in a case of clearly established fraud by the seller or, possibly, in other very exceptional circumstances. [Vol 41 (2005 re-issue) para 377]

> An irrevocable credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary. [Vol 49 (2008 5th ed.) para 934.]

[32] Mr Shackleton, in addition to relying on the status of IULCs and the courts' reluctance to interfere with them by injunctions (there being no suggestion here of

fraud), submitted that a claim for injunctive relief was flawed in this case quite simply because Greymouth had not displayed a cause of action.

[33] Greymouth's statement of claim, which sets out the cause of action, pleads the background facts surrounding the 2 May 2008 agreement, the settlement of the transaction on 25 August 2008, and the critical variation letter of that date. It pleads the exchange of correspondence between the parties in February 2009 which highlighted Greymouth's concerns over the adequacy of repayment arrangements. The pleaded cause of action is that SENZ is in breach of its contractual obligations by failing to make appropriate arrangements to ensure it is able to return all or part of the purchase price. It further pleads as particulars that SENZ intends to distribute or pay the 25 February 2009 instalment (US$5 million) to SEC in the United States and that this is not "an appropriate arrangement as required by the [25 August 2008 letter]". The substantive relief claimed is for an order prohibiting SENZ from paying the purchase price or any part of it to its ultimate parent company or any other affiliated company or paying the purchase price out of the jurisdiction "or making any other arrangement which is not appropriate to ensure an ability to repay the funds should that be necessary pending resolution of the dispute by arbitration or otherwise".

[34] In Mr Shackleton's submission Greymouth's substantive claim was essentially one for declaratory relief seeking a correct interpretation of the critical 25 August words. There was no substantive claim involving a damages issue. Thus, in an injunctive relief context, it was tenuous whether there was a serious issue to be tried.

[35] I record that, towards the end of the hearing, Mr O'Brien indicated he might want to amend Greymouth's interlocutory application specifically to refer to the proceeds of the IULC being paid overseas. Mr Shackleton for his part foreshadowed opposition to such an amendment which he considered would change the basis on which he had prepared his submissions.

[36] Six days after the hearing Mr O'Brien filed a memorandum seeking an amendment. An injunction prohibiting SENZ from paying the purchase price or any

part of it to its ultimate parent company or any other affiliated company was retained. Mirroring the order made by Duffy J, however, an expanded injunction was sought prohibiting the transfer of the proceeds of the IULC from SENZ's account with J P Morgan Chase in the United States to any other bank or deposit-taker with a Standard & Poor's credit rating lower than the current credit rating of J P Morgan Chase of A+. In short, a restriction on SENZ transferring the US$5 million out of the jurisdiction was abandoned, but an obligation on SENZ to retain the moneys in its originally proposed J P Morgan Chase account or some comparable account was sought.

[37] Given the result which flows from my judgment I do not have to consider whether to grant such an amendment.

Decision

[38] The general principles applicable to interim injunctive relief are well known and do not need to be replicated in this judgment (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396; *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140). Greymouth must raise a serious issue to be tried. The balance of convenience must be assessed. The risk of serious damage which cannot appropriately be compensated by a damages award must be weighed. And importantly, the overall justice of the result on the parties' competing positions must be considered.

[39] I am satisfied that Greymouth has raised a serious issue to be tried. The parties' contractual obligations imposed on SENZ both a contingent obligation to repay the US$5 million (and potentially the two subsequent instalments of the US$15 million purchase price), if it eventuates that the 2 May 2008 agreement is unlawful, ineffective or invalid. That contingent obligation is coupled with an immediate obligation by SENZ to "make appropriate arrangements to ensure it is able to do so". In my judgment, whether SENZ is obliged to reveal its arrangements to Greymouth and importantly whether certain arrangements comply with the contractual intention of the parties, are serious issues appropriate for judicial or arbitral determination. But, as is apparent from the statement of claim and counsel's

submissions, the real issue is whether Greymouth is entitled to interim injunctive relief pending a decision by the arbitrator.

[40] In my judgment Greymouth is not entitled to an interim injunction in the circumstances currently before the Court. There are a number of reasons why I have reached this view. Those reasons lead me, in the exercise of my discretion, to the conclusion that to grant an interim injunction will be contrary to the justice of the case before me. I turn to the reasons which in combination have led to my conclusion.

[41] First, (and I expressly indicate this reason is certainly not binding on and should carry no weight with a subsequent arbitrator) the evidence does not satisfy me that the current arrangements between SENZ and SEC render SENZ's contingent obligation to repay dubious or of little worth. The evidence satisfies me that SEC is a substantial corporation. It is the largest oil and gas producer in the State of Louisiana and has other financial interests and a substantial cashflow. The observations of Mr Isaac relating to capitalisation, share price decline and credit arrangements point to phenomena which most, if not all, companies listed on developed world stock exchanges are currently facing. Oil and gas prices are notoriously volatile and unpredictable. Historically this has been the case, and given endemic political instability in many of the globe's oil-producing regions, will continue to be the case. I have no intention of making judicial pronouncements on the current financial state of SEC or predicting its financial future. But such evidence as I have falls well short of satisfying me that SEC is in imminent danger of collapse, or that the current standby arrangements it has put in place with SENZ, put the latter's ability to perform its contingent liability at significant risk.

[42] My second reason relates to the effect an interim injunction would have on the contractual position of the parties. The parties did not bargain for any restriction to be placed on the use to which SENZ, as vendor under the 2 May 2008 agreement, could make of the three US$5 million instalments of the purchase price. Like any other vendor, SENZ can do what it likes with its money. The 25 August 2008 letter in no way alters either the obligation of Greymouth to pay the 25 February 2009 instalment or the right of SENZ to have unrestricted use of that money. Certainly

SENZ assumed an obligation to make arrangements to ensure it had the ability to meet its continuent liability should the May 2008 agreement have to be unwound. But had the parties on 25 August 2008 intended to place some new restriction on SENZ's right to deal with its money as it wished, then other mechanisms imposing such restrictions could have been agreed. They were not.

[43] Thirdly, although I accept the distinction evident from the Court of Appeal's judgment in *Intrico* (supra [28]) between an IULC and its proceeds, I consider courts should exercise caution and restraint in the IULC area. Had (hypothetically) the US$5 million been payable not by an IULC but instead by cheque into SENZ's New Zealand bank account, I would probably not have been persuaded, for my first and second reasons set out above, to make a Mareva injunction or a freezing order. But the mechanism of payment on which the parties agreed is, in my judgment, a powerful reason for exercising my discretion against making an interim injunction. The agreed form of the IULC which the parties scheduled to their contract (supra[13] – [15]) and its agreed certificate specify neither a payee nor place of payment. The beneficiary was SENZ or its nominee. The destination of the funds payable under the IULC was thus entirely a matter for SENZ as the IULC's beneficiary. This, in my judgment, is a powerful pointer to the "sacrosanct" nature of SENZ's interest and strengthens the argument that the parties intended SENZ to have unrestricted use of the IULC's proceeds.

[44] Additionally, as a matter of contract, clause 3.4.2 of the May 2008 contract (supra [8]) obliged Greymouth not to commence proceedings which interfered with, delayed, or hindered the Bank of New Zealand from paying out to SENZ on presentation of the IULC. In this case, Greymouth, by commencing its proceedings and seeking injunctive relief before presentation, was *prima facie* in breach of that contractual obligation. It cannot be seriously argued that the interim order made by Duffy J is not a hindrance to paying out to SENZ since the order prevented SENZ's intended payment of the moneys to it in the United States.

[45] Duffy J in [23] of her 3 March reasons judgment was not carried by the argument that injunctive relief was a breach of clause 3.4.2. Her Honour saw the

injunction as not interfering, delaying or hindering BNZ from paying out to SENZ or its nominee. She instead stated:

> The impact of the interim injunction is felt by Swift NZ Ltd which is required to direct the BNZ to pay the money to the bank account nominated in the interim injunction order.

[46] With respect, for my part, I see an order limiting the destination of the proceeds of this IULC as being both an interference with and a hindrance on paying out.

[47] Certainly, I do not rule out the right and power of courts to freeze or control by injunctive relief the proceeds of an IULC in exceptional cases. (See the first *Halsbury* reference (supra [31]). But in my judgment, this is not such a case. The agreed IULC, unlike the letter of credit in *Intrico*, did not stipulate a specific bank account or destination. Nor did it stipulate payment to a New Zealand account.

[48] Fourthly, the evidence falls short of satisfying me that Greymouth is facing any imminent or irrevocable loss. The dispute dividing the parties is whether SENZ's current obligation to make "appropriate arrangements" for its contingent liability to repay is met by arrangements which are indeed adequate or appropriate. Whether or when the contingent liability to repay will arise is problematic. There is nothing to suggest the obligation to repay is imminent. Payment of the US$5 million overseas, or by SENZ to SEC, obviously cause Greymouth some anxiety. But that anxiety in my judgment falls well short of the type of loss or risk which interim injunctions are designed to prevent.

[49] Fifthly and finally, despite the concerns raised in Mr Dunphy's affidavit (supra [25]) I am not satisfied that, in the event of the May 2008 agreement having to be unwound, the resumption by Greymouth and SENZ of their previous 20% and 80% interests respectively in the exploration permit, would be inadequate to provide appropriate security for SENZ's obligation to disgorge the US$5 million were it, for some reason, to be tardy in meeting its contingent liability.

[50] Taking the necessary step back and considering the overall justice of the situation I am satisfied that this over-arching obligation is met by declining interim

injunctive relief. The five reasons I have articulated are cogent and compelling. Greymouth, its anxiety rooted in the impact which global economic uncertainty may have on SEC, is trying to strengthen its position under both the 2 May 2008 contract and the 25 August 2008 unwind agreement. In my judgment, and for the reasons I have stated, Greymouth should not be permitted on the current facts to achieve a stronger contractual position through the mechanism of interim relief.

Result

[51] The plaintiffs' application for an interlocutory injunction is dismissed.

[52] The interim injunction made by Duffy J on 25 February 2009 is rescinded. In making that order I am conscious of the fact that the matter was argued before Duffy J at very short notice. The Judge did not have the benefit of the additional evidence and the carefully considered submissions which I have received.

[53] The plaintiffs' substantive application is listed for mention in the Duty Judge list at 10.00 a.m. on Thursday 28 May 2009.

Costs

[54] The defendant is entitled to costs. I note that Duffy J reserved costs in respect of the initial hearing before her. Counsel are urged to resolve costs between themselves. Leave is reserved to file memoranda on costs if agreement cannot be reached. Costs can be determined on the papers unless counsel require a hearing.

.....…
Priestley J