

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2007-404-**

**BETWEEN**

**TURNERS & GROWERS (HORTICULTURE)**

**LIMITED** a duly incorporated company having its  
registered office at Auckland

**Plaintiff**

**AND**

**GDP TRUSTEE LIMITED** a duly incorporated  
company having its registered office at Auckland

**First Defendant**

**AND**

**ALAN DOUGAL THOMPSON** of Kerikeri,  
businessman

**Second Defendant**

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**STATEMENT OF CLAIM  
26 NOVEMBER 2007**

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Auckland

**AND** **HELEN LOUISE THOMPSON** of Kerikeri,  
occupation unknown

**Third Defendant**

**AND** **PHILIP HAMISH MCHARDY** of Hastings,  
merchant banker

**Fourth Defendant**

**AND** **SUNDRY INVESTMENTS LIMITED** a duly  
incorporated company having its registered office  
at Hastings

**Fifth Defendant**

**AND** **JONATHAN FORBES MCHARDY** of New York,  
merchant banker

**Sixth Defendant**

**AND** **PHILIP HAMISH MCHARDY, JONATHAN  
FORBES MCHARDY AND ROGER SINCLAIR** as  
trustees of the **MURRAYFIELD TRUST**

**Seventh Defendants**

**AND** **ANBRAN TRUSTEE COMPANY LIMITED** a duly  
incorporated company having its registered office  
at Wellington

**Eighth Defendant**

**AND** **LAWRENCE BRUCE FLETCHER** of London,  
England, merchant banker

**Ninth Defendant**

The plaintiff by its solicitors says:

### **Parties**

1. The plaintiff, Turners & Growers (Horticulture) Limited ("**TGL**"), is a duly incorporated company having its registered office at Auckland.
2. The first defendant, GDP Trustee Limited ("**GDPT**"), is a duly incorporated company having its registered office at Auckland. GDPT is the nominee company of Grove Darlow & Partners, solicitors ("**Grove Darlow**").
3. The second defendant, Alan Thompson, is the Managing Director of Kerifresh Limited ("**Kerifresh**"), and a founding shareholder of Kerifresh.
4. The third defendant, Helen Thompson, is the wife of Alan Thompson and jointly holds shares in Kerifresh with Alan Thompson.
5. The fourth defendant, Hamish McHardy, is a merchant banker, Chairman of Kerifresh, and a shareholder of Kerifresh.
6. The fifth defendant, Sundry Investments Limited ("**SIL**"), is a company owned by Hamish and Audrey McHardy and controlled by Hamish McHardy. SIL is a shareholder of Kerifresh.
7. The sixth defendant, Jonathan McHardy, is a merchant banker who was living in London at the time of many of the transactions at issue in these proceedings and is now resident in New York. Jonathan McHardy is the son of Hamish and Audrey McHardy.
8. The seventh defendants, Hamish McHardy, Jonathan McHardy and Roger Sinclair, are trustees of the Murrayfield Trust. Hamish McHardy, Jonathan McHardy and Roger Sinclair jointly hold shares in Kerifresh. Roger Sinclair became a trustee of the Murrayfield Trust in September 2003.
9. The eighth defendant, Anbran Trustee Company Limited ("**Anbran**"), is a duly incorporated company whose sole shareholder is Emma Eastwood. Anbran is a shareholder of Kerifresh.
10. The ninth defendant, Lawrence Fletcher, is a merchant banker who resides in London, and is a shareholder of Kerifresh through GDPT.

11. Kerifresh, is a New Zealand incorporated company based in Northland. Its principal business is the production of lemons and other fruit.
12. TGL holds 4.7% of the shares in Kerifresh comprising 346,000 shares.

#### **Kerifresh is a code company**

13. At all times since July 2001 Kerifresh's financial statements show that it had more than \$20 million in gross assets and Kerifresh's register of members shows that it had more than 50 shareholders. Accordingly, Kerifresh was at all material times, and remains, a code company for the purposes of the Takeovers Act 1993 ("**Act**") and the Takeovers Code ("**Code**").
14. On 1 October 2007 TGL gave notice under rule 41 of the Code of its intention to make a full takeover offer for Kerifresh. On the same date TGL lodged a complaint with the Takeovers Panel ("**Panel**") regarding its concerns that it had become aware of allegations of certain irregular transactions that had occurred with respect to Kerifresh shares over the previous five years.

#### **Alan Thompson's shareholding**

15. In July 2001, at the time the Code came into force, and subsequently, Alan Thompson and Helen Thompson were the joint owners of 1,313,016 shares in Kerifresh, representing 18.49% of the company's total voting rights. The parents of Alan Thompson held 346,050 shares in Kerifresh, representing 4.87% of the company's total voting rights.
16. During the period from July 2001 to May 2007, Alan and Helen Thompson transferred 250,206 Kerifresh shares to the Thompson Family Trust. Alan and Helen Thompson are the sole trustees of that Trust. Accordingly they remain the registered holders of those shares and have retained control of those shares.

#### **Agreement between Alan Thompson, Hamish McHardy and Jonathan McHardy**

17. As a condition to Hamish McHardy personally, and Hamish McHardy and Jonathan McHardy jointly as trustees of the Murrayfield Trust, acquiring shares in Kerifresh, prior to 29 May 2002 Hamish McHardy and Alan

Thompson entered into an oral agreement ("**Agreement**"), which included the following terms:

- (a) Alan Thompson agreed to lend \$245,000 to Hamish McHardy so as to allow Hamish McHardy to purchase 361,000 shares in Kerifresh.
- (b) The loan was interest free and of no fixed term.
- (c) Alan Thompson had no right to require the loan to be repaid in cash but could require the loan to be satisfied at any time by the transfer to him of the 361,000 Kerifresh shares.
- (d) Alan Thompson was entitled to any income arising from the 361,000 shares purchased by Hamish McHardy.
- (e) Hamish McHardy agreed to maintain at least 361,000 shares in Kerifresh, or the equivalent if split or bonus shares were issued, and would not allow any security interests to be registered against the shares.
- (f) While the Agreement did not confer voting rights in the shares on Alan Thompson the Agreement gave him a beneficial interest in the 361,000 Kerifresh shares initially held in the name of Hamish McHardy and subsequently in the name of SIL.

#### **Purchase of shares from the Hendls**

18. On 29 May 2002, Hamish McHardy personally acquired 669,200 shares and Hamish McHardy and Jonathan McHardy as trustees of the Murrayfield Trust acquired 597,316 shares in Kerifresh, from Peter and Linda Hendl.

#### **Purchase of shares by SIL**

19. On 23 September 2002, Hamish McHardy transferred to SIL, a company wholly owned by him and his wife and of which he and his wife are the sole directors, the 669,200 shares in Kerifresh which he had acquired as referred to in paragraph 18 above.
20. Between 18 August 2003 and 22 September 2003, SIL acquired a further 84,000 shares in Kerifresh.

## **The purchase of shares by Anbran**

### *Initial purchase by GMS Fulfilment Limited*

21. In or about 2004, Graham Cowley through his company GMS Fulfilment Limited ("**GMSF**"), Alan Thompson and Hamish McHardy entered into an arrangement whereby ("**Arrangement**"):
- (a) GMSF would acquire shares in Kerifresh;
  - (b) Hamish McHardy would provide GMSF with the funds to make the acquisitions.
22. As a further step in the Arrangement, although not known to Graham Cowley or GMSF, the shares acquired by GMSF were agreed by Alan Thompson and Hamish McHardy to be transferred to Alan Thompson to satisfy the obligations of Hamish McHardy under the Agreement.
23. In accordance with the terms of the Arrangement, between 28 July 2004 and 30 June 2005, GMSF acquired 245,000 Kerifresh shares (3.45% of total voting rights) from numerous individual shareholders. The funding for the purchase of these shares was provided by Hamish McHardy.

### *Purchase of shares by Anbran*

24. Graham Cowley requested that GMSF cease to be involved in further purchases of shares in Kerifresh on 27 September 2005.
25. Alan Thompson arranged the incorporation of Anbran, and the establishment of the Anbran Trust.
26. On 1 November 2005 the 245,000 Kerifresh shares held by GMSF were transferred to Anbran as trustee of the Anbran Trust. Pursuant to the Arrangement, to the extent that Anbran has any liability for the purchase price of the shares, it is to Alan Thompson not to Hamish McHardy (who originally funded the purchase of the shares).
27. On 31 December 2005 Anbran as trustee of the Anbran Trust acquired a further 116,000 shares in Kerifresh from multiple shareholders. The purchase price for the shares was provided by Hamish McHardy. Again, to the extent Anbran has any liability for the repayment of the sums

advanced to it to buy these additional shares, pursuant to the Arrangement it is indebted to Alan Thompson, not Hamish McHardy.

28. Anbran's total shareholding in Kerifresh was therefore 361,000 shares, or some 5.08% of the total voting rights in the company.
29. The above arrangements in respect of Anbran discharged (or were intended to discharge) Hamish McHardy's obligations to Alan Thompson under the Agreement.

#### **Share repurchases by Kerifresh**

30. During the period from March 2006 to April 2006, Kerifresh repurchased shares which it held as treasury stock. Such a repurchase increased the percentage of voting rights held by existing shareholders.

#### **Acquisition of shares by Helen Thompson**

31. On 29 June 2006, Helen Thompson purchased 4,900 shares in Kerifresh from the Kerifresh Employee Trust.

#### **Takeover offer made by TGL**

32. On 1 October 2007, TGL gave notice of an intention to make a takeover offer for all the shares in Kerifresh in accordance with the Code. The terms of the offer included (among other things):
  - (a) The consideration offered was \$2.00 in cash for every Kerifresh share.
  - (b) The offer was conditional on acceptances being received, by the end of the offer period, in respect of that number of Kerifresh shares which, when taken together with Kerifresh shares already held or controlled by TGL, confer on TGL more than 50% of the voting rights in Kerifresh.
33. On the same date TGL made a formal complaint to the Panel regarding its concerns that it had become aware of allegations of certain irregular transactions that had occurred with respect to Kerifresh shares, which, if correct, indicated numerous contraventions of the Code. It provided the Panel with such information it had in relation to its concerns and requested the Panel to investigate such matters.

**Acquisition of shares by Lawrence Fletcher**

34. In August 2007, GDPT acquired 10,000 shares in Kerifresh. Such acquisition was facilitated by Alan Thompson, Hamish McHardy and Jonathan McHardy, with Hamish McHardy initially paying the purchase price of \$15,000 for those shares for which he was subsequently reimbursed.
35. On 8 October 2007, Alan Thompson and Helen Thompson executed a share transfer form transferring to GDPT 165,000 Kerifresh shares. That transfer has not yet been registered by Kerifresh.
36. On 18 October 2007, GDPT made an offer to Kerifresh shareholders to buy 335,000 Kerifresh shares.
37. On 19 October 2007, Russell McVeagh on behalf of TGL, wrote to Grove Darlow requesting that their client withdraw the offer given that Hamish McHardy was restrained from acquiring further shares in Kerifresh and Jonathan McHardy was an acknowledged associate of Hamish McHardy with their collective shareholding in Kerifresh being 18.87%.
38. The offer was not withdrawn, but is now the subject of a restraining order issued by the Panel on 9 November 2007.
39. At all times in respect of the above transactions, GDPT was acting as a nominee. Initially at the time of the purchase of the 10,000 shares referred to in paragraph 34, Grove Darlow advised that it was acting on behalf of Hamish McHardy and his associated interests. Accordingly, GDPT was acting as nominee for Hamish McHardy and those associated interests.
40. Subsequently, Grove Darlow has advised that GDPT is acting as nominee for Lawrence Fletcher.

**Determination of the Takeovers Panel dated 18 October 2007**

41. After considering the complaint by TGL, and after undertaking its own investigations, the Panel called a meeting under section 32 of the Act which was held on 16 October 2007.
42. By determination dated 18 October 2007, the Panel found (among other things):

- (a) that it was not satisfied that Hamish McHardy complied with rule 6(1) of the Code when he acquired 669,200 Kerifresh shares in May 2002;
- (b) that it was not satisfied that Hamish McHardy, through his company SIL, complied with rule 6(1) of the Code when SIL purchased 84,000 Kerifresh shares in August and September 2003;
- (c) that it was not satisfied that Hamish McHardy was not directly and knowingly concerned in the contravention of the Code by Graham Cowley, GMSF and Alan Thompson;
- (d) that it was not satisfied that Emma Eastwood, and Anbran, which acquired 361,000 shares in Kerifresh in late 2005, complied with rule 6(1) of the Code in respect of those acquisitions;
- (e) that Alan Thompson was directly, and knowingly concerned in, and a party to, any contravention of the Code by Anbran and Emma Eastwood.

A full copy of the Panel's determination dated 18 October 2007 is annexed as Appendix A.

- 43. On 26 October 2007, TGL made a written request of the Panel to apply to Court for orders under sections 36, 37, 39 and 43 of the Act against those persons who were subject to the Panel's determination dated 18 October 2007. TGL also requested the Panel to apply for orders under sections 33I and 33J against Lawrence Fletcher and GDPT.
- 44. The Panel did not apply to Court for the requested orders within 10 days of receiving the request.
- 45. The letter from Russell McVeagh to Grove Darlow dated 19 October 2007 referred to in paragraph 37 above was copied to the Panel. After considering that letter, and after undertaking its own independent inquiry, the Panel called a further meeting under section 32 of the Act. That meeting was held on 7 November 2007.

46. By determination dated 9 November 2007, the Panel found that (among other things):
- (a) it was not satisfied that Jonathan McHardy complied with rule 6 of the Code when he with Hamish McHardy, as trustees of the Murrayfield Trust, acquired 597,316 Kerifresh shares on 29 May 2002;
  - (b) it was not satisfied that Lawrence Fletcher complied with, is complying with, or intends to comply with, rule 6 of the Code, in relation to his having acquired control of, acquiring control of, or intending to acquire control of, through GDPT as holder, up to 500,000 voting rights in Kerifresh (of which 181,000 have already been acquired or have been contracted to be acquired);
  - (c) it considers that Jonathan McHardy and Hamish McHardy have contravened the Code by being directly, and knowingly concerned in, or a party to, the contraventions of the Code by Lawrence Fletcher detailed above.

Full copies of the Panel's determination dated 9 November 2007, and reasons for determination dated 22 November 2007, are annexed as Appendices B and C.

#### **Association between Alan Thompson and Hamish McHardy**

47. Alan Thompson and Hamish McHardy became associates for the purposes of rule 4 of the Code upon the entry into the Agreement, and remained associates at least until the 361,000 shares were acquired by Anbran. They may, however, still remain associates.

#### *Particulars*

- (a) Hamish McHardy and Alan Thompson, by entering into the Agreement, formed a business relationship for the purposes of rule 4(1)(d) of the Code such that, in the circumstances, being the acquisition and holding of Kerifresh shares, they should be regarded as associates.
- (b) Hamish McHardy and Alan Thompson also formed an ownership relationship, in respect of the parcel of Kerifresh

shares, such that, in the circumstances, they should be regarded as associates.

- (c) Hamish McHardy said that he would not invest in shares in Kerifresh unless Alan Thompson made a similar commitment to acquire Kerifresh shares with his own money.
- (d) The Agreement was in effect an advance purchase of voting rights in Kerifresh by Alan Thompson because Hamish McHardy could not terminate the Agreement other than by giving Alan Thompson 361,000 shares in Kerifresh.
- (e) The informal nature of the arrangement, being undocumented and therefore entirely dependent on mutual trust, was indicative of a closer business relationship than a normal commercial borrower-lender relationship.
- (f) After the unwind of the Agreement by the transfer of the 361,000 shares to Anbran, Hamish McHardy and Alan Thompson have maintained a close relationship and have acted jointly and/or in concert in respect of Kerifresh.

#### **Association between Alan and Helen Thompson**

48. Alan and Helen Thompson are associates for the purposes of rule 4 of the Code.

##### *Particulars*

- (a) Helen Thompson is the wife of Alan Thompson.
- (b) Alan and Helen Thompson jointly hold 1,313,016 Kerifresh shares.

#### **Association between Alan Thompson, Hamish McHardy and GMSF**

49. Alan Thompson, Hamish McHardy and GMSF are associates for the purposes of rule 4 of the Code.

##### *Particulars*

- (a) Alan Thompson and GMSF (together with Hamish McHardy) were parties to the Arrangement, whereby:

- (i) GMSF acquired Kerifresh shares;
- (ii) Hamish McHardy provided GMSF with the funds to make the acquisitions; and
- (iii) as a further step in the Arrangement, and one that was not known to GMSF, the shares acquired by GMSF were to be transferred to Alan Thompson to satisfy Hamish McHardy's obligations under the Agreement.

Accordingly, the parties formed a business relationship, in circumstances such that they should be considered associates for the purposes of rule 4 of the Code.

- (b) Alan Thompson at all material times controlled the shares acquired and held by GMSF.

**Association between Hamish McHardy and Jonathan McHardy**

- 50. Hamish McHardy and Jonathan McHardy are associates for the purposes of rule 4 of the Code.

*Particulars*

- (a) Jonathan McHardy is the son of Hamish McHardy.
- (b) Hamish McHardy and Jonathan McHardy hold Kerifresh shares jointly as trustees of the Murrayfield Trust.
- (c) Hamish McHardy acknowledged at a hearing before the Panel on 16 October 2007 that Jonathan McHardy was his associate.
- (d) Jonathan McHardy acknowledged at a hearing before the Panel on 7 November 2007 that he was an associate of Hamish McHardy in 2002 for Code purposes.
- (e) Hamish McHardy and Jonathan McHardy have common investment interests.

**Association between Alan Thompson and Jonathan McHardy**

- 51. Alan Thompson and Jonathan McHardy became associates for the purposes of rule 4 of the Code upon the entry into the Agreement. Jonathan McHardy was aware of that Agreement, and it was a material

factor in his and his co-trustee Hamish McHardy's decision to invest in the Kerifresh shares as trustees of the Murrayfield Trust.

52. In addition, in accordance with rule 4(1)(e), Jonathan McHardy is an associate of Hamish McHardy, and Hamish McHardy is an associate of Alan Thompson. The nature of the relationship between those three parties is such that, in the circumstances, Alan Thompson and Jonathan McHardy should be considered associates.
53. The association remained at least until the Agreement was unwound as referred to above. However, given that Hamish McHardy and Alan Thompson have maintained a close relationship and have acted jointly and/or in concert in respect of Kerifresh shares, and Jonathan McHardy has been party to such actions, such association has continued.

#### **Association between Alan Thompson and Anbran**

54. Alan Thompson and Anbran are associates for the purposes of rule 4 of the Code.

#### *Particulars*

- (a) Emma Eastwood is the sole shareholder of Anbran, and is the niece of Alan and Helen Thompson.
- (b) The three children of Alan Thompson and Helen Thompson were named as the beneficiaries in the trust deed establishing the Anbran Trust, with the trust named after them.
- (c) Anbran was set up specifically by Alan Thompson as a vehicle for holding shares.
- (d) Anbran acquired the 245,000 shares as part of the transaction to satisfy the Agreement between Hamish McHardy and Alan Thompson.
- (e) Emma Eastwood had no role in deciding the assets to be acquired by Anbran.
- (f) Anbran purchased 116,000 shares at the direction of Alan Thompson.

- (g) Emma Eastwood had no knowledge of who had deposited the funds into her personal cheque account to fund the payment for those 116,000 shares.

**Association between Hamish McHardy and SIL**

55. Hamish McHardy and SIL are associates for the purposes of rule 4 of the Code.

*Particulars*

- (a) SIL is owned by Hamish McHardy and Audrey McHardy and is used to hold their personal investment portfolio.
- (b) Hamish McHardy and Audrey McHardy are the sole directors of SIL.
- (c) Hamish McHardy acknowledged at the meeting held before the Panel on 16 October 2007 that he controls SIL. The consequences of controlling SIL are that Hamish McHardy remains in control of the Kerifresh shares held by SIL.

**Association between Hamish McHardy, Jonathan McHardy and Lawrence Fletcher**

56. Lawrence Fletcher, Hamish McHardy and Jonathan McHardy acted in concert and are acting in concert for the purposes of rule 4 of the Code in relation to Lawrence Fletcher becoming the holder or controller of voting rights in Kerifresh by acquiring shares in Kerifresh and by seeking to increase his holding to up to 500,000 Kerifresh shares.

*Particulars*

- (a) Lawrence Fletcher and Jonathan McHardy have a personal relationship as friends and colleagues in Credit Suisse First Boston;
- (b) Lawrence Fletcher, Jonathan McHardy and Hamish McHardy have had a business relationship as evidenced by participation in a property investment and through the lending of a significant sum of money by Lawrence Fletcher to Hamish McHardy, Jonathan McHardy and Roger Sinclair as trustees of the

Murrayfield Trust, on a basis clearly showing a high degree of confidence and trust in each other;

- (c) Lawrence Fletcher, Hamish McHardy and Jonathan McHardy have an ongoing business relationship in relation to the acquisition of shares in Kerifresh by Lawrence Fletcher in circumstances where:
- (i) Jonathan McHardy encouraged Lawrence Fletcher to invest in Kerifresh, a highly illiquid under-performing, but asset-rich, company,
  - (ii) Hamish McHardy and Jonathan McHardy discussed strategies for raising capital funds for Kerifresh and increasing their percentage of control in Kerifresh which involved getting Lawrence Fletcher on to the Kerifresh share register,
  - (iii) Hamish McHardy made the initial contact with Grove Darlow, financed the initial purchase of shares, disclosed confidential company information to Jonathan McHardy, and remained closely involved with all aspects of the acquisition strategy;
  - (iv) Lawrence Fletcher was "keen to get involved" and provided his own money to purchase up to 500,000 Kerifresh shares; and
  - (v) Lawrence Fletcher, Hamish McHardy and Jonathan McHardy maintained frequent and close communications with each other over the strategy to be followed in planning and executing Lawrence Fletcher's acquisition of shares in Kerifresh,

such that, in the circumstances, Hamish McHardy, Jonathan McHardy and Lawrence Fletcher are associates of each other in terms of rule 4 of the Code.

**Association between Hamish McHardy, Jonathan McHardy, Lawrence Fletcher and GDPT**

57. GDPT is the nominee company for Grove Darlow.

58. Hamish McHardy initially instructed Grove Darlow in relation to acquisitions of Kerifresh shares, and they continue to take instructions from Hamish McHardy.
59. After Hamish McHardy introduced Lawrence Fletcher to Grove Darlow, they have also taken instructions from Lawrence Fletcher in relation to acquisitions of Kerifresh shares.
60. The offer by GDPT to acquire Kerifresh shares was made on behalf of Hamish McHardy and/or Lawrence Fletcher.
61. GDPT is therefore acting jointly or in concert with Hamish McHardy, Jonathan McHardy and Lawrence Fletcher.

**FIRST CAUSE OF ACTION AGAINST THE SECOND, FOURTH AND SEVENTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-18, 32-33, 41-44, 47 and 50.

62. The 1,266,516 shares purchased by Hamish McHardy were registered as to 669,200 shares into the name of Hamish McHardy and the balance as to 597,316 into the joint names of Hamish McHardy and his son Jonathan McHardy, as the (then) two trustees of the Murrayfield Trust.
63. Pursuant to the terms of the Agreement, 361,000 Kerifresh shares were held by Hamish McHardy on behalf of Alan Thompson.
64. The holding of Hamish McHardy in his own right and the holding of Hamish McHardy with his son Jonathan McHardy, when aggregated with those of Hamish McHardy's associate Alan Thompson was well in excess of 20% of Kerifresh's voting rights.
65. The acquisition of the 1,266,516 shares in Kerifresh on or about 29 May 2002 was in contravention of rule 6 of the Code.
66. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the second, fourth and seventh defendants to pay

compensation to TGL for the costs expended or liabilities incurred by TGL:

- (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and
  - (ii) in respect of the investigation of the matters referred to in the determinations made by the Panel dated 18 October 2007 and 9 November 2007 ("**Determinations**") and the proceedings before the Panel leading to the Determinations.
- (b) Orders pursuant to section 36(1)(g) of the Takeovers Act 1993 that the 597,316 Kerifresh shares held by the seventh defendants, the trustees of the Murrayfield Trust, be forfeited and cancelled.
- (c) Or, in the alternative, orders pursuant to section 36(1)(h) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
- (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;
  - (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;
  - (iv) the purchaser(s) shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
  - (v) the trustee will apply the sale proceeds as follows:

- (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
  - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
  - (cc) third, pay the balance to Kerifresh on trust for Kerifresh to pay proportionally, according to the number of shares, to those persons from whom the shares were acquired by the seventh defendants.
- (d) Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the second, fourth and seventh defendants from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.
- (e) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (f) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (g) Costs.

**SECOND CAUSE OF ACTION AGAINST THE SECOND, FOURTH AND FIFTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-19, 32-33, 41-44, 47, 50 and 55.

67. At the time of the acquisition by SIL of the 669,200 Kerifresh shares on 23 September 2002, SIL was controlled by Hamish McHardy and, by virtue of being controlled by Hamish McHardy, an associate of Alan Thompson and of Jonathan McHardy, whose aggregate shareholding was in excess of 20% of Kerifresh's voting rights. The 669,200 Kerifresh shares held by SIL were and are controlled by Hamish McHardy.
68. The acquisition by SIL of 669,200 shares in Kerifresh on 23 September 2002 was in contravention of rule 6 of the Code.

69. Pursuant to the terms of the Agreement, 361,000 Kerifresh shares were held by Hamish McHardy on behalf of Alan Thompson.
70. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the second, fourth and fifth defendants to pay compensation to TGL for the costs expended or liabilities incurred by TGL:
- (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and
  - (ii) in respect of the investigation of the matters referred to in the Determinations and the proceedings before the Panel leading to the Determinations.
- (b) Orders pursuant to section 36(1)(g) of the Takeovers Act 1993 that the 669,200 Kerifresh shares held by the fifth defendant be forfeited and cancelled.
- (c) Or, in the alternative, orders pursuant to section 36(1)(h) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
- (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;
  - (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;

- (iv) the purchaser(s) shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
- (v) the trustee will apply the sale proceeds as follows:
  - (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
  - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
  - (cc) third, pay the balance to Kerifresh on trust for Kerifresh to pay proportionally, according to the number of shares, to those persons from whom the shares were acquired by the fourth defendant.
- (d) Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the second, fourth and fifth defendants from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.
- (e) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (f) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (g) Costs.

**THIRD CAUSE OF ACTION AGAINST THE FOURTH AND FIFTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-18, 20, 32-33, 41-44, 47, 50 and 55.

71. At the time of the acquisitions by SIL of 84,000 Kerifresh shares between 18 August 2003 and 22 September 2003, SIL was controlled by Hamish McHardy. By virtue of being controlled by Hamish McHardy, an associate of Alan Thompson and of Jonathan McHardy, the aggregate voting rights

of SIL and its associates were in excess of 20% of Kerifresh's voting rights. The 84,000 shares held by SIL were and are controlled by Hamish McHardy.

72. The acquisitions by SIL of 84,000 shares in Kerifresh between 18 August 2003 and 22 September 2003 were in contravention of rule 6 of the Code.
73. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the fourth and fifth defendants to pay compensation to TGL for the costs expended or liabilities incurred by TGL:
- (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and
  - (ii) in respect of the investigation of the matters referred to in the Determinations and the proceedings before the Panel leading to the Determinations.
- (b) Orders pursuant to section 36(1)(g) of the Takeovers Act 1993 that the 84,000 Kerifresh shares held by the fifth defendant be forfeited and cancelled.
- (c) Or, in the alternative, orders pursuant to section 36(1)(h) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
- (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;

- (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;
- (iv) the purchaser(s) shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
- (v) the trustee will apply the sale proceeds as follows:
  - (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
  - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
  - (cc) third, pay the balance to Kerifresh on trust for Kerifresh to pay proportionally, according to the number of shares, to those persons from whom the shares were acquired by the fifth defendant.
- (d) Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the fourth and fifth defendants from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.
- (e) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (f) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (g) Costs.

**FOURTH CAUSE OF ACTION AGAINST THE SECOND AND FOURTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-29, 32-33, 41-44 and 49.

74. At the time of the acquisitions by GMSF of 245,000 Kerifresh shares between 28 July 2004 and 30 June 2005 (in accordance with the terms of the Arrangement), GMSF was an associate of Alan Thompson and of Hamish McHardy, who held or controlled, in aggregate, in excess of 20% of Kerifresh's voting rights.
75. The 245,000 Kerifresh shares were indirectly controlled by Alan Thompson, and were acquired to satisfy the Agreement between Alan Thompson and Hamish McHardy.
76. The acquisitions by GMSF of the 245,000 Kerifresh shares between 28 July 2004 and 30 June 2005 were in contravention of rule 6 of the Code.
77. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the second and fourth defendants to pay compensation to TGL for the costs expended or liabilities incurred by TGL:
- (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and
  - (ii) in respect of the investigation of the matters referred to in the Determinations and the proceedings before the Panel leading to the Determinations.
- (b) Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the second and fourth defendants from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.

- (c) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (d) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (e) Costs.

**FIFTH CAUSE OF ACTION AGAINST THE SECOND AND EIGHTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-29, 32-33, 41-44 and 54.

- 78. At the time of the acquisition by Anbran of the 245,000 Kerifresh shares, Anbran was an associate of Alan and Helen Thompson. The 245,000 Kerifresh shares were indirectly controlled by Alan Thompson.
- 79. The acquisition of 245,000 Kerifresh shares by Anbran on 1 November 2005 therefore brought Anbran's voting rights in Kerifresh, once aggregated with the Kerifresh shares held or controlled by Anbran's associates, to above 20%.
- 80. The acquisition by Anbran of 245,000 shares in Kerifresh on 1 November 2005 was in contravention of rule 6 of the Code.
- 81. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the second and eighth defendants to pay compensation to TGL for the costs expended or liabilities incurred by TGL:
  - (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and
  - (ii) in respect of the investigation of the matters referred to in the Determinations and the proceedings before the Panel leading to the Determinations.

- (b) Orders pursuant to section 36(1)(g) of the Takeovers Act 1993 that the 245,000 Kerifresh shares held by the eighth defendant be forfeited and cancelled.
- (c) Or, in the alternative, orders pursuant to section 36(1)(h) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
- (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;
  - (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;
  - (iv) the purchaser shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
  - (v) the trustee will apply the sale proceeds as follows:
    - (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
    - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
    - (cc) third, pay the balance to Kerifresh on trust for Kerifresh to pay proportionally, according to the number of shares, to those persons from whom the shares were acquired by GMSF.

Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the second and eighth defendants from holding or controlling further shares or any interest in or rights relating to

further shares in Kerifresh, other than in accordance with the Code.

- (d) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (e) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (f) Costs.

**SIXTH CAUSE OF ACTION AGAINST THE SECOND AND EIGHTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-29, 32-33, 41-44 and 54.

- 82. The acquisition of 116,000 Kerifresh shares by Anbran on 31 December 2005, when aggregated with the shares in Kerifresh held or controlled by Anbran and Anbran's associates, was in excess of 20% of the voting rights in Kerifresh.
- 83. The 116,000 Kerifresh shares were indirectly controlled by Alan Thompson.
- 84. The acquisition by Anbran of 116,000 shares in Kerifresh on 31 December 2005 was in contravention of rule 6 of the Code.
- 85. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the second and eighth defendants to pay compensation to TGL for the costs expended or liabilities incurred by TGL:
  - (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and

- (ii) in respect of the investigation of the matters referred to in the Determinations and the proceedings before the Panel leading to the Determinations.
- (b) Orders pursuant to section 36(1)(g) of the Takeovers Act 1993 that the 116,000 Kerifresh shares held by the eighth defendant be forfeited and cancelled.
- (c) Or, in the alternative, orders pursuant to section 36(1)(h) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
  - (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;
  - (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;
  - (iv) the purchaser shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
  - (v) the trustee will apply the sale proceeds as follows:
    - (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
    - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
    - (cc) third, pay the balance to Kerifresh on trust for Kerifresh to pay proportionally, according to the number of shares, to those persons from whom the shares were acquired by the eighth defendant.

- (d) Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the second and eighth defendants from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.
- (e) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (f) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (g) Costs.

**SEVENTH CAUSE OF ACTION AGAINST THE THIRD DEFENDANT:  
BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-17, 31-33, 41-44 and 48.

- 86. The acquisition by Helen Thompson of 4,900 Kerifresh shares on 29 June 2006 increased Helen Thompson's shareholding and, when aggregated with the voting rights held or controlled by her and her associates Alan Thompson and Anbran, was in excess of 20% of the voting rights in Kerifresh.
- 87. The acquisition by Helen Thompson of 4,900 Kerifresh shares on 29 June 2006 was in contravention of rule 6 of the Code.
- 88. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) An order pursuant to section 36(1)(p) of the Takeovers Act 1993 directing the third defendant to pay compensation to TGL for the costs expended or liabilities incurred by TGL:
  - (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and

- (ii) in respect of the investigation of the matters referred to in the Determinations and the proceedings before the Panel leading to the Determinations.
- (b) Orders pursuant to section 36(1)(g) of the Takeovers Act 1993 that the 4,900 Kerifresh shares held by the third defendant be forfeited and cancelled.
- (c) Or, in the alternative, orders pursuant to section 36(1)(h) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
  - (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;
  - (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;
  - (iv) the purchaser shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
  - (v) the trustee will apply the sale proceeds as follows:
    - (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
    - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
    - (cc) third, pay the balance to Kerifresh.
- (d) Orders pursuant to section 36(1)(m) of the Takeovers Act 1993 prohibiting the third defendant from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.

- (e) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (f) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (g) Costs.

**EIGHTH CAUSE OF ACTION AGAINST THE FIRST, FOURTH, SIXTH AND NINTH DEFENDANTS: BREACH OF RULE 6 OF THE CODE**

TGL repeats paragraphs 1-17, 32-46 and 56-61.

- 89. At the time of the acquisitions and proposed acquisitions of the Kerifresh shares by GDPT, GDPT was an associate of Hamish McHardy, Jonathan McHardy, and Lawrence Fletcher.
- 90. The acquisition by GDPT of 10,000 shares in Kerifresh in August 2007, subsequent agreement to acquire 6,000 shares from a Kerifresh shareholder, the entering into an agreement (and execution of a share transfer form) with Alan and Helen Thompson to acquire 165,000 shares, and the offer to acquire up to 335,000 further shares in Kerifresh, were in contravention of rule 6 of the Code.
- 91. For the purposes of section 2(2)(e) of the Act, Hamish McHardy and Jonathan McHardy were either directly or indirectly, knowingly concerned in, or a party to, the contravention by GDPT and Lawrence Fletcher of rule 6 of the Code.
- 92. None of the exceptions in rule 7 of the Code were used to validate these acquisitions.

**Claim for relief**

- (a) Compensation pursuant to section 33K of the Takeovers Act 1993.
- (b) Orders pursuant to section 33J(c) and (f) of the Takeovers Act 1993 prohibiting Lawrence Fletcher from completing any agreements to purchase shares or any interest in or rights relating to shares in Kerifresh.

- (c) Orders pursuant to section 33J(e) of the Takeovers Act 1993 directing the forfeiture of the following shares in Kerifresh and requiring Kerifresh to cancel the forfeited shares:
- (i) all ordinary shares held by GDPT; and
  - (ii) any other shares held by or on behalf of Lawrence Fletcher.
- (d) Or, in the alternative, orders pursuant to section 33J(g) of the Takeovers Act 1993 vesting such of the shares identified in paragraph (b) above as are not ordered to be forfeited in a trustee for sale on the following terms and conditions:
- (i) the sale will be by tender;
  - (ii) the trustee should seek to maximise the price paid overall for the shares sold;
  - (iii) the tender should be completed within 30 days, with completion to occur as soon as practicable after conclusion of the tender;
  - (iv) the purchaser shall not be any of the defendants or an associate, within the meaning of rule 4 of the Code, of any of the defendants, and each purchaser shall give the trustee a statutory declaration to that effect;
  - (v) the trustee will apply the sale proceeds as follows:
    - (aa) first, deduct the amount of any costs that the trustee has incurred in the sale;
    - (bb) second, pay to those persons whose shares have been ordered to be sold the price that those persons paid for the shares;
    - (cc) third, pay the balance to Kerifresh on trust for Kerifresh to pay proportionally, according to the number of shares, to those persons from whom the shares were acquired by the first defendant or the ninth defendant.

- (e) Orders pursuant to section 33J(c) of the Takeovers Act 1993 prohibiting the first, fourth, sixth and ninth defendants from holding or controlling further shares or any interest in or rights relating to further shares in Kerifresh, other than in accordance with the Code.
- (f) Damages for losses resulting from TGL being forced to suspend its takeover offer due to breaches of the Code.
- (g) Interest at 7.5% per annum pursuant to section 87 of the Judicature Act 1908.
- (h) Costs.

**NINTH AND ALTERNATIVE CAUSE OF ACTION AGAINST THE FIRST, FOURTH, SIXTH AND NINTH DEFENDANTS: INTENTIONAL INTERFERENCE WITH BUSINESS INTERESTS BY UNLAWFUL MEANS**

TGL repeats paragraphs 1-17, 32-46 and 56-61.

93. Lawrence Fletcher, Hamish McHardy, Jonathan McHardy, and GDPT intentionally interfered with TGL's business interests by conspiring to devise and partially implement a scheme aimed at defeating TGL's takeover offer.

**Particulars**

- (a) The scheme was that Lawrence Fletcher would acquire up to 500,000 shares in Kerifresh.
- (b) Hamish and Jonathan McHardy were actively involved in Lawrence Fletcher's offer for Kerifresh shares, including assisting with the drafting of correspondence to Kerifresh shareholders, seeking to acquire their shares.
- (c) Hamish and Jonathan McHardy were closely involved with a proposed purchase of 165,000 shares by Lawrence Fletcher on 8 October 2007, which failed to settle only as a result of restraining orders made by the Panel (and subsequent enforceable undertakings given to the Panel).

- (d) Lawrence Fletcher, Jonathan McHardy and Hamish McHardy were acting in concert and were associates for the purposes of the Code.
- (e) GDPT was aware of their association and the intention to defeat TGL's takeover offer.
- (f) Further particulars will be provided after discovery.

94. The intentional interference with TGL's business interests was by unlawful means.

**Particulars**

- (a) The proposed acquisition of up to 500,000 shares in Kerifresh by Lawrence Fletcher would be in contravention of rule 6 of the Code.

95. As a result of the intentional interference with TGL's business interests by unlawfully contravening the Code:

- (a) TGL's takeover offer was frustrated and/or impeded and TGL lost a valuable business opportunity.
- (b) TGL has suffered a loss, including the costs expended or liabilities incurred:
  - (i) in investigating, preparing, and attempting to execute a takeover of Kerifresh (including, without limitation, any costs payable to Kerifresh pursuant to rule 49(2) of the Code in respect of the notice of intention to make a takeover offer, given on 1 October 2007 by TGL); and
  - (ii) in respect of the investigation of the matters referred to in the determinations and the proceedings before the Panel leading to those determinations.

**Claim for relief**

- (a) Damages.
- (b) Interest.

(c) Costs.

This document is filed by **Sarah Janine Katz**, solicitor for the plaintiff, of Russell McVeagh. The address for service of the plaintiff is Level 30, Vero Centre, 48 Shortland Street, Auckland.

Documents for service may be left at that address or may be:

- (a) posted to the solicitor at PO Box 8, Auckland; or
- (b) left for the solicitor at a document exchange for direction to DX CX10085.