Ref: 770-acA / #95505

BEFORE THE TAKEOVERS PANEL

IN THE MATTER OF the Takeovers Act 1993 ("the Act") and the Takeovers Code ("the Code")

AND

IN THE MATTER OF a meeting held under section 32 of the Act to determine:

(1) Whether Jonathan Forbes McHardy ("Jonathan McHardy") and Philip Hamish McHardy ("Hamish McHardy"), whom the Panel has already determined at a meeting of the Panel on 16 October 2007 were, for the purposes of the Code, associates of each other in terms of rule 4 of the Code, were also associates under that rule of Alan Dougal Thompson ("Alan Thompson") at the time that Hamish McHardy and Jonathan McHardy, as trustees of the Murrayfield Trust, acquired 597,316 shares in Kerifresh Limited ("Kerifresh") on or about 29 May 2002 such that the aggregate of the shareholdings of Jonathan McHardy and Hamish McHardy (singly and jointly) and Alan Thompson was in excess of 20% of the voting rights in Kerifresh after the 29 May 2002 acquisition of shares so that that acquisition of 597,316 Kerifresh shares was made otherwise than in compliance with rule 6 of the Code;

(2) Whether Lawrence Bruce Fletcher ("Lawrence Fletcher") who made an offer for 335,000 Kerifresh shares on 18 October 2007 at $2 per share, which was contained in a letter to individual Kerifresh shareholders from Grove Darlow

& Partners, Auckland dated 18 October 2007, was at the time of making the offer, and remains, an associate for Code purposes of Jonathan McHardy and of Hamish McHardy and/or of Alan Thompson, who between them hold in excess of 20% of the voting rights in Kerifresh (although some are currently restrained) such that any acquisitions of Kerifresh shares by Lawrence Fletcher would not comply with rule 6 of the Code and therefore that Lawrence Fletcher was not complying with and did not intend to comply with the Code by circulating the offer;

(3) Whether Alan Thompson, Hamish McHardy and Jonathan McHardy were, directly or indirectly, knowingly concerned in, or a party to, the intended acquisition of shares in Kerifresh by Lawrence Fletcher.

MEETING: 7 November 2007 at Auckland

MEMBERS:
D O Jones (Chairman)
K J O'Connor
C G Giffney
S H Suckling

COUNSEL ATTENDING
B W F Brown QC Counsel assisting the Panel and attending the meeting

APPEARANCES:
M Pasley (during the video conference) and J Long (during the hearing) appearing for A D Thompson and H T Thompson
R Wallis and J Graham appearing for J F McHardy and P H McHardy,
J Windmeyer and M Sudzum appearing for Turners and Growers Limited
J Horner appearing for Kerifresh Limited

IN ATTENDANCE:	D Morrison and R Wood of Grove Darlow & Partners
	A D Thompson representing himself and Kerifresh Limited
	H B Thompson
	P H McHardy
	J F McHardy (by videolink from New York)
	M Patterson, employee of Kerifresh Limited
	B S P Marra representing Kerifresh Limited
	A I Gibbs representing Turners and Growers Limited
	K G Morrell, J L Fawcett and T S Barnes (from Panel Executive)
DETERMINATION:	9 November 2007
STATEMENT OF REASONS	22 November 2007

REASONS FOR DETERMINATION

Preliminary

1. On 1 November 2007 the Panel gave notice of a meeting to be held under section 32 of the Act in relation to various aspects of the affairs of Kerifresh and its shareholders and prospective shareholders. That meeting was held in Auckland on 7 November 2007. The Panel published its determination from that meeting on 9 November 2007. The Panel also made or continued a number of restraining orders on that day.

2. The Panel is now publishing the reasons for its determination. This statement concludes by restating the determination itself.

Background

3. Kerifresh is an unlisted New Zealand incorporated company based in Northland. Its principal business is the production of lemons and other fruit. At all times since July 2001 its financial statements show that it had more than $20 million in gross assets. The share register showed it always had more than 50 shareholders throughout this period. As such Kerifresh was a code company for the purposes of the Act and the Code[1] and continued to be throughout the period that the transactions considered during these proceedings occurred.

4. When this view was challenged at the first Panel meeting the Panel did not uphold the challenge and found that Kerifresh was a code company in 2002 and has been since. The issue was not raised at the 7 November 2007 meeting.

5. Turners and Growers Limited ("TGL") is a New Zealand listed company.

6. 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 Panel alleging that a number of irregularities had occurred in transactions in Kerifresh shares over the previous 5 years.

7. After following the required procedural steps the Panel convened a meeting under section 32 of the Act on 16 October 2007 ("the first Panel meeting") to investigate various issues raised by TGL's complaint. The Panel issued its determination from that hearing on 18 October 2007.

8. The evidence provided to the Panel at the first Panel meeting, particularly by Hamish McHardy, Chairman of Kerifresh, gave the Panel information about his relationship with his son Jonathan, in particular that they were both trustees of the Murrayfield Trust which acquired 597,316 Kerifresh shares on 29 May 2002, at the same time that Hamish McHardy acquired 669,200 Kerifresh shares.

9. At the first Panel meeting the Panel determined that Hamish McHardy was an associate of Alan Thompson for the purposes of the Code in May 2002 because of

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[1] The requirement for code companies to have $20 million of assets was removed by the Takeovers Amendment Act 2006. The 2002 transactions under consideration at the Panel's meeting took place prior to the change of definition but the Fletcher offer was made under current law.

certain share warehousing arrangements entered into between them relating to the acquisition of Kerifresh shares in May 2002. The question of whether Jonathan McHardy was also an associate of Alan Thompson, which may have had adverse consequences for the Murrayfield Trust, was not explored at the first Panel meeting. One of the reasons for this was that Jonathan McHardy did not attend the first Panel meeting and had not been advised of the possible consequences for him if he did not participate in that meeting. The issue of Jonathan McHardy's possible association with Alan Thompson was considered at the meeting of 7 November 2007 and is discussed in later paragraphs of this statement of reasons (see paragraph 35 onwards).

10. On 19 October 2007 the Panel received a further complaint from TGL relating to an offer for 335,000 Kerifresh shares made by Lawrence Fletcher on 18 October 2007 and circulated to Kerifresh shareholders by the Auckland law firm of Grove Darlow & Partners ("Grove Darlow"). TGL alleged that Grove Darlow was acting for Hamish McHardy and that Lawrence Fletcher was linked with Hamish McHardy and his son Jonathan McHardy in ways which suggested that they were associates for the purposes of the Code. If that were the case then the offer by Lawrence Fletcher would not comply with the Code because of the percentage of voting rights in Kerifresh already held or controlled or which would be held or controlled by the three of them in aggregate.

11. The Panel also decided to take the opportunity of the meeting of 7 November 2007 to satisfy itself regarding any possible association for Code purposes between Harold Burcham Thompson ("Harold Thompson") and his wife Helen Wern Thompson, who hold just under 5% of the voting rights in Kerifresh, and their son Alan Thompson and his wife Helen Louise Thompson. For reasons explained later (see paragraph 170 onwards) Harold Thompson was summonsed to the Panel's first meeting but did not attend that meeting.

Initial actions by the Panel in response to the second TGL complaint

12. Following receipt of the second complaint from TGL the Panel reviewed the information provided by TGL and undertook enquiries of its own with Grove Darlow.

13. The Panel ascertained that Grove Darlow's trustee company, GDP Trustee Limited ("GDPT"), had paid for 10,000 Kerifresh shares in August 2007.

14. As part of its enquiries the Panel requested information from the solicitors for the counterparties to the acquisition by GDPT.

15. The Panel initially met on Wednesday 24 October 2007 to consider the information available to it about the Lawrence Fletcher offer and also the new information arising from the first Panel meeting about the Murrayfield Trust's acquisition of Kerifresh shares in May 2002. After further enquiry the Panel met again on Tuesday 30 October 2007. At that meeting the Panel resolved:

> Alan Dougal Thompson ("Alan Thompson") and Helen Thompson held some 1,313,016 shares in Kerifresh, representing some 18.49% of the company's issued capital, at the time the Code came into force on 1 July 2001.
>
> Harold Burcham Thompson ("Harold Thompson") and Helen Wern Thompson held some 346,050 shares in Kerifresh, representing some 4.87% of the company's issued capital, at that time.
>
> On or about 29 May 2002 Philip Hamish McHardy ("Hamish McHardy") acquired 669,200 shares in Kerifresh. On the same day the trustees of the Murrayfield Trust, who the Panel learned at its meeting on 16 October 2007 were Jonathan Forbes McHardy (son of Hamish) and Hamish McHardy, acquired 597,316 shares in Kerifresh.
>
> At its meeting of 16 October 2007 the Panel determined that Hamish McHardy and Alan Thompson were associates for the purposes of the Code at the time of entering into the 2002 transaction.
>
> Hamish McHardy acknowledged that he and his son Jonathan undertook a number of investments together and that he considered he was probably an associate of Jonathan for the purposes of the Code.
>
> The Panel considers, on the basis of information available to it and which it received at its meeting of 16 October 2007, that Jonathan McHardy was an associate of Hamish McHardy in May 2002 and may have been, for the purposes of rule 4(1)(e) of the Code also an associate of Alan Thompson at that time.
>
> On the understanding that Hamish McHardy and Jonathan McHardy were joint trustees of the Murrayfield Trust and acquired 597,316 Kerifresh shares on 29 May 2002, that Jonathan McHardy was an associate of Hamish McHardy, that Hamish McHardy was an associate of Alan Thompson on 29 May 2002, that, in the circumstances, Jonathan McHardy may have been an associate of Alan Thompson, and given the level of shareholding in Kerifresh by both Alan Thompson and Hamish McHardy after the acquisition of the 597,316 Kerifresh shares, the Panel considers that the acquisition of 597,316 Kerifresh shares may have not been made in compliance with the fundamental rule of the Code.
>
> Turners and Growers allege that Harold Thompson and his wife Helen are associates of their son Alan Thompson and his wife Helen. If this were so it may have implications for the extent to which acquisitions by Alan Thompson and any other of his associates may breach the Code. The Panel was unable to resolve this issue satisfactorily at its meeting on 16 October 2007 because Harold Thompson did not attend the meeting. The Panel proposes to explore the nature of the relationship

between Harold Thompson and his son Alan at the meeting being held on 7 November 2007.

On or about 18 October 2007 Grove Darlow circulated a letter to existing shareholders of Kerifresh detailing an offer by one Lawrence Fletcher who is making an unconditional offer at $2 per share for 335,000 Kerifresh shares to add to 10,000 shares already held for him by GDP Trustee Limited.

The Panel has been advised that Lawrence Fletcher is a friend of Jonathan McHardy, that Lawrence Fletcher discussed his investment intentions in Kerifresh with Hamish McHardy, and that Hamish McHardy made the initial contact with Grove Darlow concerning Lawrence Fletcher's proposed investment. The Panel has also learned that Alan Thompson may have been promoting and facilitating the acquisition of shares by Hamish McHardy, whether on his own behalf or on behalf of interests associated with him.

The Panel considers that Lawrence Fletcher may be an associate of Jonathan McHardy and of Hamish McHardy and of Alan Thompson for the purposes of the Code, and/or may be acting on behalf of one or the other or both of the McHardys and Alan Thompson in making his offer.

The current shareholdings of Jonathan McHardy and Hamish McHardy, as trustees of the Murrayfield Trust, amount to 617,316 or 7.89% of the voting rights in Kerifresh. The current shareholding of Sundry Investments Limited, Hamish McHardy's personal investment vehicle, in Kerifresh is 812,200, or 9.94% making a combined interest of 17.83%.

The current shareholding of Alan and Helen Thompson in their own right and as shareholders of the Thompson Family Trust, of Anbran Trustee Company Limited (an associate of Alan Thompson), and of Helen Thompson in her own name, currently amount to 1,678,176 shares or 22.45% of the voting rights in Kerifresh.

If Lawrence Fletcher is an associate of Jonathan and Hamish McHardy and/or of Alan Thompson then the acquisition of 345,000 Kerifresh shares, or 4.56% of the voting rights in Kerifresh would, when aggregated with the holdings controlled by Hamish and Jonathan McHardy and/or Alan Thompson, exceed 20% of the voting rights in Kerifresh. The Panel considers that Lawrence Fletcher, by making an offer to purchase up to 335,000 Kerifresh shares, may not have complied, may not be complying, and may intend not to comply with the fundamental rule of the Code.

The Panel made interim restraining orders under section 32(2) of the Takeovers Act 1993 restraining Jonathan McHardy and Lawrence Fletcher from:

a. exercising the voting rights attached to any of the shares they hold or control in Kerifresh; and

b. acquiring or disposing of any voting securities in Kerifresh.

The Panel also made interim restraining orders under section 32(2) of the Takeovers Act 1993 restraining Kerifresh from registering any transfers of shares in Kerifresh to or from Jonathan McHardy and Lawrence Fletcher.

These restraining orders are due to expire at the close of 9 November 2007.The full details of the Panel's restraining orders are published on the Panel's website.

16. Summonses were issued to Alan Thompson, Harold and Helen Wern Thompson, Hamish McHardy, Maureen Patterson (an employee of Kerifresh), Robert Wood and David Morrison (solicitor and partner, respectively, of Grove Darlow), GDP Trustee Company Limited and Kerifresh Limited. Jonathan McHardy, who lives in New York, and Lawrence Fletcher, who lives in London, were both invited to give evidence for the purposes of the Panel's meeting by videolink.

17. The Panel arranged videoconferencing facilities in Auckland to facilitate participation by the overseas witnesses. Jonathan McHardy availed himself of the opportunity to use the videoconferencing facilities. Evidence was taken from him on the morning of the Panel's meeting. Unfortunately visual contact was lost during this process but evidence was given on affirmation and audio contact was maintained. The session was recorded and a transcript of evidence made.

18. Lawrence Fletcher did not participate in the meeting but provided a number of written statements through his lawyers, Grove Darlow[2]. He explained that because of a recent family bereavement and the short period of notice of the meeting he was not able to participate in the meeting. Subsequently Lawrence Fletcher provided a sworn declaration dated 6 November 2007 that had been signed in Oman.

19. The Panel acknowledges that Lawrence Fletcher had experienced a recent family bereavement. At the time of the hearing the Panel was advised that he was on a break with his family in Oman following the bereavement. While no adverse implication can be drawn from Lawrence Fletcher's non-participation in the Panel's meeting, nevertheless the consequences of his non-participation were made clear to Mr Fletcher by the Panel in its invitation to him to attend either in person or via a videoconference.

20. Under section 32(3) of the Act the Panel may make a determination that it is satisfied or that it is not satisfied that a person has complied with the Code. If, on the basis of the information available to it and having given the person the opportunity to be present and to respond to the information put to him, the Panel is not satisfied that a

[2] Although Grove Darlow act as legal advisers for Lawrence Fletcher in relation to the offer for Kerifresh shares the firm did not appear for him, nor make submissions on his behalf, at the Panel's meeting. Members of the firm, Messrs Wood and Morrison, attended as witnesses summonsed to give evidence in relation to their own conduct.

person has complied with the Code then the Panel can so determine. The election of a person not to appear before the Panel, even if via the facility of a videoconference, cannot preclude the Panel from making what it considers is the appropriate determination on the available evidence concerning that person.

21. After the notice of the 7 November 2007 meeting had been given, TGL formally requested, under section 31V(2) of the Act, that it be given leave to be heard and be represented at the Panel's 7 November 2007 meeting. The Panel decided, on Monday 5 November 2007, that TGL was a party who ought to be heard and whose appearance would be of assistance to the Panel. The Panel therefore granted leave to TGL to be heard and represented at the meeting.

22. Submissions and written statements of evidence were received from or on behalf of Hamish McHardy, Jonathan McHardy and Alan Thompson prior to the meeting. Documents sought under summons were provided to the Panel on Monday 5 November by Hamish McHardy, Jonathan McHardy, and Kerifresh. Further documents were provided by Hamish McHardy and Maureen Patterson on Tuesday 6 November 2007. Grove Darlow handed the Panel its Lawrence Fletcher and Hamish McHardy files at the start of the meeting on 7 November 2007. The Panel is appreciative of the efforts of those parties who made early provision of their documents. This facilitated the progress of the hearing, which ran from receiving video evidence from 8.30 a.m. to 10.30 a.m. and then a normal hearing from 11.00 a.m. to 6.30 p.m. on 7 November 2007.

23. Evidence relevant to the matters the subject of the meeting was received under oath or affirmation from, in sequence, Jonathan McHardy (by videolink), Harold Thompson, Anthony Gibbs, Hamish McHardy, Maureen Patterson, Alan Thompson, David Morrison and Robert Wood. Evidence was also given during the course of the meeting by Paddy Marra, independent director of Kerifresh. Legal submissions were received from, in sequence, legal advisers representing TGL, Kerifresh, Hamish and Jonathan McHardy, and Alan Thompson.

Application of the Code

24. In the analysis and reasoning which follow the elements of the Code that are of primary interest are rule 6, the fundamental rule, and rule 4, which defines "associates" for Code purposes.

25. Rule 6 of the Code is the "fundamental rule". It provides:

> (1) Except as provided in rule 7, a person who holds or controls-
> (a) no voting rights, or less than 20% of the voting rights, in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company unless, after that event, that person and that person's associates hold or control in total not more than 20% of the voting rights in the code company:
>
> (b) 20% or more of the voting rights in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company.
>
> (2) For the purposes of subclause (1), if-
> (a) a person and any other person or persons acting jointly or in concert together become the holders or controllers of voting rights, that person is deemed to have become the holder or controller of those voting rights:
>
> (b) a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights:
>
> (c) voting rights are held or controlled by a person together with associates, any increase in the extent to which that person shares in the holding or controlling of those voting rights with associates is deemed to be an increase in the percentage of the voting rights held or controlled by that person.

26. Rule 4 defines "associate" for the purposes of the Code:

> (1) For the purposes of this code, a person is an **associate** of another person if-
> (a) the persons are acting jointly or in concert; or
>
> (b) the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or
>
> (c) the persons are related companies; or
>
> (d) the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or
>
> (e) the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.
>
> (2) A director of a company or other body corporate is not an associate of that

company or body corporate merely because he or she is a director of that company or body corporate.

Matters for determination by the Panel

(1) Whether Jonathan McHardy and Hamish McHardy, whom the Panel has already determined at a meeting of the Panel on 16 October 2007 were, for the purposes of the Code, associates of each other in terms of rule 4 of the Code, were also associates under that rule of Alan Thompson at the time that Hamish McHardy and Jonathan McHardy, as trustees of the Murrayfield Trust, acquired 597,316 shares in Kerifresh on or about 29 May 2002 from Peter and Linda Hendl such that the aggregate of the shareholdings of Jonathan McHardy and Hamish McHardy (singly and jointly) and Alan Thompson was in excess of 20% of the voting rights in Kerifresh after the 29 May 2002 acquisition of shares and therefore that that acquisition of 597,316 Kerifresh shares was made otherwise than in compliance with rule 6 of the Code.

27. Peter Hendl, co-founder of Kerifresh with Alan Thompson, and Linda Hendl jointly held 1,266,516 shares, or 17.84% of total voting rights, in Kerifresh in May 2002.

28. On or about 29 May 2002, after a period of negotiation, Hamish McHardy acquired 669,200 shares in Kerifresh from the Hendls. In addition Jonathan McHardy and Hamish McHardy, as trustees of the Murrayfield Trust, acquired the balance of the Hendl's holding, being 597,316 Kerifresh shares. The trustees of the Murrayfield Trust already held 20,000 Kerifresh shares for the Trust. The combined holdings of the McHardys, father and son, in their personal and trustee capacities, was 18.12% of the total voting rights in Kerifresh following these acquisitions in May 2002.

29. Jonathan McHardy is an investment banker who was living in London at the time of these transactions and is now resident in New York. He is a senior executive with the international firm of Credit Suisse First Boston.

30. For the purposes of the first Panel meeting the Panel was provided by TGL with a copy of an unsigned document purporting to be an agreement between Alan Thompson and Hamish McHardy ("the Draft Agreement"). Alan Thompson is Chief Executive Officer of Kerifresh.

31. The text of the Draft Agreement is as follows:

PURCHASE OF KERIFRESH SHARES

This agreement is between Alan Thompson (Trust name)("Thompson") and Hamish McHardy (trust name)("McHardy")

The parties agree

1) Thompson on 29 May 2002 will lend $255,000 to McHardy so as to allow McHardy to buy 375,000 in Kerifresh Ltd. ("The Thompson Loan")

2) The Thompson Loan is at 0% interest and of no fixed term.

3) Thompson has the right to recall the loan at any time on the terms agreed below.

4) McHardy agrees to Thompson having the right to recall the loan at any time on the basis that repayment shall be in the form of the transfer to Thompson of the 375,000 shares originally purchased by McHardy or such other shares that McHardy may acquire but in either case the value of the transfer will be 375,000 shares at 68¢ each.

5) Thompson is entitled to any income arising from the 375,000 shares originally purchased by McHardy. In the event this is cash as in a dividend the Thompson will raise a GST invoice for interest equal to the cash dividend. In the event that cash is a principal or capital repayment then this amount shall be applied to reducing the principal amount of the Thompson Loan. If there is any share split or bonus shares then the number of shares to be transferred to Thompson will be adjusted accordingly, as if Thompson had held the shares himself.

6) McHardy agrees to maintain at least 375,000 shares in Kerifresh, or the equivalent if split or bonus shares issued and not allow any security interests to be registered against these shares.

Agreed this day

32. The terms of the Draft Agreement are unusual. On its face the Draft Agreement indicated that Alan Thompson was funding or intended to fund the acquisition and holding by Hamish McHardy of 375,000 Kerifresh shares by an interest-free loan from Thompson to McHardy. That loan could be recalled by Thompson at any time, the loan being repaid by the return of 375,000 Kerifresh shares to Thompson. The economic interest in these shares remained with Thompson although there was no provision for Alan Thompson to exercise the voting rights attached to them.

33. Hamish McHardy and Alan Thompson confirmed in evidence and submissions at the first Panel meeting that they had entered into an agreement, ("the 2002 Agreement") albeit unsigned, essentially in the same terms as the document set out in paragraph 31 above. However, the actual numbers which they agreed were 361,000 Kerifresh

shares to the value of $245,000. As provided for in clause 4 of the Draft Agreement, they confirmed that under the 2002 Agreement, the "debt" could only be repaid by Alan Thompson recalling the 361,000 Kerifresh shares so held by Hamish McHardy. Accordingly, the 2002 Agreement amounts to a warehousing arrangement, under which Hamish McHardy would hold Kerifresh shares, paid for by Alan Thompson, on behalf of Alan Thompson.

34. While the 2002 Agreement did not confer voting rights in the shares on Alan Thompson the 2002 Agreement gave him an equity interest in 361,000 Kerifresh shares originally held in the name of Hamish McHardy. [3]

35. The Panel took evidence on how Jonathan McHardy became involved in the Kerifresh investment in May 2002.

36. Jonathan McHardy, in his written statement of evidence for the 7 November 2007 meeting, said that it was his decision, and not Hamish's, to increase the Murrayfield Trust's holding of Kerifresh shares in 2002. He said that:

> ...also, to the best of my memory, I was not aware of the transactions that led to the alleged association between Hamish and Alan Thompson in May 2002. I was not aware of the details of the so called "warehousing" at all until Hamish unwound the arrangement in 2005, and the details only became fully clear to me due to the recent determination of the Takeovers Panel.
>
> Further, for the whole period the Trust has owned the shares, I, like Hamish, have considered myself completely independent of Mr Thompson and free to act as I wished.
>
> I have met and spoken to Mr Thompson only once in my life, which was when he was in New York on 24 August 2007 as part of marketing Kerifresh's crops where we discussed the company and its prospects.

37. During the course of his videolink evidence, Jonathan McHardy said that he had become involved in the purchase of the Hendls' shares because of his father. He said that to the best of his recollection all communications relating to the Murrayfield Trust acquisition of shares in Kerifresh came through the person of his father. To the best of his knowledge all that happened was that Hamish asked him if the Murrayfield Trust would like to buy just under 600,000 shares at 68 cents per share, to which he

[3] The Kerifresh shares held by Hamish McHardy were subsequently transferred to Sundry Investments Limited, whose shareholders and directors are Hamish and Audrey McHardy

had said "yes". He remembers that at the beginning he[4] had more shares than his father held personally.

38. Jonathan McHardy was asked how the division of the Hendl shares between his father and the Murrayfield Trust was determined. Jonathan McHardy was asked if this had just been presented to him as the number available or whether there had been any discussion about how the Hendl holding would be divided between Hamish McHardy and the Trust. He said:

> No from memory I believe my father had a certain amount of money he wanted to invest himself and the balance of the shares he was happy for the Murrayfield Trust to buy, if I wanted to buy them.

Asked if he knew how much Hamish had to invest, Jonathan replied:

> No, although I remember at the beginning of this I think I had more shares than he did. That's my memory and the reason I remember that is he thought 68 cents was a good price and I was able to buy more shares than he did.

39. The Panel questioned Jonathan McHardy as to how he could know of Hamish's lesser economic interest in Kerifresh from the time of acquisition of the Hendl shares up until 2005 when Hamish McHardy always had more Kerifresh shares in his name (and that of his company Sundry Investments Limited) than did the Murrayfield Trust (the trustees of which were Jonathan and Hamish McHardy). He was asked what caused him to know in 2005 that he, i.e. the Trust, had had a greater economic interest in Kerifresh than his father. He said:

> The reason I remember that I did become aware in '05 that was the first time it was clear that he had actually purchased in terms of economic ownership additional shares and the reason that lodges in my mind is obviously at that point once he'd unwound that transaction and bought the extra shares he had 812,000-odd shares – more than I did.

Asked again what it was in 2005 that caused him to know that there had been a different number of shares acquired than he had previously thought, and whether he had been monitoring the share register, he replied:

> No, no. I mean initially I think my father – in terms of economic ownership – you know I had more shares than he did in terms of economic ownership. In terms of obviously when he unwound the warehousing and he actually bought more shares at a somewhat higher price, he then moved to have a greater number of shares than I did.

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[4] In various parts of his evidence Jonathan McHardy referred to himself when strictly speaking he was intending to refer to the Murrayfield Trust.

Asked again how Jonathan knew that he had a greater amount of interest than his father, Jonathan said:

> Just because I thought I had a bigger stake in the company than he did.

Asked where the information came from that led him to believe that Jonathan said:

> It was from Hamish.

40. In summary, Jonathan McHardy:

(a) Denied any knowledge of the total number of shares held by the Hendls at the time of the purchase of part of the Hendl holdings by himself and his father, Hamish, as trustees of the Murrayfield Trust;

(b) Denied any knowledge of the actual number of shares acquired by his father, Hamish, from the Hendls contemporaneously with the purchase by himself and Hamish as trustees of the Murrayfield Trust;

(c) Said that he was aware that he, i.e. the Trust, had had a greater economic interest in Kerifresh than had his father Hamish McHardy (personally and through his investment company Sundry Investments Limited) up until 2005.

41. The Panel noted that Kerifresh's annual reports do not list the shareholdings of the largest shareholders nor those of the directors. However, the financial statements of the Murrayfield Trust, which were provided to the Panel, do show the number of shares held by the Trust. Accordingly, it was not due to publicly available information that Jonathan McHardy could have known of his greater, and then lesser, economic interest in Kerifresh than that of Hamish McHardy.

42. Hamish McHardy, in a written statement for the meeting of 7 November 2007, said that he did not accept the Panel's view that he was an associate of Alan Thompson in 2002 but that, if he was, then he was not an associate from 2005 onwards (once the warehousing arrangements were unwound).

43. In respect of the 2002 arrangements for the purchase of the Hendl Kerifresh shares Hamish McHardy said in his written submission for the 7 November 2007 meeting:

> While I have previously acknowledged that I may have been an associate of my son Jonathan, it does not follow that he is an associate of Mr Thompson. I do not think

> Jonathan even knew of the arrangement I made with Mr Thompson in 2002. In fact, Mr Thompson is practically unknown to Jonathan (he only met him recently) and neither could nor should be treated as associates of the other.
>
> ...
>
> Jonathan, from a practical perspective, has total control of Murrayfield Trust in terms of appointing trustees, and over the Trust's investments. Jonathan was not involved with, and I do not think even knew about, the arrangements I made with Mr Thompson in 2002. Jonathan has met Mr Thompson only once which was in August this year in New York. I do not see how Jonathan and the Murrayfield Trust can in any way be associates of him.
>
> In any event, I understand the Murrayfield Trust has, prior to the Turners and Growers Takeovers Notice, unconditionally sold its shares to a corporate trustee of Jonathan's pension plan, which is completely independent of me and cannot be fixed with any association I am supposed to have.

44. The Panel was told by Graham Cowley (who was the subject of a Panel finding) at the first Panel meeting that during the early months of 2002 the Hendls had decided they wanted to sell their Kerifresh shares and that they had approached him, Graham Cowley, up until July 2001 a director of Kerifresh, to arrange the sale of their shares. This evidence has been subsequently disputed by Peter and Linda Hendl in correspondence with the Panel. Peter Hendl advised the Panel that he had no particular wish to sell his shares but was approached by Cowley, who said he had a buyer who wanted to purchase the shares. The Panel has not drawn any adverse inference or conclusion from this disputed testimony.

45. From evidence at the first Panel meeting the Panel was told that Hamish McHardy was identified as a possible purchaser of the Hendls' shares and that Alan Thompson was encouraging Hamish McHardy to acquire those shares. Hamish McHardy was interested in investing but said he wanted Alan Thompson to acquire some of the Hendls' Kerifresh shares himself, thus increasing his (Thompson's) commitment to Kerifresh. In submissions to the first Panel meeting Alan Thompson's additional investment (albeit in the name of Hamish McHardy) was described as being a condition of Hamish McHardy's investment in Kerifresh.

46. Both Hamish McHardy and Alan Thompson explained at the first Panel meeting that the reason why the warehousing agreement was implemented was so that Thompson's name would not appear as the purchaser of any of the Hendl shares. The rationale for this was that, for a number of reasons given in evidence at the meeting, they did not want Hendl to know Thompson was a buyer of Hendl shares. Both Hamish McHardy

and Alan Thompson said at the first Panel meeting that they did not appreciate in 2002 that a small unlisted public company like Kerifresh could be caught by the Code. Hamish McHardy said that he became aware of the Code's application some months later while Alan Thompson was less certain.

47. In May 2002 Alan and Helen Thompson held 18.49% of the voting rights in Kerifresh.[5]

48. The provisions of rule 4 of the Code defining "associates" are set out above (see paragraph 26).

49. In the Panel's view, as expressed in the Determination of 18 October 2007 following the first Panel meeting, Hamish McHardy and Alan Thompson, by entering into the 2002 Agreement, formed a business relationship in terms 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 for the purposes of the Code.

50. In the Panel's view 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 for the purposes of the Code. The reasons for this conclusion are set out in paragraph 53 of the Panel's determination of 18 October 2007.

51. In the course of his evidence at the first Panel meeting Hamish McHardy told the Panel that he considered that he and his son were probably associates for Code purposes.

52. It does not follow as a necessary consequence of the associate relationship between Hamish McHardy and Alan Thompson in relation to the acquisition of Hamish McHardy's personal shareholding that there would be an associate relationship between them in relation to any or every shareholding which Hamish McHardy might hold or acquire in another capacity.

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[5] For the purposes of the Code the Panel aggregates the shareholdings of Alan and Helen Thompson with those of the Thompson Family Trust, of which Alan and Helen were originally the sole trustees. See the Panel's determination of 18 October 2007 for its reasoning.

53. However in the circumstance of Hamish McHardy's acquisition as trustee for the Murrayfield Trust of the balance of the Hendl parcel at the same time as the acquisition of his personal holding and when, as he explained to the Panel (see paragraph 53(a) of the Reasons dated 18 October 2007), he would not invest in shares in Kerifresh unless Alan Thompson made a similar commitment to acquire Kerifresh shares with his own money, the Panel considers that the respective acquisitions by Hamish McHardy personally and as trustee were so proximate and both dependent on the Thompson commitment that the associate relationship between Hamish McHardy and Alan Thompson also embraced the acquisition of Kerifresh shares in 2002 by Hamish McHardy as trustee of the Murrayfield Trust.

54. Jonathan McHardy, in written evidence received ahead of the Panel's November 7 meeting, confirmed that he and his father undertook a number of investments together as they were co-trustees of the Murrayfield Trust. Jonathan McHardy agreed that he, consequently, was an associate of his father in 2002 for Code purposes, but questioned whether this was still the case in 2007.

55. The Panel confirms its earlier view determined at the first Panel meeting that Hamish McHardy and Jonathan McHardy were associates for Code purposes in 2002. In addition to the personal relationship as father and son, and their common investment interests, they also, as co-trustees of the Murrayfield Trust, had an ownership relationship that made them associates for Code purposes. Nothing the Panel heard at the 7 November meeting has changed the Panel's view of their relationship as associates at 2002. The position in 2007 is considered later.

56. The Panel received no evidence that Jonathan McHardy was directly involved in the negotiations in May 2002 between Hamish McHardy and Alan Thompson over the warehousing arrangements and their entry into the 2002 Agreement.

57. In the absence of evidence of direct participation in the warehousing arrangements by Jonathan McHardy the Panel considers that for Jonathan McHardy to have been an associate of Alan Thompson in 2002 at the time of purchase of the Hendl shares it would have to be shown, at least:

(a) That Jonathan McHardy was aware, at least in broad terms, that Alan Thompson was investing in conjunction with Hamish McHardy when he purchased part of the Hendls' Kerifresh shares in 2002; and

(b) That Alan Thompson's investment in Kerifresh shares, under the terms of the 2002 Agreement, was a material factor in Jonathan McHardy's, and his co-trustee Hamish McHardy's, decision, on behalf of the Murrayfield Trust, to invest in Kerifresh shares in 2002.

58. On the other hand it is not necessary, for the purposes of rule 4(1)(d) and (e) of the Code that Jonathan McHardy should have had any degree of control over Alan Thompson's voting rights, or indeed over Hamish McHardy's voting rights, in order for all three of them to be associates for Code purposes in the context of this transaction.

59. In addressing these issues the Panel noted the following factors:

(a) Kerifresh is an unlisted company with relatively illiquid shares and from all accounts has been performing poorly over many years;

(b) Hamish McHardy proposed making a sizeable investment (around $210,000) personally in Kerifresh. However, as a condition of his investing he required Alan Thompson to make a similar commitment to acquire shares;

(c) Hamish McHardy was a co-trustee of the Murrayfield Trust, a Trust settled for the benefit of his grandchildren. If it was important for Hamish, when investing his own money, to require Alan Thompson to increase his commitment to Kerifresh, then it would have been also important, as a trustee, to obtain the same protection for the beneficiaries of the Murrayfield Trust for their investment being made in Kerifresh;

(d) The evidence obtained by the Panel for the purposes of its inquiries into the Lawrence Fletcher offer (discussed later in this statement of reasons) show that there is a very easy and candid relationship between Hamish and Jonathan McHardy on investment matters. Apart from being father and son they are both experienced and successful business people. In his evidence to the

Panel's 7 November 2007 meeting Hamish McHardy said, in response to questions from the Panel's Counsel, Brendan Brown QC:

> BB: Yes, and he's (Jonathan) obviously done very well. You must be very proud of his successes.
>
> HM: Yes he's a good son to have.
>
> BB: And would it be fair to say that you think he's got good sort of strategic tactical nous?
>
> HM: Yeah absolutely. Credit Suisse think so.
>
> BB: And would you – be fair to say you were happy to have the opportunity to bounce these sort of issues [the position of Kerifresh] off him?
>
> HM: I think, you know I was an associate of Murrayfields because I'm in the trust deed. And Murrayfield and myself have made – and my company have made these investments. Talking with Jonathan on some of these things where – oh well we pass quite a bit of information together on various things where we've got co-investments and – so I do listen to what he has to say, but I don't follow it always.

Jonathan McHardy confirmed in his evidence that the source of his knowledge about the Kerifresh investment in 2002 came from his father.

(e) The Panel believes it is reasonable to draw the inference from their later dealings that Hamish and Jonathan McHardy would also have been candid in their dealings with each other in 2002 concerning the major decision to invest in around 18% of Kerifresh between them. The Panel considers it is reasonable to infer that Hamish and Jonathan would have discussed Hamish's wish to insist that Alan Thompson himself fund around one-quarter of the purchase price of the Hendl parcel.

(f) To the extent that the commitment reflected in such an arrangement would also benefit the Murrayfield Trust, the Panel also sees every reason why Hamish would have informed Jonathan about it in the context of communicating to him the merits of the investment which Hamish was inviting the Trust to consider. That would also have been consistent with the dynamics of the relationship between Hamish and Jonathan seen in relation to the Lawrence Fletcher offer;

(g) Jonathan McHardy is a very experienced and successful merchant banker. Given his background, the Panel's view is that he would not have made what is a reasonably significant investment in such a company (8.4% of the share capital and around $400,000) without knowing the composition of the shareholding in the company and where the scope for profit from the investment lay;

(h) Jonathan McHardy reiterated several times during his video evidence that he thought he had a greater economic interest in Kerifresh shares than did Hamish until 2005, when the warehousing arrangements were unwound. This greater economic interest was despite Hamish McHardy holding more Kerifresh shares in his own name than did Jonathan and Hamish as the trustees of the Murrayfield Trust. Jonathan McHardy was not able to provide any explanation to the Panel for his knowing that he had a greater economic interest in Kerifresh in 2002 than did his father, and that that situation reversed in 2005. The inference the Panel draws from this is that Jonathan McHardy knew of at least the substance, if not the full details, of the arrangements between Hamish McHardy and Alan Thompson;

(i) The McHardys divided up the Hendls' discrete parcel of Kerifresh shares between them, down to the last single digit numbers. The Panel's view is that both of the McHardys would have known the number of shares that were to be held by Hamish McHardy in his own name, and by Jonathan and Hamish McHardy as trustees of the Murrayfield Trust;

(j) The Panel had considerable reservations about the credibility of the evidence given on a number of matters by both Jonathan McHardy and Hamish McHardy, particularly concerning the nature of the participation of each of them in the acquisition of the shares from the Hendls and concerning Jonathan McHardy's state of knowledge at the time of the warehousing arrangement. In that connection the Panel noted that their written statements were carefully phrased: for example Jonathan McHardy's evidence of his knowledge of the arrangements with Alan Thompson (see paragraph 36) refers to "*the best of my memory*" which does not preclude that he knew of the arrangements at the time.

60. The Panel concludes, on the basis of the evidence received at the first Panel meeting and the meeting of 7 November 2007, and of the views it has formed, that:

(a) Jonathan McHardy was aware of:

(A) relevant details of the purchase of shares from the Hendls by both his father in his own right and himself and his father as trustees of the Murrayfield Trust;

(B) the particular financing arrangements (see paragraph 32 above) between Hamish McHardy and Alan Thompson, at least in general terms, at the time that the Murrayfield Trust acquired 597,316 Kerifresh shares on 29 May 2002;

(b) The financial involvement of Alan Thompson in funding part of the purchase of Kerifresh shares acquired by Hamish McHardy was a material factor in Jonathan and Hamish McHardy's decision, on behalf of the Murrayfield Trust, to purchase 597,316 Kerifresh shares on 29 May 2002.

61. The Panel consequently finds that, in addition to Jonathan McHardy being an associate for Code purposes of Hamish McHardy in 2002, and Hamish McHardy being an associate for Code purposes of Alan Thompson, the nature of the relationship between these three parties is such that, in the circumstances (being the purchase of the Hendls' Kerifresh shares in 2002) Alan Thompson should be considered to be an associate of Jonathan McHardy for Code purposes at 2002 and at least until the warehousing arrangements were unwound in 2005. The Panel makes no finding as to whether that association continued beyond 2005.

62. The Panel determined at its first meeting that at the time that Hamish McHardy purchased 669,200 Kerifresh shares, or 9.43% of the company's voting rights, that holding, when aggregated with those of his associates Alan and Helen Thompson (18.49%) and Jonathan McHardy and Hamish McHardy jointly (8.69%) was well in excess of 20% of Kerifresh's voting rights. None of the exceptions in rule 7 of the Code were used to undertake this acquisition.

63. The 597,316 Kerifresh shares purchased on 29 May 2002 by Jonathan McHardy with his co-trustee Hamish McHardy, when added to the Trust's existing holding of 20,000 shares, equated to 8.69% of total Kerifresh voting rights. When this amount is aggregated with the holdings of Jonathan McHardy's associates, Hamish McHardy in his own right (9.43%) and Alan and Helen Thompson (18.49%), Jonathan McHardy had in aggregate well in excess of 20% of the voting rights in Kerifresh. None of the exceptions in rule 7 of the Code were used to undertake this acquisition and it was accordingly made otherwise than in compliance with rule 6 of the Code.

64. The Panel's conclusion in paragraph 63 above, that the acquisition of 597,316 Kerifresh shares in May 2002 by Hamish McHardy and Jonathan McHardy as trustees of the Murrayfield Trust was not in compliance with rule 6 of the Code, followed from the finding that Jonathan McHardy, Hamish McHardy and Alan Thompson were all associates of each other for the purpose of the acquisition of the Hendl's parcel of Kerifresh shares. That finding of association was made on the basis that Jonathan McHardy had the state of knowledge referred to in paragraph 60 above.

65. However, even if Jonathan McHardy had not had the degree of awareness as found by the Panel in paragraph 60, the Panel considers that, to the extent of any parcel of Kerifresh shares acquired by Jonathan McHardy jointly as co-trustee with Hamish McHardy for the benefit of the Murrayfield Trust during the duration of the 2002 Agreement to which Hamish McHardy was a party, the trustee relationship between Hamish McHardy and Jonathan McHardy nevertheless produced the same outcome whereby there was a failure of compliance with rule 6 of the Code.

66. As noted in paragraphs 49 to 55 above, Hamish McHardy and Alan Thompson were associates for the purposes of the Code by reason of the 2002 Agreement and that associate relationship extended to Hamish McHardy's shareholding in his trustee capacity resulting from the contemporaneous acquisition by the Trust of the balance of the Hendl parcel in 2002.

67. Hamish McHardy and Jonathan McHardy recognised that they were associates at least in 2002 (see paragraphs 51 - 54 above). But in relation to shareholdings which they acquired as trustees their relationship was also governed by trust law. In the context of the Murrayfield Trust's shareholding their capacity to act independently of each

other was constrained by their obligations as co-trustees. Trustees are required to act unanimously unless the trust instrument provides otherwise. The copy of the unsigned Deed of Settlement constituting the Murrayfield Trust provided to the Panel provided in clause 30 as follows:

> TRUSTEES' MAJORITY DECISIONS
>
> If any dispute or difference shall arise between the Trustees respecting any matter relating to the sale leasing mortgaging investment control management or distribution of the Trust Fund the decision of the majority of the Trustees if there be more than two shall be binding on other Trustees.

68. It was not until September 2003 that a third trustee was appointed in addition to Hamish and Jonathan McHardy who were the original trustees. Consequently during 2002 clause 30 had no application and it would have been necessary for Hamish and Jonathan McHardy to be in agreement in relation to any relevant actions to be taken on the Trust's behalf.

69. In this context the Panel records that a submission was made on behalf of Jonathan McHardy and the Murrayfield Trust to the following effect:

> Jonathan was the first-named joint shareholder on the Kerifresh share register for the Murrayfield Trust shares, and, according to clause 11 of the First Schedule of the Companies Act 1993, had control over the Murrayfield Trust's votes while Murrayfield Trust was a shareholder.

70. Clause 11 is a procedural provision relating to the manner of exercise of votes by joint holders at shareholders' meetings. It states:

> Where 2 or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter must be accepted to the exclusion of the votes of the other joint holders.

71. The Panel does not consider that the fact of clause 11 has any implications for co-trustees' obligations of unanimity. Subject to the terms of the trust deed, trustees must act unanimously or not at all and, were a trustee with voting powers to exercise them without the consent of a co-trustee, such conduct might warrant the intervention of the court: *Dawson v Dawson* [1945] VLR 99; Ford's Principles of the Law of Trusts paragraph [9380].

72. In the particular circumstances, where Hamish McHardy and Alan Thompson were associates, where the Trust's acquisition was promoted by Hamish McHardy whose

participation as a Kerifresh shareholder was dependent on the Alan Thompson commitment and where Jonathan McHardy was not at liberty to act independently of Hamish McHardy in relation to the Murrayfield Trust's affairs, the Panel considers that in terms of rule4(1)(e) Alan Thompson should be considered to be an associate of both the co-trustees, Hamish and Jonathan McHardy, in relation to the Trust's acquisition of shares in Kerifresh in 2002. This finding is not reliant on the finding in paragraph 60 as to the extent of Jonathan McHardy's knowledge or understanding about the 2002 Agreement between Alan Thompson and Hamish Thompson.

73. The acquisition of 597,316 Kerifresh shares in 2002 by Jonathan McHardy jointly with his co–trustee Hamish McHardy when aggregated with Hamish McHardy's personal holding and the voting rights held by Alan and Helen Thompson was considerably in excess of 20% of the voting rights of Kerifresh. That acquisition was therefore made otherwise than in compliance with rule 6 of the Code.

Further matters for determination

(2) Whether Lawrence Fletcher, who made an offer for 335,000 Kerifresh shares on 18 October 2007 at $2 per share, which was contained in a letter to individual Kerifresh shareholders from Grove Darlow & Partners, Auckland dated 18 October 2007, was at the time of making the offer, and remains, an associate for Code purposes of Jonathan McHardy and of Hamish McHardy and/or of Alan Thompson, who between them hold in excess of 20% of the voting rights in Kerifresh such that any acquisitions of Kerifresh shares by Lawrence Fletcher would not comply with rule 6 of the Code and therefore that Lawrence Fletcher was not complying with and did not intend to comply with the Code by circulating the offer;

(3) Whether Alan Thompson, Hamish McHardy and Jonathan McHardy were, directly or indirectly, knowingly concerned in, or a party to, the intended acquisition of shares in Kerifresh by Lawrence Fletcher

74. On 18 October 2007 Grove Darlow circulated a letter to all Kerifresh shareholders ("the Lawrence offer letter") in the following terms:

KERIFRESH LIMITED

We hold 10,000 Kerifresh shares in our nominee company on behalf of Lawrence Bruce Fletcher, a resident of the United Kingdom.

Mr Fletcher desires to increase his shareholding by up to 335,000 shares and is prepared to purchase that number of shares at $2 per share with no conditions attached. If you are interested in offering to sell all or part of your shares to Mr Fletcher please complete and sign the share transfer enclosed and return to us as soon as possible.

We are holding funds to pay for the shares being sought and undertake to hold the share transfer on your behalf until such time as we have sent payment in full to you. The share offers will be accepted on a "first come basis". Share offers received after the 335,000 limit has been met will not be accepted and the share transfer form will be returned to the shareholder concerned.

Like you, Mr Fletcher has received the letter from Turners and Growers Limited advising that it intends to make an offer for all the shares in Kerifresh and that offer is conditional on acceptances from holders of at least 50% of the shares. Our client's understanding is that this threshold may not be achieved. On the other hand his offer is unconditional.

75. The legal advisers to TGL, Russell McVeagh, Auckland, copied the Panel in on a letter of 19 October 2007 from TGL to Grove Darlow in which TGL sought explanations of a number of aspects of the Lawrence offer letter. Among other things TGL said that in its opinion Jonathan McHardy was an associate of Alan Thompson and of Hamish McHardy (whom it regarded as Grove Darlow's client). TGL drew attention to the initials "MCH" being included in the Grove Darlow file reference on the Lawrence offer letter.

76. The Panel considered that, given the existing level of Kerifresh shareholdings of the McHardys and of the Thompsons, and given that the Panel had determined on 18 October 2007 that Hamish McHardy and the Thompsons were associates of each other for the purposes of the Code, at least between 2002 and 2005, such relationships could mean that any acquisitions of Kerifresh shares by Lawrence Fletcher would not comply with rule 6 of the Code.

The personal and business relationship between Jonathan McHardy, Hamish McHardy and Lawrence Fletcher

77. Grove Darlow replied to Russell McVeagh on 25 October 2007. Its letter was copied to the Panel on the same day. That letter included, among other comments:

> No one is denying that Lawrence knows Hamish, mainly through Hamish's son Jonathan. However the association is not a close one. Lawrence lives in London but

> wants to invest in New Zealand. Hamish as a New Zealand resident business man was able to initiate business contacts in New Zealand for Lawrence.
>
> While Hamish initially referred Lawrence to Grove Darlow & Partners, we have been instructed by Lawrence subsequently.
>
> The writer [Rob Wood] enquired into the question of control and association that may arise in the case of Lawrence seeking to acquire shares in Kerifresh.
>
> Our advice was that Lawrence sought information from Hamish regarding investment in New Zealand but made his own assessment of that information and any investment suggested.
>
> Lawrence advises that there has been little ongoing contact between Hamish and Lawrence subsequent to the initial referral about the advisability of buying shares in, or the business of Kerifresh itself.
>
> ...
>
> Lawrence intends to act on his investment in Kerifresh as an independent person and will not be handing any form of "control" to anyone else.
>
> Further, Lawrence denies that there is any "acting in concert" with Hamish or other people with regard the acquisition of shares.
>
> ...
>
> Your reference to Grove Darlow & Partners document indexing is similarly speculative. Initially the referral [to Grove Darlow] was from Hamish (whom incidentally we have not acted for in the past) who simply made the first approach, but subsequent dealings were with Lawrence. The file having been opened in one name remained in that name. ...

78. In his written submissions to the 7 November 2007 meeting Hamish McHardy said, of the Lawrence Fletcher relationship:

> I have met Mr Fletcher only once in London and consider I am not associated with him. I have had one investment with him in a private company called Neverland Investments in which he was a fellow shareholder. I was also aware that at the conclusion of this investment Mr Fletcher had left funds in New Zealand via a loan to my son Jonathan which was in turn on-lent to the Murrayfield Trust.
>
> From my son Jonathan I became aware of Mr Fletcher's interest in acquiring shares in Kerifresh and I asked Kerifresh management to send to Grove Darlow, Mr Fletcher's lawyers, a copy of the Kerifresh share tender documents. Grove Darlow subsequently wrote to Kerifresh expressing interest on behalf of Mr Fletcher in acquiring shares.
>
> A parcel of 10,000 shares for sale was identified and Grove Darlow made the purchase on Mr Fletcher's behalf in early August. I originally paid the $15,000 to Grove Darlow for the settlement of the shares and was promptly reimbursed by Mr Fletcher.
>
> My actions in encouraging Mr Fletcher's investment were entirely in accordance with my chairmanship of Kerifresh where I have a continuing interest in encouraging investors to invest in the company. This role extended to discussions in relation to Mr Fletcher's desire and attempt to acquire further shares after Turners and Growers gave notice of its intention to make a takeover bid.

79. In his written submissions to the Panel for the 7 November 2007 meeting Jonathan McHardy made a number of comments about his relationship with Lawrence Fletcher, including:

> Larry is a UK national and a colleague of mine at Credit Suisse.
>
> My investment history with him involves just two transactions.
>
> The first was in relation to a private New Zealand company, Neverland Investments Limited. In July 2004, the Trust purchased 20% of the equity in Neverland which owned a block of land in Ngunguru, Northland.
>
> Hamish had a 14.3% shareholding in this company, Larry Fletcher 10%, with the balance of the equity held by 6 other separate non-connected individuals. The total equity of the company was approximately $3.5 million
>
> In September 2006, this company was sold in its entirety by the nine shareholders for approximately $10 million and the proceeds, after repayment obligations were met, were distributed to shareholders in September and October 2006.
>
> The second transaction was a loan from Larry to me.
>
> In September and October 2006, Larry received an amount of $611,967.93 from the sale of his interest in Neverland, which he decided he wanted to keep in New Zealand dollars and to potentially reinvest in a suitable property or other enterprise.
>
> I offered to borrow the money from him at the prevailing interest rates on the basis I would repay it on demand. I in turn on-lent the money to the Trust which utilised it for its general purposes.
>
> This money with interest was repaid by me (via the Trust) to Larry in three instalments as per his requests:
>
> > On 6 August 2007, $15,000
> >
> > 10 October 2007, $330,000
> >
> > on or about 24 October 2007, $330,000 ...
>
> The interest rate for the loan was set at 7.5% for the period through to 11 June 2007 and thereafter 8.25%.

80. In relation to the Neverland Investments Limited ("Neverland") property syndicate the Panel was told by Jonathan McHardy, in his oral evidence, that the Murrayfield Trust was in the business of investing in property and a friend had become aware of a block of land in Northland that was available for purchase. He said that Lawrence Fletcher was keen to invest in New Zealand.

81. Jonathan McHardy acknowledged that he had introduced Lawrence Fletcher to the Neverland investment. He could not recollect whether he had also introduced his father, Hamish McHardy, to the property. Jonathan McHardy said that Hamish McHardy was originally not going to invest but in the end he did. Jonathan McHardy

acknowledged that he had been communicating with his father about the investment in Neverland before they had individually decided to invest.

82. Jonathan McHardy gave evidence to the effect that apart from himself and Lawrence Fletcher, four other syndicate members were either current or former employees of Credit Suisse First Boston. Other members of the syndicate were employed by major banks. Basically this was a syndicate of friends who had decided to invest in a New Zealand property. The Panel was told that all members of the syndicate other than Lawrence Fletcher were New Zealanders.

83. Hamish McHardy, in his oral evidence, said that he had been the sole trustee and sole director[6] of Neverland and as such had dealt extensively with Grove Darlow, who were the lawyers for that investment syndicate.

84. Lawrence Fletcher, in his sworn statement to the Panel, did not comment on his investment in Neverland. However, he did note that he has several friends in New Zealand whom he consults from time to time over investment opportunities. One of these friends is Jonathan McHardy.

85. In summary, the evidence given at the Panel's 7 November 2007 meeting and the documents produced for the meeting indicate the following:

(a) Jonathan McHardy and Lawrence Fletcher are friends and work colleagues but not necessarily close friends. Lawrence Fletcher acknowledges that he has taken advice on investments in New Zealand from time to time from, among others, Jonathan McHardy;

(b) Hamish McHardy, Jonathan McHardy and Lawrence Fletcher were three members of a nine member property syndicate which purchased and later sold property in Northland;

(c) In oral evidence and written submissions it was said that Lawrence Fletcher lent Jonathan McHardy $611,967.93, being the proceeds of Lawrence Fletcher's investment in their property syndicate. The loan was on an

[6] The reference to sole director was probably a correction of "sole trustee". However, Companies Office records show that Hamish McHardy was not the sole director of Neverland Investments Limited in 2004. There were

unsecured basis, with details covered by a limited number of email exchanges between them. The email evidence shows that this money was actually lent directly to the Murrayfield Trust;

In an email message of 19 September 2006 from Jonathan McHardy to Hamish McHardy and Lawrence Fletcher, copied to Roger Peter Sinclair ("Roger Sinclair") (the third trustee of the Murrayfield Trust) Jonathan McHardy wrote:

> Larry Re the suggested advance of your share of the funds received to Murrayfield Trust (Hamish, Roger and I are trustees). Assuming you still want to proceed I suggest you confirm to Hamish (who can forward to the lawyers who may want you to sign something) that these funds are to be paid to Murrayfield Trusts [bank account]. For now propose Murrayfield Trust pays you 7.75% which is a little above the current cash rate (7.25%) down there and we agree the Murrayfield Trust will repay these funds when you require ie on demand.

This arrangement was advantageous to Jonathan because it helped the Murrayfield Trust reduce an overdraft. It was helpful to Lawrence who wanted to retain a New Zealand dollar exposure. Jonathan McHardy regarded the informal basis on which the loan was made as being not unusual.

In the Panel's view these loan arrangements are evidence of a substantial degree of trust and reliance by Lawrence Fletcher and Jonathan McHardy on the word of each other;

(d) As already noted, Hamish and Jonathan McHardy are father and son and undertake a number of investments in common, including in relation to Kerifresh. Prior to consideration of their relationship for the purposes of the Lawrence Fletcher offer, Hamish and Jonathan McHardy have been found by the Panel to be associates for the purposes of the Code;

(e) Lawrence Fletcher made no comment about his involvement in Neverland in his sworn statement of evidence.

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two directors, the second of whom was Peter John Haworth, of St Heliers, Auckland. He was not a member of the investment syndicate.

The decision to acquire shares in Kerifresh and the initial purchase of 10,000 shares

86. Jonathan McHardy, in his written statement of evidence for the 7 November 2007 meeting, said:

> Sometime earlier this year, I mentioned to Larry that, in my opinion, Kerifresh was an attractive if highly illiquid property/horticulture play. This view was based on Kerifresh's NTA of $3.50 as against a share price of around $1.50, the company's ownership of valuable lifestyle land and the rising demand for agricultural products globally.
>
> These positive factors were reinforced by Kerifresh having an improved first half result, and more recently by the increased activity in the company's equity (i.e. Terrance O'Connor [sic] and the recent T & G actions and inactions).
>
> I am aware Larry first purchased 10,000 shares in August 2007. I am also aware of his desire to purchase further shares in the company, through him asking for his loan to me to be repaid on the above dates, his written offer to shareholders and his conversation with me on the investment and recent events.

87. Lawrence Fletcher, in his sworn statement of 6 November 2007, responding to the Panel's invitation that he attend the Panel's meeting on 7 November 2007, said:

> In the course of my work I have occasion to work with several people from New Zealand who have become friends over time.
>
> Because I am interested in investing some money in New Zealand I have turned to them on several occasions for advice on investment opportunities to be found in New Zealand.
>
> One friend based in London is Jonathan McHardy who recommended to me the purchase of shares in Kerifresh as he believed they were selling at an undervalued level at the time around $1.50.
>
> I carried out my own investigations and satisfied myself after some inquiry that at $2.00 shares in Kerifresh were undervalued and would be a good investment. On that basis and with the help of Jonathan McHardy and his father Hamish McHardy I signified my interest in purchasing the shares and sought guidance from them on the method by which I could achieve such a purchase.
>
> Mr Hamish McHardy referred me to Grove Darlow, Solicitors, who undertook to act as my agent in New Zealand for the purchase of the shares.
>
> I have already purchased 10,000 shares in Kerifresh in August and while I have invited existing shareholders to offer me their shares for sale I have not purchased further shares at this point of time.

88. Hamish McHardy's written evidence on this point is set out at paragraph 78 above.

89. Initial contact with Grove Darlow was made by Hamish McHardy in June 2007. A letter dated 19 June 2007 from Grove Darlow to Kerifresh Limited, written in response to that contact, included:

> We have a client which is interested in purchasing shares in Kerifresh Limited. Could you kindly forward the last annual report and confirm the number of shares which are currently available for purchase. Subject to approval of the annual report our client intends to make an offer to purchase some or all of the shares. Could you please let us know the current share sale price.

90. Maureen Patterson, an employee of Kerifresh responsible for processing share transfers, passed this message on the same day in an email message to Alan Thompson and Phil Wallis of Kerifresh. Alan Thompson is the Chief Executive Officer of Kerifresh, while Mr Wallis is the finance director.

91. On 25 June 2007 Alan Thompson replied to David Morrison, partner of Grove Darlow, and gave some general information about the company's share tender process. Within an hour David Morrison had passed this message from Alan Thompson on to Hamish McHardy. Hamish McHardy is the Chairman of Kerifresh.

92. A purchase of 10,000 Kerifresh shares was made from the executors of an estate in Blenheim. Solicitors acting for the vendors provided the Panel with various letters and file notes concerning the vendors' transaction. Other information came from the files of Grove Darlow and in the form of oral evidence. That material included:

(a) On 13 July 2007 solicitors in Blenheim acting for a deceased estate advised Kerifresh that the executors of the estate wished to offer their shares into the annual tender[7].

(b) On 16 July 2007 a file note prepared by one of the secretarial staff of the Blenheim solicitors recorded that Alan Thompson had phoned regarding Kerifresh shares. He said he had phoned to suggest that the offer into the tender be withdrawn because:

> ... he was sure a higher price could be achieved. He said he was aware of other buyers around and he would put Alan [Blenheim solicitor] in contact with them.

(c) One of those other buyers was Terry O'Connor, a former Chairman of Kerifresh and, as it transpired, acting for TGL, who had circulated a letter of offer to selected Kerifresh shareholders on 9 July 2007, repeated on 23 July

[7] Because Kerifresh is not listed on the New Zealand Exchange it runs an annual tender, soon after publication of its annual report, whereby the company would match up intending sellers of Kerifresh shares with interested buyers.

2007, offering $1.50 per share for their Kerifresh shares. Another possible buyer would have been Grove Darlow's unnamed client in its letter of 19 June 2007 to Kerifresh (see paragraph 89 above).

(d) The Blenheim solicitors followed Alan Thompson's advice to withdraw their shares from the tender. A letter of 31 July 2007 from the Blenheim solicitors to Kerifresh, marked for the attention of "Hamish McHardy", indicated that the Estate wished to sell 10,000 shares. There is a note on the letter indicating that Hamish McHardy had been telephoned on 1 August 2007 to say that the letter was on its way.

(e) There was also a note from the file of the Blenheim solicitors on an A4 piece of paper dated 31 July 2007 with the words "Alan Thompson", the figure "$1.50". and a telephone number with the words "Hamish McHardy" written alongside the telephone number. When asked in evidence if the telephone number had any connection with him, Hamish McHardy said "*No, I don't know anything.*" When prompted by his lawyer that the number was in fact his (Hamish's) telephone number, Hamish McHardy said "*Oh yeah that's mine.*" Hamish McHardy then confirmed that it was his number although with one numeral missing.

(f) A letter of 17 August 2007 from Grove Darlow to the Blenheim solicitors which stated:

> We act for Hamish McHardy and interests associated with Mr McHardy. We advise that our trust account cheque for $15,000, together with a completed share transfer form was sent to Kerifresh Limited on 8 August 2007, attention Mr Phil Wallis.

In oral evidence given at the 7 November 2007 meeting, David Morrison of Grove Darlow said that the reference to acting for Hamish McHardy had been "*an unfortunate use of wording from a conveyancing lawyer in this context.*" The file had been opened in Hamish McHardy's name and the business remained in that file until 1 November 2007, when a Fletcher file was opened. The Panel was told that the total billing on the McHardy and Fletcher files had been made to Lawrence Fletcher.

David Morrison confirmed in evidence that it was not until early August 2007 that they knew that the firm's client was Lawrence Fletcher.A handwritten letter on Grove Darlow's file, dated 6 August 2007, from Hamish McHardy to David Morrison, said:

> David
>
> Please bank this cheque for $15,000 and draw another for the same on your nominee a/c and sign the transfer and post to Kerifresh in the postage included envelope provided.
>
> Lawrence Fletcher may contact you as his nominee!
>
> Yours
>
> Hamish McHardy

Subsequent email correspondence shows that Grove Darlow was closely involved in communications with Hamish McHardy and Jonathan McHardy right up until the time Lawrence Fletcher's offer was sent to shareholders on 18 October 2007.

(g) In evidence Hamish McHardy acknowledged that he had paid $15,000 to Grove Darlow to settle the purchase of the 10,000 Kerifresh shares, and had been repaid the next day from funds released by Jonathan McHardy to Lawrence Fletcher in part repayment of the loan by Fletcher to the Murrayfield Trust. As stated in his written evidence (see paragraph 78 above) Hamish McHardy said that the reason he paid for the shares was because of his chairmanship of the company and his responsibility to encourage investment in the company. When questioned by Panel members at the hearing as to why he had settled for the 10,000 shares purchased by Grove Darlow for Lawrence Fletcher and been reimbursed the next day, he said:

> Can't remember. But I – it seems a funny thing to have done, doesn't it. For me to pay $15,000 for Fletcher and then being reimbursed the next day or the day after. I asked myself the same question just the other day – I thought why did I do that? It may be the payment was due immediately and Fletchers had difficulty in getting the money back or something – I can't remember exactly.

(h) There are three separate strings of emails relating to this initial purchase of 10,000 Kerifresh shares, following the initial message of 5 August 2007 from Hamish McHardy, excerpts of which are set out below.

(A) In the initial message of 5 August 2007 at 18:46 from Hamish McHardy to Jonathan McHardy and Lawrence Fletcher, copied to David Morrison, Hamish McHardy said:

> I have paid NZ$ 15,000 to Grove Darlow solicitors, for 10,000 Kerifresh shares to be held for Lawrence Fletcher. Please reimburse me at [account number] David's details are below.

(B) In a reply of 6 August 2007 at 10.31 a.m. from Lawrence Fletcher to David Morrison, Lawrence asks:

> Are you ok to hold these shares for me through your nominee company. Hamish said this may be possible. Please let me know if I have to complete any forms to enable you to do this and what any fees might be. Thanks and regards, Larry

(C) David Morrison replied on 8 August 2007 at 10.29 a.m. He said:

> Gidday Lawrence. No problem holding shares on trust for you. I will draft up a bare trust document. …

(D) In a reply of 6 August 2007 at 3.06 a.m. to Hamish's message set out in paragraph (A) above, Jonathan McHardy said:

> That account is yours right ie P H McHardy?"

(E) In his reply of 5 August 2007 at 16.34 Hamish McHardy said:

> Yes that's right.

(F) Jonathan McHardy, in a message on 6 August 2007 at 10.33 a.m. in reply to Hamish McHardy's message requesting reimbursement (see paragraph (A) above) said:

> Ok will be paid today.

(G) Lawrence Fletcher, in his reply to Hamish McHardy's message of 5 August 2007 which he also sent to Jonathan McHardy (see paragraph (A) above) said:

> Thanks Hamish. Jonathan let me know if I need to do anything. Kind regards, Larry.

(H) Jonathan McHardy, in a message on 6 August 2007 at 1.50 a.m., to Lawrence Fletcher and Hamish McHardy, said:

> I will effect payment from funds owed to you so no need to do anything.

(I) On 8 August 2007 at 9.16 a.m. Hamish McHardy sent an email to David Morrison, under the subject "Lawrence Fletcher", saying:

> Hopefully you will have my letter and cheque and will have filled in the registration form and sent to Kerifresh with your nominee cheque. Sorry to be a nuisance. Regards ..

This message was acknowledged by David Morrison at 10.23 a.m. the same day.

93. The evidence clearly shows the money trail. It is uncontested that Hamish McHardy initially paid the $15,000 for the 10,000 Kerifresh shares purchased by GDPT from the Blenheim estate. It is uncontested that Hamish McHardy was reimbursed the following day by a payment from Jonathan McHardy of $15,000 in reduction of the amount owing by the Murrayfield Trust to Lawrence Fletcher under the "Neverland" loan.

94. The Panel does not accept that the initial payment by Hamish McHardy to Grove Darlow to fund the purchase of the 10,000 Kerifresh shares was simply the actions of the chairman of the company facilitating investment in the company by a new investor.

95. Hamish McHardy had used Grove Darlow in June 2007 to approach Kerifresh to obtain information readily-available to him as chairman of Kerifresh. Grove Darlow said in its 19 June 2007 letter to Kerifresh that the information requested was to pass to an investor said to be interested in making an offer for some or all of the shares in the company. Lawrence Fletcher has never at any point in the evidence provided to the Panel indicated an interest in making an offer for all the shares in Kerifresh available for purchase. Hamish McHardy's letter of 6 August to Grove Darlow included an exclamation mark after the reference to Lawrence Fletcher using that firm as his nominee.

96. In the Panel's experience it is quite unusual for the chairman of a company to go through a firm of solicitors to obtain copies of the company's annual report for a client who is interested in making an offer to purchase some or all of the shares of the company when as chairman and shareholder he could obtain this material directly himself. The inference the Panel draws is that he did not want his interest known to other Kerifresh directors.

97. Hamish McHardy, in his oral evidence, was asked why it was necessary for him to introduce Lawrence Fletcher to Grove Darlow when Lawrence was already known to the firm as a syndicate member in Neverland. Hamish McHardy said that he (Lawrence Fletcher) needed someone in New Zealand to act for him and *"I was keen for him to be involved"*.

98. When questioned further about the apparent inconsistency (Grove Darlow already being known to Lawrence Fletcher so he did not need an introduction) Hamish McHardy said *"That's true. But anyway, whatever the reason, I mean that's what happened."*

99. The Panel does not find it credible that Hamish McHardy was just acting as chairman to facilitate an investment in Kerifresh by a new investor. However, the Panel does accept that Hamish McHardy was keen for Lawrence Fletcher to become a significant shareholder in Kerifresh.

100. In the next section of the determination the Panel discusses a possible control strategy by the McHardys and a motivation for Lawrence Fletcher's involvement in Kerifresh.

Discussions preceding Lawrence Fletcher's initial acquisition of Kerifresh shares

101. The Panel received in evidence quite a volume of email messages obtained under summons from Hamish McHardy. In respect of some of that information counsel for Hamish McHardy requested confidentiality because the emails contained confidential information about Kerifresh's affairs or made sensitive comments about other people.

102. The Panel will respect that confidentiality to the extent possible. However, it is not always possible or appropriate in the context of this determination.

103. An email of 3 August 2007 at 4.24 a.m. from Hamish McHardy to Jonathan McHardy discussed aspects of capital raising by Kerifresh. Included in the message, under the subject heading "Kerifresh", was:

> I have sent you a one page of the shareholding after a one for three at $1.50. OConnor has been buying shares at $1.50 and upwards. It is not much use competing with him and putting up the share price.
>
> But there are several factors of interest to Kerifresh now that there is interest in its shares. We are in a good place to expand but have too much debt in a risky business.

> We have $[X]m of tax losses so debt reduced will add the whole of the interest foregone to profits as there is no tax shelter.
>
> We have 40ha of sheltered land and kiwi plants to plant and get approval to graft to gold to produce superior returns over a five year period. ROI in this exercise is in excess of [Y]%.
>
> A stronger balance sheet will allow us to develop this land and have strong market reputation which would give us the chance to selldown to investors once the publicity took hold. Once producing or planted land was sold and better profits obtained, then there would be chances to buy back our shares etc. or we might find a buyer.
>
> The model is attached and can be used to change the issue price and the allocation rate.
>
> Nothing said to the Thompsons or any others yet.

Various aspects of the business are discussed, included the possibility of Kerifresh selling off certain assets and then buying back some of its own shares. The email makes clear that this strategy had not been discussed with other directors.

104. An email in reply from Jonathan McHardy to Hamish McHardy on 3 August 2007 at 11.57 p.m. included:

> so O Connor, ourselves and Fletcher would actually or effectively underwrite the share issue ... assuming others don't subscribe ... O Connor gets his stake at a good price ... we keep ours, Larry gets his ... the company gets capital ... its one way to dilute the weak holders ...better for the company maybe but generous to OConnor, who might be a trouble maker. Maybe Fletcher and others could come in with enough money to underwrite the amount that is not taken up .. ie acquire a bigger stake ...

105. In a reply sent on 3 August 2007 at 5.13 p.m. from Hamish McHardy to Jonathan McHardy (with the non-corresponding clock times apparently the result of the senders being in different time zones) Hamish McHardy said:

> Yes thanks for that. There are a few say 10,000 shares for sale which I propose Larry buys so we get him on the share register. Then any shareholder may be able to ask for a share in any shortfall in the take up.
>
> The deal may not be acceptable to Thompson and David Callagher who are two of the four on the board. First the Board would have to agree and then at least a 51% majority of shareholders who vote, so it would need Thompson's approval.
>
> Apart from the $3.50 NTA value per share there are two significant values not part of the NTA. [Then details are given of three separate aspects of the company's business that are said to be worth more than book value.] So this is another $0.50 per share.
>
> A factor in the OConnor bid may be that he had been working in Australia for a wheat exporting business there. There have been many problems also because of the water shortage. Kerikeri is immune from this as we have a wonderful and cheap to run lake catchment that provides all the water we want. We also have nearly a nil

> frost problem compared to that of the rest of the NZ kiwi business. If OConnor gets a decent holding he may bring in his Aussi mates to bid for the rest.

106. In a reply from Jonathan McHardy sent to Hamish McHardy at 10.23 a.m. on 4 August 2007 he said:

> I agree on getting Larry on the register ... let me know if he should fill in that form ...
>
> I think getting these shares at up to $2 looks ok ... maybe the alternative to the cash issue is we ourselves bid $2 with an agreement from thompson and callagher not to sell but if we don't get to the 50% they will sell some top up amount to get us to that level ie make the buys effective ... buying 30% would cost say $4.5mio ... and I would be happy to fund that ... I would use my [named bank] money or get it put in my pension fund better still ... our average entry would still be very good."

107. The Panel makes the following comments and finding in respect of this exchange of emails between Hamish and Jonathan McHardy, which the Panel was asked to treat in confidence and which accounts for the deletions in the text. The exchange:

(a) Conveys confidential company information given by Hamish McHardy, the Chairman of Kerifresh, to another Kerifresh shareholder, his son Jonathan, that is relevant to the value of the company and that the Panel has been asked not to disclose to other interested parties. This is unacceptable to the Panel in the context of a company whose shares are currently or are sought to be under offer;

(b) Discloses, just a few days before the purchase of the 10,000 shares through the Blenheim solicitors, that the McHardys proposed to get Lawrence Fletcher on the Kerifresh share register, and that the 10,000 shares would achieve this purpose;

(c) Is consistent with information given at the 7 November 2007 meeting by Paddy Marra, independent director of Kerifresh, that Kerifresh had been looking at ways to raise new capital and shows that the McHardys were looking at ways to increase their level of control of the company, either by underwriting a rights issue or by launching their own takeover. Having Lawrence Fletcher on the share register was a part of this strategy;

(d) Shows a commonality of purpose between Jonathan and Hamish McHardy, and their intention to involve Lawrence Fletcher in their plan to increase the shareholder base, if not their control, of Kerifresh;

(e) Shows the McHardys' expectation that Lawrence Fletcher will be supportive of their strategy in relation to Kerifresh even though he is not involved in the exchange of emails.

The purchase of 165,000 Kerifresh shares by GDP Trustee Limited from Alan and Helen Thompson

108. On 9 August 2007 Terry O'Connor, who on 9 July 2007 and 23 July 2007 had approached Kerifresh shareholders with an offer to buy their shares, wrote to Kerifresh pointing out a number of potential breaches of the Code by Thompson interests.

109. In response to this complaint the Kerifresh board, through independent director Paddy Marra, decided to appoint Quigg Partners to investigate these allegations. There was a subsequent exchange of correspondence between O'Connor and Marra about the appointment of Quigg Partners.

110. The Panel was told that ~~S~~subsequently, during August 2007, ~~the Panel was told that~~ John Horner of Quigg Partners gave informal legal advice to Alan Thompson that the shares held by Anbran Trustee Company Limited may have been acquired in breach of the Code. He recommended that Alan Thompson sell those shares.

111. On 1 October 2007 TGL issued its takeover notice and made its first complaint to the Panel about various alleged breaches of the Code. These allegations were considered by the Panel at its first meeting on 16 October 2007.

112. On 5 October 2007 at 12.48 p.m. Helen Thompson sent a message to Hamish McHardy. It said:

> Hi Hamish. Just to let you know that Alan and I will be downsizing by 158,380. ... Rgds Helen.

113. On 5 October 2007 at 1.01 p.m. David Morrison of Grove Darlow sent an email to Alan Thompson. In that email Morrison said:

> I act for a party which is interested in purchasing up to 350,000 ordinary shares at $2 per share. If you are interested in selling please send to my office a share transfer form, at which time I shall arrange for execution and payment. I look forward to hearing from you if the above is of interest. Regards ...

David Morrison immediately forwarded his message to Hamish McHardy *"fyi"*.

114. Later on 5 October 2007, at 3.36 p.m., David Morrison sent a further message to Alan Thompson. In that message he said:

> Further to my email earlier, my client would be grateful if you could send me a list of the shareholders with current contact details. I would appreciate if this could be provided promptly. Thank you in anticipation of same. Regards ....

This message was sent on to Hamish McHardy at 3.38 p.m. *"fyi"*.

115. Maureen Patterson forwarded a copy of the share register with addresses to David Morrison at 4.18 p.m. on 5 October 2007, copied to Alan Thompson.

116. On 5 October 2007 at 4.33 p.m. David Morrison forwarded the share register to Hamish McHardy, copied to Lawrence Fletcher.

117. On 6 October 2007 at 8.19 a.m. Hamish McHardy sent an email to David Morrison, copied to Lawrence Fletcher, observing that neither Grove Darlow nor Lawrence Fletcher was on the share register. It transpired that the transfer in favour of GDPT had not been registered when originally sent to Kerifresh.

118. Maureen Patterson, the person responsible for processing share transfers, in her evidence given to the Panel at the 7 November 2007 meeting, said that the non-registration of the transfer of 10,000 shares to Grove Darlow was *"just a pure oversight"*. She added, in answer to further questioning *"There was quite a bit of correspondence in my tray and I just hadn't got through to it. That was simply that."*

119. On 10 October 2007 at 3.51 p.m. Hamish McHardy copied the email at paragraph 108 to Lawrence Fletcher, copied to Jonathan McHardy and David Morrison to which he added the message:

> Transfer selling these shares has been sent to Grove Darlow for you to fund at $2.00. Regards ..

120. On 10 October 2007 at 21.29 Jonathan McHardy sent a message to Hamish McHardy and Lawrence Fletcher, copied to Jonathan McHardy and David Morrison. It said:

> the instruction was for 165,000 shares ie 330,000.

121. On 10 October 2007 at 6.03 p.m. David Morrison sent a message to Lawrence Fletcher. It said:

> Gidday Larry. Your offer to purchase shares from Alan Thompson has been accepted. Can you deposit NZ $330,000 to our trust account (deposit slip attached). When making the payment use the reference "MCH603-1". Thanks ...

On 11 October 2007 at 9.44 a.m. David Morrison forwarded this message on to Hamish McHardy "*FYI*".

122. Alan Thompson and his wife Helen executed a share transfer form in respect of 165,000 Kerifresh shares on 8 October 2007. The offer by GDPT to buy up to 350,000 shares was accepted by the Thompsons as to 165,000 shares but the transaction has not proceeded. This is first, because of the original restraining orders made by the Panel on 10 October 2007, and subsequently by enforceable undertakings given to the Panel by the Thompsons, which prevent the Thompsons from selling any Kerifresh shares and Kerifresh from registering the transfers until the close of 30 November 2007.

123. This sequence of messages demonstrates the intimate involvement of Hamish and Jonathan McHardy in the initial purchase of Kerifresh shares from Alan and Helen Thompson, and the apparent lack of detailed knowledge of these matters by Lawrence Fletcher.

124. While this transaction between Alan Thompson and Lawrence Fletcher, with the full knowledge and involvement of the McHardys, was entered into before the Panel's first hearing on 16 October 2007, it was not disclosed and only came to light in the second hearing.

125. While summonses were issued and documents sought in relation to share dealing this particular transaction was not disclosed by any of the parties to the first Panel meeting. When questioned in the second hearing about why the Panel was not told earlier about the sale of shares by the Thompsons, the response from Hamish

McHardy was "*You didn't ask!*" .and from Alan Thompson "*I don't think I was asked.*"

126. Counsel for Alan Thompson, Julian Long, observed at that point that there would have been no purpose for that information to be withheld from the Panel at its first meeting and he did not know why it had not been volunteered.

127. The Panel considers that those responses are an example of the lack of candour with the Panel on a number of aspects of this inquiry, one of a number of considerations that have influenced the Panel in its assessment of credibility.

The offer by Lawrence Fletcher for 335,000 shares in Kerifresh through GDP Trustee Limited

128. As already noted, TGL gave notice of its intention to make a takeover offer, and lodged a complaint with the Panel, on 1 October 2007. On 10 October 2007 the Panel gave notice of its first Panel meeting, to be held on 16 October 2007 and made a number of restraining orders. On 18 October 2007 the Panel issued its determination arising from its meeting of 16 October 2007. On 19 October 2007 the Panel received its second letter of complaint from TGL, being the copy of a letter TGL had sent to Grove Darlow, concerning the Lawrence Fletcher offer.

129. On 18 October 2007, and unbeknown to the Panel, Grove Darlow circulated the Lawrence offer letter, offering to buy on behalf of Lawrence Fletcher 335,000 Kerifresh shares at $2 per share (see paragraph 74 above). At that time TGL had given notice of a takeover offer but had not made the offer.

130. Lawrence Fletcher, in his sworn statement of 6 November 2007 provided to the Panel for the purposes of the meeting of 7 November 2007, said:

> I am purchasing the shares with my own money.
>
> I have not discussed with either Jonathan McHardy or Hamish McHardy any arrangement or agreed to work in concert with either of them or anybody else in the purchase of shares.
>
> My sole purpose in purchasing the shares is as an investment.
>
> I am not interested in being involved in any dispute or breach of any regulations or provisions in New Zealand and while Kerifresh presents as a good investment at $2.00 per share I am just as happy to invest elsewhere should there be any problem with New Zealand authorities in me so doing.

> However, I state categorically that I do not consider myself to be an associate or to be working in concert with Hamish McHardy, Jonathan McHardy or any other person.
>
> I do however turn to Jonathan for advice from time to time and have sought guidance from numerous people including Hamish McHardy and Jonathan and if that, in the eyes of the Panel, amounts to being an associate then I am prepared to discontinue any interest in Kerifresh.

131. Hamish McHardy, in his written statement for the 7 November 2007 meeting said:

> My actions in respect of encouraging Mr Fletcher's investment were entirely in accordance with my chairmanship of Kerifresh where I have a continuing interest in encouraging investors to invest in the company. This role extended to discussions in relation to Mr Fletcher's desire and attempt to acquire further shares after Turners and Growers gave notice of its intention to make a takeover bid.

132. Jonathan McHardy, in his written statement of evidence for the 7 November 2007 meeting, said:

> I want to categorically state that I have no written or verbal agreement with Larry relating to any shares he may presently own or seek to own. In particular, given the heightened interest in his actions or future actions, I have again made it very clear to him that if he elects (or is allowed) to invest in Kerifresh, he is doing so as an independent shareholder and is doing so completely separately to my or my father's interests in the company.

133. It is apparent from the evidence that the offer made in the Lawrence offer letter (see paragraph 74 above) to purchase up to 335,000 Kerifresh shares was part of an overall plan to purchase up to 500,000 Kerifresh shares.

134. The first indications were that Lawrence Fletcher was interested in buying up to 350,000 Kerifresh shares (see paragraph 113 above). Later it became clear from the email exchanges that Lawrence Fletcher has an interest in acquiring up to 500,000 Kerifresh shares. The first indications of this intention were in the letter to shareholders drafted by Hamish McHardy (see paragraph 139(a) below).

135. The evidence in Grove Darlow's records shows that Lawrence Fletcher has transferred sufficient funds to Grove Darlow to fund the purchase of 500,000 Kerifresh shares.

136. The 335,000 shares offered for in the Lawrence Fletcher offer letter of 18 October 2007 is the difference between the 500,000 Kerifresh shares which it was intended to acquire (discussed below) and the 165,000 shares sold by the Thompsons to GDTP on 8 October 2007.

137. The statement to shareholders in the Lawrence Fletcher offer letter of Lawrence Fletcher's intentions to acquire 335,000 Kerifresh shares may have been literally true but was arguably misleading and deceptive by not mentioning the purchase that had already been agreed to from the Thompsons.

138. Lawrence Fletcher, in his sworn statement of 6 November 2007 to the Panel, does not refer to the 165,000 Kerifresh shares sold by the Thompsons to GDPT on or about 8 October 2007. His statement that:

> I have already purchased 10,000 shares in Kerifresh in August and while I have invited existing shareholders to offer me their shares for sale I have not purchased further shares at this point in time,

when coupled with his earlier statement that he had asked Grove Darlow:

> to purchase on my behalf up to 335,000 shares in Kerifresh Limited for the price of $2.00 per share

is also misleading and deceptive because it omitted any reference to the purchase of the Thompsons' shares which he was aware of through various emails as early as 10 October 2007 (see paragraph 119 above).

139. In addition to the above, evidence provided to the Panel under summons for the meeting on 7 November 2007, primarily in the form of email correspondence, indicates that the McHardys had an active role in Lawrence Fletcher's offer for Kerifresh shares. This evidence includes:

(a) Email of 6 October 2007 at 9.02 a.m. from Hamish McHardy to Lawrence Fletcher, David Morrison and Jonathan McHardy. Subject was "*Draft letter to shareholders*." The text was:

> See draft attached. Regards Hamish McHardy.

The attachment to the email is a letter that indicates it is to be on Grove Darlow letterhead. It is in the form of a letter to Kerifresh shareholders. It included : *"Mr Fletcher is offering to buy up to 500,000 shares at $2.00 with no conditions."* Hamish McHardy confirmed in evidence that he had drafted the letter, and had forwarded it to the other parties, indicating he knew of the intention by Lawrence Fletcher to offer to buy up to 500,000 Kerifresh shares.

(b) Email of 6 October 2007 at 1.03 p.m in reply, from Jonathan McHardy to Hamish McHardy, Lawrence Fletcher and David Morrison. Jonathan says:

> That's fine and clear. Clearly Larry has to authorise and ok any letter and offer he makes so he can advise David accordingly. Best, Jonathan

(c) Email of 7 October 2007 at 4.29 a.m. in reply from Lawrence Fletcher to Hamish McHardy, Jonathan McHardy and David Morrison. Lawrence Fletcher said

> Thank you Hamish. My middle name is Bruce rather than John. ... I have emailed David separately confirming these wishes. The content of the letter is also fine if David is ok to circulate. Kind regards, Larry

(d) Email of 8 October 2007 at 12.15 p.m. from David Morrison to Hamish McHardy and Lawrence Fletcher, copied to Jonathan McHardy and Robert Wood. The text is:

> Gents, This offer by Larry may run foul to the Securities Act so we'll just have a look at this aspect first, then report back to you all on whether or not a short form prospectus needs to be issued. Regards David Morrison.

(e) Email of 8 October 2007 at 12.55 p.m., in reply, from Hamish McHardy to David Morrison and Lawrence Fletcher, copied to Jonathan McHardy, Robert Wood and Alan Thompson. The text included

> Alan can you please either email or send a copy [of the offer by Terry O'Connor] to David Morrison at Grove Darlow, ...
>
> A month or so ago Terrance O'Connor made an offer to buy Kerifresh shares and no prospectus was issued. I will get the company to either fax or email a copy of the "intention to make an offer". Regards ...

(f) Email of 8 October 2007 at 12.01 p.m. from Hamish McHardy to Lawrence Fletcher, David Morrison and Jonathan McHardy, under the subject line "Re Draft letter to shareholders.":

> David We need your comments on the letter to shareholders. Lawrence's second name obviously needs altering. Secondly, the offer should not be sent until T & G's offer is made to shareholders, as it will not then be able to buy shares otherwise than under the offer. Regards ..

(g) Email of 8 October 2007 at 12:55 a.m. from David Morrison in reply. It said:

> Gidday Hamish, We have crossed emails on this. We are currently looking into the Securities Act ramifications of Larry's offer and will report shortly. We are conscious of the tight timeframes. Regards ...

(h) Email of 10 October 2007 at 4.56 a.m. from Jonathan McHardy to Hamish McHardy, saying

> Any more news of Kerifresh, has the Turners offer gone out? My RBC shares are settled so that's good liquidity wise. ...

(i) Email of 10 October 2007 at 7.35 a.m. from Hamish McHardy to Jonathan McHardy said:

> No T & G offer has not gone out yet but is expected to any time now. Larry's offer will not go out until T & G's offer is made. Advisors up at Kerikeri doing due diligence. ...

(j) Email of 10 October 2007 at 11.16 a.m., from Lawrence Fletcher to David Morrison, Hamish McHardy and copied to Robert Wood, under the subject line "*Re: Draft letter to shareholders*". It said:

> David. Is there any news on this? Regards .

(k) Email of 10 October 2007 at 12.55 p.m. in reply from Robert Wood to Lawrence Fletcher, David Morrison and Hamish McHardy. It said:

> Good Morning Lawrence. David has asked that I give you an update on this issue.
>
> 1. No takeover: on the basis that your share holding both before and after you have made the offer to buy the additional shares is, or will be, less than 20% of the total shareholding of the company, and that you are not "associated" or acting in concert with any other shareholder that would bring your combined totals to more than 20%, the offer to buy the shares is not a takeover offer and the takeovers code will not apply.
>
> 2. Offer letter: We are finalising the offer letter and putting onto the system in readiness for a mail merge when the time is right. Will forward copy of the latest draft shortly.
>
>   In a recent phone conversation with Hamish it was agreed that we hold off sending out the letter to shareholders until Turners and Growers have sent out their takeover offer. We understand that has not yet been sent out.
>
>   We will need the updated shareholder details in order to address your letter to shareholders, ...
>
>   We will also need the money to purchase the shares i.e. $1m to be paid into our trust account prior to the letter of offer going out.
>
>   Is there any other detail that needs to be clarified? Regards ..."

Hamish McHardy was questioned whether this meant that he was actually instructing Grove Darlow on the strategy for the Lawrence Fletcher offer. In evidence Hamish McHardy said:

> No its not. It's really just asking for my opinion – when would be a good date for the offer to go out...

Hamish McHardy was asked who the "we" was referred to in the email. He said:

> No, it was agreed between discussions I'd had with Jonathan on this matter.

In response to "*Oh I see. So it's you and Jonathan*" Hamish said:

> Yes, and yeah, I think.

(l) On 11 October 2007 at 7.55 a.m. Jonathan McHardy sent a message to Hamish McHardy, copied to Lawrence Fletcher. It said:

> So that's Alan's shares.... 165,000 ... so think larry will instruct Morrison etc that he can buy 335,000 more ...

(m) On 11 October 2007 at 9.39 a.m. Lawrence Fletcher sent a message to Jonathan McHardy and Hamish McHardy, copied to David Morrison which said:

> David I have appetite for a further 335,000 shares. With respect to the letter to shareholders is the only thing you are waiting for the funds from myself to cover the whole amount, or should I hold off sending this until Kerifresh [sic – TGL] make their formal offer? Kind regards, Larry

(n) On 11 October 2007 at 9.54 a.m. David Morrison sent a message to Lawrence Fletcher, Jonathan McHardy and Hamish McHardy, copied to Robert Wood. It said:

> Yes we have a share transfer to 165,000 shares at $2.00 per share.
>
> The plan unless matters have changed is to wait until T & G made an offer before Larry made his. Let me know if that has changed. If not we will proceed to have things set up for a mail merge to shareholders. In the interim if you could deposit the $330K NZ into the account as advised yesterday, that would be good.

Hamish McHardy was questioned by the Panel about the reference to "*the plan*" and whether it was Hamish and Jonathan McHardys' understanding. He said:

> Yeah that's right. The plan was to wait until T & G made an offer..

(o) On 11 October 2007 at 11.35 a.m. Hamish McHardy sent a message to David Morrison, Lawrence Fletcher and Jonathan McHardy, copied to Robert Wood. It read:

> Dated 10 October Kerifresh is subject to a restraining order from the Takeovers Panel not to register any transfer of securities by Alan Thompson or Helen Thompson in their own right or as trustees. Regards ...

(p) On 17 October 2007 at 11.01 a.m. Hamish McHardy sent a message to Jonathan McHardy copied to Lawrence Fletcher which said:

> Grove Darlow are all set to send out Fletchers offer which they will do as soon as Fletcher emails them such instructions.

(q) On 17 October 2007 at 8.35 p.m. Lawrence Fletcher sent an email to Hamish McHardy and Jonathan McHardy. It said:

> Hamish. What is the current status – David had indicated holding off with my letter until Kerifresh [sic] made their formal offer. Has this now been made? Kind regards …

(r) On 18 October 2007 at 7.44 a.m. Hamish McHardy, in an email message to Lawrence Fletcher and Jonathan McHardy, said:

> It appears that T & G can wait until the end of the month to make its offer. In the meantime they have written to shareholders asking them to sell irrevocably if T & G actually make the offer. Thus, before making the offer, which can be altered or not made, they are gaining information as to the likely acceptances and advice of those willing to sell which they could take up up to 20% if the offer is not made.
>
> We think it is better to put a superior offer in the market. Superior in that it is unconditional whereas the T & G offer has every chance of not succeeding as it is unlikely to meet the 50% acceptance condition.

Hamish McHardy was asked by the Panel who the "we" was in the email. He said:

> Yes. We'd have discussed this with Jonathan. He felt it was better for Fletcher to go and make an offer if he really wanted to buy the shares rather than wait for the T & G offer to come.

(s) On October 18 2007 at 5.02 a.m. Lawrence Fletcher sent a message to Hamish McHardy, copied to Jonathan McHardy, David Morrison and Robert Wood. It said:

> Robert, David. It sounds like now is the time for me to approach shareholders at nzd2.00 a share. I remain interested in up to 500,000 shares of which I understand I have just purchased 165,000 shares.
>
> If you could send the letter out along the lines previously discussed.
>
> Please send me your bank account details so I can arrange the transfer of further funds. Thank you and regards …

(t) In a message on 18 October 2007 at 9.00 a.m. Robert Wood advised Lawrence Fletcher, copied to Hamish McHardy:

> Good evening Lawrence. Will send the offers out today. Meantime attached please find copy of the letter we intend sending and our bank account details. Regards ..." [See paragraph 74 for the final text of the letter]

(u) On 23 October 2007 at 00:33 Lawrence Fletcher sent a message to Jonathan McHardy. It said:

> Jonathan. I am being chased to transfer funds to grove darwell [sic]. Are you able to transfer the remainder of the amount I have with you to grove darwell? Thanks ..

(v) On 23 October 2007 at 11.24 p.m., following an earlier interim acknowledgement, Jonathan McHardy, in a message to Lawrence Fletcher copied to Hamish McHardy, said:

> Confirm balance owed of $333,000 has been paid for value October 24th. So total repayment to Grove is $663,000. Good luck getting some shares! Best ...

140. There are subsequent exchanges of messages relating to the complaint from TGL and discussions with the Panel. These do not bear on the behaviour of the parties prior to the making of the offer.

141. In his oral evidence given to the Panel at its 7 November 2007 meeting, Hamish McHardy generally repeated the statement made in his written evidence, namely that his involvement in the Lawrence offer was simply as that of the chairman of the company trying to encourage investment in Kerifresh. He confirmed that he had drafted the letter to shareholders for Lawrence Fletcher's offer and sent it to Jonathan for comments. He said that he did not know why he was copied in to so many of these emails.

142. The Panel does not accept this explanation. The matters under discussion involved serious legal issues, substantial sums of money and interests in property i.e. shares. The Panel does not find the suggestion that unintended recipients were casually left in the email strings as being credible.

143. In his evidence Jonathan McHardy acknowledged that he had encouraged Lawrence Fletcher to invest in Kerifresh but denied there was any attempt on the part of himself and his father to orchestrate Lawrence's involvement. Jonathan McHardy acknowledged the possibility of a capital raising by the company so it would be of benefit to have Lawrence on the company's share register. He said that he was copied

into the various emails and commented on the draft letter to shareholders because he was a friend of Lawrence Fletcher and had introduced him to Kerifresh. However, the evidence clearly indicates a stronger involvement than that by Jonathan McHardy.

Conclusion in relation to the Lawrence Fletcher offer for Kerifresh shares

144. Lawrence Fletcher, through GDPT, currently holds 10,000 Kerifresh shares and has received an expression of interest from a Kerifresh shareholder to his offer for another parcel of 6,000 shares. In addition, there is an executed transfer of 165,000 shares from Alan and Helen Thompson that was subject to the Panel's restraining order and is now subject to the parties' subsequent enforceable undertakings. Lawrence Fletcher has expressed an intention, and has provided the funds, to purchase up to 500,000 Kerifresh shares in total or some 6.6% of total voting rights in Kerifresh.

145. The offer by Lawrence Fletcher on its own would not breach the Code because it is for less than 20% of the total voting rights of Kerifresh. The issue for the Panel is whether Lawrence Fletcher was and is an associate of any of the other shareholders of Kerifresh at the time of making the offer.

146. The evidence shows that Hamish McHardy and Jonathan McHardy were closely involved in the formulation and making of Lawrence Fletcher's offer. The Panel does not accept that Hamish McHardy's role in this process was that of a chairman of a code company simply trying to encourage investment in the company.

147. Jonathan McHardy is a friend of Lawrence Fletcher and accepted (in fact Hamish and Jonathan McHardy as trustees of the Murrayfield Trust accepted) a large loan from Lawrence with minimal documentation. Those funds were ultimately returned to Lawrence Fletcher to part-fund Lawrence Fletcher's offer for Kerifresh shares.

148. Confidential documentation provided to the Panel (excerpts of which are set out in paragraphs 101 to 106 above) indicates that the McHardys' have an interest in increasing their level of control in Kerifresh either by takeover or through participating in a capital raising by the company. Lawrence Fletcher's acquisition appears from the evidence to be a part of the McHardys' strategy. They see the same benefits in Kerifresh as TGL – an undervalued company with a lot of upside possibility.

149. Rule 4(1)(a) of the Code provides that for the purposes of the code, a person is an **associate** of another person if-

> (a) the persons are acting jointly or in concert; or
>
> ...
>
> (d) the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates;

150. In considering the activity of "acting ... in concert" in the context of the question whether Hamish McHardy, Jonathan McHardy and Lawrence Fletcher were acting jointly or in concert in relation to the acquisition or intended acquisition of voting rights in Kerifresh by Lawrence Fletcher, the Panel was assisted by the discussion in *Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597 and the several authorities reviewed in that judgment.

151. While the Panel does not attempt to summarise those authorities in these reasons, the essence of the concept of acting in concert involves knowing conduct the result of communication between the parties and not simply simultaneous actions occurring spontaneously. It involves at least an understanding between the parties as to a common purpose or object.

152. In relation to the acquisition and intended acquisition of voting rights in Kerifresh by Lawrence Fletcher the Panel finds as follows:

(a) Lawrence Fletcher, Hamish McHardy and Jonathan McHardy had an understanding between them that their purpose was to get Lawrence Fletcher to become the holder or controller of an increased percentage of voting rights in Kerifresh by initially acquiring 10,000 shares in Kerifresh and by subsequently increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;

(b) There was knowing conduct arising from the frequent communications between Lawrence Fletcher, Hamish McHardy and Jonathan McHardy as to Lawrence Fletcher's intention to become the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;

(c) There was a consensual adoption of a common understanding between Lawrence Fletcher, Hamish McHardy and Jonathan McHardy that Lawrence Fletcher was to become the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;

(d) There was mutual contemporaneous engagement, as evidenced by the many emails sent between or copied to each of them, in respect of Lawrence Fletcher becoming the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;

(e) The email correspondence sent between or copied to each of them clearly indicates that the actions of Lawrence Fletcher, Hamish McHardy and Jonathan McHardy in relation to Lawrence Fletcher's becoming the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders were not simply spontaneous and independent actions on the part of each one of them;

(f) The Panel considers that the thinking and actions of Lawrence Fletcher, Hamish McHardy and Jonathan McHardy intercepted in relation to Lawrence Fletcher becoming the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders. The thinking and actions of each of them did not merely run in parallel.

153. The Panel therefore concludes that 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 an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders. Lawrence Fletcher, Hamish McHardy and Jonathan McHardy are

therefore associates for the purposes of the Code in relation to the acquisition and intended acquisition of control of voting rights in Kerifresh by Lawrence Fletcher through GDPT.

154. The Panel has also considered whether Hamish McHardy, Jonathan McHardy and Lawrence Fletcher have a personal or business relationship such that, under the circumstances (being the offer to acquire voting rights in Kerifresh by Lawrence Fletcher) they should be considered as associates for the purposes of the Code.

155. In respect of the relationships between the parties the Panel considers, on the basis of the evidence, that:

(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 the Neverland property syndicate and through the lending of a significant sum of money by Lawrence Fletcher to the trustees of the Murrayfield Trust, the trustees of which are Hamish McHardy, Jonathan McHardy and Roger Sinclair in 2006, 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:

(A) where Jonathan McHardy encouraged Lawrence Fletcher to invest in Kerifresh, a highly illiquid under-performing, but asset-rich, company,

(B) where 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,

(C) where Hamish McHardy made the initial contact with Grove Darlow, financed the initial purchase of shares, disclosed confidential company

information to Jonathan, and remained closely involved with all aspects of the acquisition strategy,

(D) where, as Jonathan McHardy advised Hamish McHardy in an email of 17 October 2007, Lawrence Fletcher was "*keen to get involved*" and provided his own money to purchase up to 500,000 Kerifresh shares, and

(E) where 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, under the circumstances, Hamish McHardy, Jonathan McHardy and Lawrence Fletcher are associates of each other in terms of rule 4 of the Code.

The Panel does not accept the denials of association by Hamish McHardy, Jonathan McHardy and Lawrence Fletcher.

The implications of association

156. Hamish McHardy, through Sundry Investments Limited, currently holds 812,200 shares in Kerifresh, or 10.72% of voting rights in Kerifresh. As found at the Panel's first meeting, any associate of Hamish McHardy is an associate of Sundry Investments Limited by virtue of rule 4(1)(e) of the Code.

157. Jonathan McHardy, through the Murrayfield Trust of which he, Hamish McHardy and Roger Sinclair (from September 2003) are trustees, is the registered holder of 617,316 Kerifresh shares, or 8.15% of total voting rights. The combined holdings of the McHardy interests are therefore 18.87% of the company's total voting rights.

158. Jonathan McHardy has advised the Panel that, in September 2007, the Trust contracted to sell its 617,316 Kerifresh shares to the nominee of a Canadian pension plan of which Jonathan McHardy is the beneficiary. Jonathan McHardy provided email confirmation that this transfer had occurred on or about 12 September 2007. Settlement for the transaction, at $1.50 per share, occurred on 5 October 2007. However, the resultant share transfer has not yet been registered. This means that

Hamish McHardy, Jonathan McHardy and Roger Sinclair are still the registered holders of those shares despite the contract to purchase them by the pension fund trustee.

159. Jonathan McHardy, in his written evidence, said that he had decided to consolidate and move some of his longer term investments into his own name. He told the Panel he has a personal pension plan administered by a Canadian bank. He said that he had asked the trustee of the plan to purchase his Kerifresh shares.

160. Jonathan McHardy, in his evidence to the Panel, acknowledged that he had effective control over the assets of his pension plan and considered himself the beneficial owner of those assets, and that the trustee would not do anything in relation to the Kerifresh shares without his approval.

161. In the Panel's view the status of Jonathan McHardy's interest is not affected by whether his Kerifresh shares are held by the Murrayfield Trust or by the corporate trustee of his personal pension plan. His degree of control is such that, under the circumstances, for the purposes of rule 4(1)(e) of the Code, the trustee holders would be regarded as being associates of Jonathan McHardy for the purposes of the Code.

162. Jonathan McHardy and Hamish McHardy, through the Murrayfield Trust and Sundry Investments Limited, currently hold or control 18.87% of the voting rights in Kerifresh. Lawrence Fletcher, through GDTP holds, has bought, or has contracted to buy, 181,000 Kerifresh shares, or 2.39% of Kerifresh. The Panel having found Jonathan McHardy, Hamish McHardy and Lawrence Fletcher, and their various interests, to be associates of each other under rules 4(1)(a) and 4(1)(d) of the Code, in aggregate this is a total of 21.26% of Kerifresh's total voting rights.

163. In addition, Lawrence Fletcher has indicated a desire, and has provided the funds, to purchase a further 329,000 Kerifresh shares, or 4.34% of Kerifresh. Any shares acquired by Lawrence Fletcher in excess of an aggregate (i.e. taking together the voting rights held or controlled by his associates) of 20% of the voting rights in Kerifresh would not comply with the fundamental rule of the Code.

164. As noted earlier, the Panel had no indication at its first meeting on 16 October 2007 of the intention by Lawrence Fletcher to make an offer for any shares in Kerifresh. The

Panel received no documents from Hamish McHardy at its first hearing relating to his funding of the purchase of 10,000 Kerifresh shares by GDPT on 6 August 2007, relating to the purchase of shares from the Thompsons, nor relating to his involvement in the Lawrence Fletcher offer. The Panel believes that its summons to Hamish McHardy dated 10 October 2007[8] should have produced these documents. The Panel reserves its position on this matter.

Other contraventions of the Code

165. Amendments to the Act in late 2006 expanded the definition of contravention of the code.

166. Section 2(2)(e) of the Act provides that a contravention of the Code includes "*being in any way, directly or indirectly, knowingly concerned in, or a party to, a contravention by any other person of the takeovers code ... .*

167. Jonathan McHardy and Hamish McHardy were, by acting in concert, clearly knowingly involved in the contravention of the Code by Lawrence Fletcher.

168. The state of their knowledge is plain from the evidence. It is not necessary that they knew that Lawrence Fletcher's actions were, or even may have been, a contravention of the Code. It is the state of their knowledge of the essential facts that constitute the contravention that is important.

The position of Alan and Helen Thompson in relation to the Fletcher offer

169. The Panel considers that Alan Thompson and his wife Helen Thompson, although they have contracted to sell 165,000 Kerifresh shares to Lawrence Fletcher/GDPT, are not associates for Code purposes of Lawrence Fletcher, Hamish McHardy or Jonathan McHardy in relation to the offer for shares made by GDPT on behalf of Lawrence Fletcher. The Panel also considers that Alan Thompson was not knowingly involved in the contravention of the Code by Lawrence Fletcher.

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[8] The summons required Hamish McHardy to produce, among other documents: "*Any document recording discussions, negotiations or correspondence entered into by Philip Hamish McHardy in anticipation of any arrangement or understanding relating to the acquisition, disposal, holding or controlling of shares in Kerifresh Limited.*

(4) The position of Harold Thompson and his wife Helen

170. TGL, in its original complaint, alleged that Harold and Helen Thompson were associates of their son Alan Thompson and his wife Helen for Code purposes. This had potential impact if their holdings had to be aggregated, particularly in relation to a repurchase of Kerifresh shares undertaken by the company in 2005.

171. Harold Thompson was summoned to the Panel's first meeting but did not attend that meeting. The summons documents were left at Mr Thompson's residential address on 15 October 2007, as allowed under the Act, but he was not at home at the time and in fact was away from home for several days.

172. The Panel understands Harold Thompson's position and has no intention of taking any action in relation to what might be seen as a technical non-compliance with a legal summons.

173. Harold Thompson gave evidence under oath to the meeting on 7 November 2007. Mr Thompson, as an octogenarian, explained his portfolio objectives. He expressed his disappointment at the performance of his Kerifresh shares. He said that while he occasionally discussed Kerifresh matters at family gatherings, these were only in the most general terms. He regularly attended Kerifresh annual meetings, frequently spoke up in criticism of the performance of the company, and never gave his son or anyone else either a general or specific proxy to exercise the voting rights attached to his shares.

174. The Panel is satisfied that, while Harold and Alan Thompson clearly have a family relationship, it is not a relationship that should, for the purposes of rule 4(1)(d) of the Code, under the circumstances, be considered to be one of their being associates for Code purposes.

Determination

175. **The Panel determined on 9 November 2007, for the purposes of section 32(3) of the Takeovers Act 1993:**

(a) **That it was not satisfied that Jonathan McHardy complied with rule 6(1) of the Takeovers Code when he with Hamish McHardy, as trustees of the Murrayfield Trust, acquired 597,316 shares of Kerifresh on 29 May 2002;**

(b) **That 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 GDP Trustee Limited 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) **That it considered that Jonathan McHardy and Hamish McHardy have contravened the Code by being directly, and knowingly concerned in, or a party to, the contravention of the Code by Lawrence Fletcher detailed above.**

Restraining orders

176. Pursuant to section 32(4) of the Takeovers Act 1993 the Panel resolved on 9 November 2007 to make the following orders:

(a) An order continuing the restraining orders preventing Lawrence Fletcher from exercising any voting rights or acquiring or disposing of any securities in Kerifresh;

(b) An order continuing the restraining order preventing GDPT from exercising any voting rights or acquiring or disposing of any securities in Kerifresh controlled by Lawrence Fletcher;

(c) An order continuing the restraining orders preventing Kerifresh from registering any transfers of securities to or from GDP Trustee Limited (where controlled by Lawrence Fletcher), Lawrence Fletcher, and Jonathan McHardy.

(d) A restraining order preventing Jonathan McHardy from exercising any voting rights or acquiring or disposing of any voting securities in Kerifresh;

(e) These orders will expire at the close of 30 November 2007.

Costs

177. The Panel will make orders for costs in terms of the Takeovers (Fees) Regulations 2001 in accordance with the Panel's published policies for applying those regulations.

Remedies

178. A series of enforceable undertakings given by Hamish McHardy and by Sundry Investments Limited, and by Kerifresh, remain in force until the close of 30 November 2007.

179. The Panel will be meeting shortly to determine what remedies it should seek in respect of these transactions.

180. The Panel has not yet concluded its consideration of remedies arising from its earlier meeting on 16 October 2007. The restraining orders following that hearing expired on 8 November 2007. However, in light of the fact of the intervening meeting on 7 November 2007, involving a number of the parties, all parties who were the subject of restraining orders gave enforceable undertakings under section 31T of the Act effectively extending the restraining orders until 30 November 2007.

Additional comment on the Panel's determination of 18 October 2007

181. In its determination and reasons dated 18 October 2007 the Panel stated in paragraph 98(d) that it was not satisfied that Hamish McHardy was not directly and knowingly concerned in the contravention of the code by Graham Cowley, GMS Fulfillment Limited and Alan Thompson. The Panel has received a submission from Chapman Tripp on behalf of Hamish McHardy dated 6 November 2007 to the effect that the Panel did not have jurisdiction to make that finding for the reason that the applicable law in relation to conduct which occurred in 2004 and 2005 was the law prior to the Takeovers Amendment Act 2006. The submission invited the Panel to revoke paragraph 98(d) pursuant to section 32(7).

182. In preparing its determination and reasons dated 18 October 2007 the Panel was aware that the applicable law was that prior to the Takeovers Amendment Act 2006: see footnote 1 on page 4 of the reasons. But even assuming that, as the law then stood, the Panel would not have had jurisdiction to make a finding of contravention of the Code merely on the basis of a person's being knowingly concerned in the contravention of the Code by another, the Panel does considers that it was not precluded from reaching and recording the view, which it did, that Hamish McHardy was directly and knowingly concerned in the contraventions of the Code by others. The Panel considers that, particularly in circumstances where the matter may come before the High Court on the issue of remedies, it is desirable that the Court should have the benefit of the Panel's views having regard to the Court's jurisdiction under section 43(1)(e) (as it stood before the 2006 Amendment).

183. However, the Panel takes this opportunity to record that in expressing its view in paragraph 98(d) of its Reasons dated 18 October 2007 the Panel was not purporting to find that Hamish McHardy's conduct in connection with the Graham Cowley/GMSF Code contraventions was itself a contravention of the Code and nor did the restraining orders detailed in paragraph 99(a) relate to that conduct. The need for and the basis of the restraining orders against Hamish McHardy in paragraph 99(a) were the findings of Code contravention by Hamish McHardy in paragraphs 98(a) and (b).

DATED at Auckland this 22nd day of November 2007

SIGNED for and on behalf of the Panel

by the Chairperson

David Oliver Jones