IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2010-409-002323
[2020] NZHC 1434

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of Livingspace Properties Limited (in rec and in liq)
BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	LIVINGSPACE PROPERTIES LIMITED (in rec and in liq) Defendant

Hearing:	4 February 2020 (additional submissions filed 24 February 2020, 2 March 2020, 19 May 2020 and 26 May 2020).
Appearances:	A Ho and B J Norling for R Walker (Applicant for review) J Moss and H M Weston for K Buxton (Respondent)
Judgment:	23 June 2020

JUDGMENT OF OSBORNE J
[on review]

This judgment was delivered by me on 23 June 2020 at 4.25 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] Robert Walker (the liquidator) is the liquidator of Livingspace Properties Ltd (in rec and liq) (Livingspace).

[2] He seeks review of an interlocutory judgment of Associate Judge Johnston (the judgment).[1] In particular, he seeks the setting aside of two orders in the judgment whereby:

(a) he was directed to serve David Henderson, Castle Operations Ltd (Castle), Tay Operations Ltd (Tay) and RFD Finance Ltd (RFD) (herein "the non-parties") with all documents associated with the liquidator's renewed application for the production of documents, with the right to file notice of opposition to that renewed application and the rights to appear to oppose the application and to seek orders they may regard as appropriate with regard to confidentiality or the use to which any documentation produced should be put (Order A);[2] and

(b) the Court concluded that it has inherent jurisdiction to remove a liquidator and to entertain applications for leave to apply for such removal by persons who do not fall within the categories identified in s 284(1) Companies Act 1993 (the Act) (Order B).[3]

[3] Kristina Buxton, who had made the interlocutory applications, opposes this review.

Background

[4] The background is set out in paras [1]–[20] of the judgment.

[5] In May 2018, the liquidator applied for production of books, records and documents by Ms Buxton and for her to attend an examination. The application was

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1 *Commissioner of Inland Revenue v Livingspace Properties Ltd* [2019] NZHC 2213 [Judgment].
2 At [71(b)].
3 At [71(c)].

made under s 266(2) of the Act. I made orders requiring Ms Buxton (in her capacity as director of RFD) to (among other things):[4]

> (a) … produce originals or copies of all books, records and/or documents relating to the business, accounts, or affairs of Livingspace Properties Limited (in liq) ("the Company") in her possession or under her control, including but not limited to the following matters:
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> (i) any statement of account detailing the transactions between the Company and RFD Finance Limited (RFD);
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> (ii) any accounting records that RFD must keep as mortgagee in possession of the Company's mortgaged land, goods or accounts receivable required by s 160 of the Property Law Act 2007;
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> (together, the Documents)

[6] Ms Buxton had two large boxes of documents delivered to the liquidator's solicitors on 12 July 2018. The documents were then scanned into PDF. The liquidator deposes that they comprised 5,135 pieces of paper (with many documents comprising multiple pages). Of those, 5,010 documents related to the period before 5 August 2011 when an affidavit of documents was filed in another proceeding relating to RFD. The liquidator deposes that 125 pages, mostly not financial in character, related to the period after 5 August 2011. He deposes that very few related to the following year during which RFD remained in possession of the Livingspace businesses.

[7] The liquidator considered it implausible that no more than 125 pages of information relating to the period after 5 August 2011 were within the control of Ms Buxton. He decided to seek further directions (leave having been reserved by the judgment to both parties to apply for further directions in relation to the orders made).[5] On 12 October 2018 he sought (by memorandum) further directions, including that Ms Buxton produce documents set out in a schedule containing 27 categories of material (the 27 categories).

[8] On 12 November 2018 I made directions for the matter to proceed on the basis of memoranda and affidavits, with a timetable to be observed.

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4 *Commissioner of Inland Revenue v Livingspace Properties Ltd* [2018] NZHC 1232 at [38] [Production judgment].

5 Production judgment, above n 4, at [38(f)].

[9] On 23 November 2018 an application was filed by Ms Buxton, the non-parties and FTG Securities Ltd (FTG) seeking:

(a) leave to bring an application for removal of Mr Walker as liquidator of Livingspace, Castle, Tay and Lichfield Ventures Ltd (Lichfield Ventures);

(b) an order of such removal (the removal application); and

(c) an order staying any further steps taken on the liquidator's s 266 application and his 12 October 2018 "application", pending the outcome of the removal application

(the stay application).

[10] Ms Buxton did not comply with the timetable in relation to the liquidator's 12 October 2018 request for further directions, apparently taking the view that her now-filed applications rendered that unnecessary. The liquidator duly filed a notice of opposition to the removal and stay applications. Both parties filed evidence in support of their positions.

[11] On 23 January 2019 an amended application was filed. Ms Buxton (alone) now sought an order joining the other non-parties as defendants in this proceeding. Ms Buxton and the non-parties continued to seek a stay of the liquidator's application. They also sought (by amendment) an order that FTG be granted leave to make the removal application, followed by an order of removal.

[12] The liquidator duly filed a notice of opposition to the amended application. Yet more evidence was filed on both sides.

[13] In the meantime, the liquidator applied for a number of orders including orders striking out aspects of Ms Buxton's amended application. The outcome of the hearing before Associate Judge Andrew (the strike-out judgment) was that the Court:[6]

(a) struck out those aspects of Ms Buxton's amended application in which the removal of the liquidator from that role with Castle, Tay and Lichfield Ventures was sought, together with leave to seek such orders; and

(b) required the applicants, if wishing to challenge the liquidator's role as such in those other companies to file separate applications for leave to apply for his removal.

Hearing of the (remaining) amended application

[14] The amended application came to be heard by Associate Judge Johnston on 29-30 July 2019. The Judge directed that the issues for hearing would be:

(a) joinder;

(b) stay; and

(c) the standing of Ms Buxton and other parties to apply for an order removing the liquidator.

[15] In the judgment, Associate Judge Johnston referred to the "prodigious amount of material for the hearing (nine bound volumes of material, together with skeletal outlines of submissions)", his Honour noting that "some of this material was referred to by counsel in argument".[7]

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6 *Commissioner of Inland Revenue v Livingspace Properties Ltd* [2019] NZHC 366 [Strike-out judgment].

7 Judgment, above n 1, at [10].

The orders

Issues on review – Order A:

[16] Order A (above at [2(a)]) is that which directed service of the liquidator's "renewed application" upon the non-parties with right to appear in opposition.

[17] The issues raised on review are whether the Associate Judge erred by:

(a) treating the request for further directions as a fresh interlocutory application akin to an application for a non-party discovery;

(b) failing to have regard to the finality of Order A by reason of the doctrine of res judicata and a privity of interest between Ms Buxton and the non-parties; and

(c) failing to consider and apply the test in *Capital and Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* when considering whether to join non-parties or to grant intervener status.[8]

Issues on review – Order B

[18] Order B (above at [2(b)]) is that in which the Associate Judge held that the Court has inherent jurisdiction to remove a liquidator and to entertain applications for leave to apply for removal by persons who fall outside the classes identified in s 284(1) of the Act.

[19] The fundamental issue in relation to Order B is whether the Court has inherent jurisdiction to remove a liquidator.

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8 *Capital and Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* [2014] NZHC 3205.

The review jurisdiction

[20] Transitional provisions in the Senior Courts Act 2016 operate so as to entitle Ms Buxton to have the judgment reviewed in this Court under s 26P Judicature Act 1908 and r 2.3 High Court Rules 2016.[9]

[21] As the Associate Judge's decision was a reasoned one, following a defended hearing, the approach is essentially appellate.[10] The review proceeds as a rehearing.[11]

[22] I adopt (summarised) the commentary in *McGechan on Procedure*.[12] The starting point is the Associate Judge's decision. The applicant has the burden of persuading the Court that the decision was wrong – that it rested on unsupportable findings of fact and/or applied wrong principles of law. The Court will apply the approach in *Austin, Nichols & Co Inc v Stichting Lodestar,* which involves the Court making its own assessment as to whether the original decision is wrong.[13]

Order A – production of documents

The reasoning in the judgment

[23] The background to Order A lies in this Court's 2018 order (under s 266 of the Act), requiring Ms Buxton (as director of RFD) to produce records of Livingspace in her possession or control. The production judgment reserved leave to the parties to apply for further directions.[14] There then followed sequentially Ms Buxton's production of records and the liquidator's request for further directions.[15]

[24] The liquidator's request for further directions was met by the November 2018 cross-application by Ms Buxton, Mr Henderson and four others, for a stay of the s 266

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9 Senior Courts Act 2016, sch 5, cl 11.
10 *Perriam v Wilkes* [2014] NZHC 2192 at [4]; Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR2.3.02(1)(a)].
11 High Court Rules 2016, r 2.3(4)(a).
12 Andrew Beck and others, above n 10, at [HR2.3.02(1)(a)].
13 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16]; *Burmeister v O'Brien* [2008] 3 NZLR 842 (HC) at 29.
14 Above at [7].
15 Above at [6]–[7].

process.[16] That cross-application was overtaken by the amended application (summarised at [11] above).

[25] In turning to the joinder application, Associate Judge Johnston referred to the history of the difficult relationship between the liquidator and Mr Henderson, noting that the decision in *Henderson v Walker* contained "a more extensive exposition of the difficult relationship".[17]

[26] His Honour then identified what he described as the applicants' legitimate interests in the documentation sought:

> [27] The applicants' claims to some sort of proprietary or possessory rights to the relevant documentation are unchallenged. I am therefore prepared to proceed on the basis that the applicants have legitimate interests in the documentation sought. It is unnecessary for the Court to reach any view as to the likelihood or otherwise of Mr Walker using any documentation to which he obtains access for collateral purposes. It is enough for the Court to conclude — as I have — that the applicants have a legitimate interest in the documentation.

[27] Associate Judge Johnston analysed the procedural regimes concerning non-parties under r 4.56 and pt 31 High Court Rules.[18] His Honour concluded:

> [36] Regardless of whether these applications are determined under r 4.56 or pt 31, the presence of Mr Henderson, Castle Operations, Tay Operations and FDR Finance is not necessary to dispose of the liquidator's application for an order for the disclosure of additional documentation. Whilst I accept, for present purposes, that they may have legitimate interests in relation to the documentation sought, and that they are entitled to be heard both as to whether the liquidator should be entitled to the relevant documentation and as to any constraints to be imposed upon him, they can be heard without being joined as parties to the proceeding.
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> [37] The situation here appears to me to be akin to an application for discovery against a non-party. In such applications, a non-party against whom discovery is sought does not become a party to the proceeding. He, she or it is, however, entitled to be heard in relation to the application. The point is that party status is not necessary in order for the court to allow a non-party against whom discovery is sought to be heard.
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> [38] I decline the applications of Mr Henderson, Castle Operations, Tay Operations and FDR Finance for orders joining them as parties to this

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16 Above at [10].
17 Judgment, above n 1, at n 3, citing *Henderson v Walker* [2019] NZHC 2184.
18 At [28]–[36].

> proceeding. However, I propose to order that they have a right of audience for the purposes of the application relating to the provision of documentation.

His Honour omitted FTG from the order as its inclusion was no longer sought.[19]

[28] Therefore, as summarised (I consider correctly) by Mr Moss, Associate Judge Johnston held that the non-parties were entitled to be heard without being formally joined to the proceeding as they had legitimate interests in the material sought by the liquidator. The legitimate interest, in his Honour's finding, was their proprietary interest in the documentation.

Non-parties' case

[29] In support of the cross-application for joinder, Mr Moss produced to Associate Judge Johnston a table relating to the 27 categories sought by the liquidator. Mr Moss included in the table a column headed "Documents belonged to". In that column he attributed ownership of the documents sought by the liquidator to a particular entity, having regard to the wording of the liquidator's category. The first two entries in Mr Moss' table serve to illustrate the entire table:

No.	**Documents sought**	**Documents belong to**
1.	Statement of account detailing the transactions between RFD and Livingspace	RFD
2.	General ledgers of Tay and Castle for period 16/9/10 – 6/8/12	Tay and Castle

[30] In his synopsis, Mr Moss submitted:

> Only the documents belonging to RFD could have been covered by the original production order of Associate Judge Osborne. The parties with a proprietary right to documents applied for joinder because they thought that was the appropriate mechanism in which to be heard in relation to whether the documents should be produced and whether quarantining orders should be put in place to protect certain documents of a confidential/privileged nature.

[31] Mr Moss submitted that the Associate Judge's dual decision – finding joinder to be unnecessary but entitling the non-parties to be served and heard – was correct by

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19 At [39].

reason of the non-parties' ownership of the documents and thus their right to contest their production.

[32] Mr Moss submitted that the right of the non-parties to be heard on the request for production of these documents is particularly pertinent in this case because of what Mr Moss described as "Robert Walker's history of misusing documents belonging to David Henderson or his associated companies in breach of his duties as a liquidator". Mr Moss referred in particular to findings of Thomas J in *Henderson v Walker*.[20] Mr Moss submitted there must be serious doubt as to Mr Walker's intentions in relation to the documents sought. In the absence of evidence from the liquidator as to his intentions with the information, Mr Moss submitted that it seems very likely that the liquidator intends to use the documents for collateral attacks on the non-parties.

Liquidator's grounds of opposition

[33] The liquidator, by his notice of opposition to the joinder application, asserted that there was no basis for adding Mr Henderson and the four others as parties. The liquidator cited four reasons:

(a) the Court's 2018 order and the liquidator's request for further directions relate solely to Ms Buxton, that is to her examination and her compliance with the production order;

(b) the non-parties ought not to be joined as Ms Buxton is the sole director, controller and possessor of the documentation and the information that the liquidator seeks;

(c) the presence of the non-parties before the Court is not necessary to adjudicate on and settle all questions involved as Ms Buxton is the sole director, controller and possessor of the documentation and the information sought; and

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20 *Henderson v Walker*, above n 17.

(d) the non-parties are not the subject of and do not have an interest in the outcomes of the production order (including the request for directions) as they are neither creditors, shareholders, directors or other entitled persons of Livingspace.

Liquidator's submissions

[34] For the liquidator, Mr Ho submitted that the Associate Judge had erred in making directions in relation to the non-parties for three reasons:

(a) his Honour had treated the further directions sought by the liquidator as a fresh interlocutory application, when it was not;

(b) the Associate Judge had failed to consider the effect of the Court's production order and the application of the doctrine of res judicata to Ms Buxton and her privies as considered in *Shiels v Blakeley* and *Ready Mark Ltd v Grant*;[21] and

(c) The Associate Judge had failed to apply the law pertaining to the conferral of rights of intervention and audience on interested parties, as summarised in *Capital and Merchant Finance Ltd*.[22]

[35] Mr Ho then expanded upon those three topics.

Treating the request for further directions as a fresh interlocutory application

[36] Mr Ho identified the liquidator's request for further directions, made on 12 October 2018, as a request made pursuant to leave reserved in the Court's 2018 production order. Mr Ho in particular referred to a minute which I issued on 12 November 2018, in which I recorded:[23]

> [9] Furthermore, the content of Mr Neil's 12 October 2018 memorandum makes plain the fact that the liquidator is seeking compliance with the Court's orders of 29 May 2018, which were the subject of leave reserved to apply for

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21 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA); *Ready Mark Ltd v Grant* [2012] NZCA 445.
22 *Capital and Merchant Finance Ltd (in rec and liq) v Perpetual Trust Ltd,* above n 8.
23 *Commissioner of Inland Revenue v Livingspace Properties Ltd (in liq)* HC Christchurch CIV-2010-409-2323, 12 November 2018.

> further directions. The Court did not anticipate a further interlocutory application at that point. What is happening is that the orders made on the original application are being revisited. It is for the Court in this context to determine its own procedure in the interests of securing a just, speedy, and inexpensive determination. That can be done in this case by properly considered and drafted memoranda and supporting evidence.

[37] Mr Ho noted that Associate Judge Johnston had treated the liquidator's memorandum request as an "application for an order for the disclosure of additional documentation".[24] Mr Ho accordingly submitted that Order A appears to have been based on the Judge's misapprehension that the request for further directions was an interlocutory application. Mr Ho submitted that, as it was not such an interlocutory application, there was no scope for the non-parties to oppose the further directions which Order A expressly permitted them to do.

[38] Mr Ho further submitted that Order A was in any event unnecessary as the arguments which Ms Buxton wishes to raise could be raised without notices of opposition from the non-parties.

Res judicata

[39] Mr Ho alternatively submitted that the doctrine of estoppel per rem judicatam applies in this case. Mr Ho invoked the Court of Appeal's judgment in *Shiels v Blakeley* as establishing two principles applicable in this case:[25]

(a) where a court has pronounced a final judicial decision over the parties to, and the subject matter of the litigation, the parties are estopped from disputing or questioning the decision on its merits; and

(b) the same principle applies to any privy to such litigation, a person becoming a privy when there is a community or privity of interest between that person and the party.

[40] In light of these principles, Mr Ho first referred to the position of RFD (one of the non-parties which Ms Buxton sought to have joined). Upon the liquidator's initial

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24 Judgment, above n 1, at [36].
25 *Shiels v Blakeley*, above n 21, at 266.

application for a production order against Ms Buxton as director of RFD, the production judgment referred to 12 grounds of opposition advanced by Ms Buxton.[26] One of those grounds of opposition was that the documents sought were the "internal documents of RFD". That was a ground specifically addressed in the production judgment and dismissed.[27]

[41] Mr Ho identified that part of Associate Judge Johnston's judgment in which Mr Moss' schedule of documents (exemplified in Table A above) was referred to. His Honour recorded that the sole basis upon which the other parties whose joinder was sought was that "the documents that Mr Walker has sought under the Further Directions application belong and relate to them rather than Ms Buxton".[28]

[42] Mr Ho submitted that there would be no material difference between the argument to be advanced by the non-parties and the arguments previously advanced by Ms Buxton.

[43] Mr Ho then turned to the relationship between Ms Buxton and the non-parties. He noted that Ms Buxton, as well as being sole director of RFD, is sole director of Castle and Tay which are fully owned subsidiaries of RFD. Mr Ho submitted that there was, as between Ms Buxton and the non-parties, such "mutuality of interest" identified by the Court of Appeal in *Shiels v Blakeley* as leads the Court to find the parties estopped from seeking to re-argue existing orders.[29]

[44] Mr Ho submitted that the outcome here should have been the same as that in *Ready Mark Ltd v Grant*.[30] Ready Mark had sought judgment against Ms Grant for a sum allegedly owing for renovation work carried out on a property she owned. Ready Mark was controlled by Ms Grant's former husband who was its sole director. Ms Grant opposed Ready Mark's summary judgment application on the basis that the claim was determined as part of the valuation of relationship property in the Family

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26 Production judgment, above n 4, at [18].
27 At [30]–[31].
28 Judgment, above n 1, at [25].
29 *Shiels v Blakeley,* above 21, at [268].
30 *Ready Mark Ltd v Grant,* above n 21.

Court. The Court of Appeal dismissed an appeal from the judgment which had dismissed a summary judgment application.

[45] Both Associate Judge Christiansen and the Court of Appeal upheld that argument – Ready Mark was clearly the privy of Mr Grant and was bound by the consequences of the outcome in the Family Court affecting Mr Grant. Ready Mark was estopped from bringing the renovation work claim independently of the Family Court's determination.[31]

[46] Mr Ho submitted that if the principles in *Shiels v Blakeley* and *Ready Mark Ltd* are applied, as they should be on the facts of this case, then the only purpose of involving the non-parties would be to relitigate the production order. In Mr Ho's submission, the doctrine of estoppel produces (as identified in *Shiels v Blakeley*) the "fair and just result" that the non-parties, as Ms Buxton's privy, cannot relitigate the production order.

Conferral of intervention rights under *Capital and Merchant Finance*

[47] Mr Ho further submitted that the Associate Judge had erred in conferring rights of intervention and audience upon the non-parties as "interested parties". He submitted that the Court, by allowing the non-parties to file a notice of opposition and be heard in opposition, had in fact made the non-parties parties to the proceeding with ostensible rights of appeal, an outcome which Mr Ho submitted was inconsistent with his Honour's declining to join the non-parties as parties to the proceeding.

[48] Mr Ho submitted that the appropriate test to be applied was that in *Capital and Merchant Finance Ltd*, where Thomas J identified seven "propositions" in relation to the joinder of interveners and interested parties.[32] Thomas J took these propositions from the authorities:

> [41] The following propositions can be distilled from the authorities on the joinder of interveners/interested parties:

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31 *Ready Mark Ltd v Grant* HC Auckland CIV-2010-404-8264, 17 June 2011 at [64]; *Ready Mark Ltd v Grant*, above n 21, at [22], [38].

32 *Capital and Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd,* above n 8.

(a) An applicant must show that its legal rights against or liabilities in relation to the subject matter will be directly affected. Commercial, financial, or reputational interests in the outcome will only be sufficient in exceptional circumstances.

(b) If the intending intervener's presence before the Court will not improve the quality of information before the Court, that will count heavily against its addition to the proceedings.

(c) A relevant consideration is the extent to which the proposed intervener can rely on one of the parties to protect its rights and obligations.

(d) If either party would be prejudiced by the intervention, or if the intervention would create an impression of partiality, the application will not be granted.

(e) In cases where development of the law is likely, the application is more likely to be granted if the proposed intervener has special expertise to assist the Court on wider public policy issues.

(f) The underlying issue is whether it would be unjust to adjudicate on the matter in dispute without the intervener being heard. Several of the factors mentioned above tie into this issue.

(g) Where intervention is justified, the degree of participation granted to the intervener should be the minimum necessary to protect the intervener's interests.

[49] Mr Ho submitted, by reference to the *Capital and Merchant Finance* principles, that Order A ought not to have been made. This was, he said, because:

(a) the legal rights and liabilities of the non-parties were not affected by the further directions sought;

(b) the non-parties' presence would not improve the quality of information before the Court;

(c) the non-parties could rely on Ms Buxton to protect their rights and obligations;

(d) Ms Buxton would not be prejudiced by the exclusion of the non-parties;

(e) this was not a case where the law was likely to be developed; and

(f) it would not be unjust to adjudicate on the matters in dispute without the non-parties being heard.

Submissions for Ms Buxton

No separate interlocutory application?

[50] For Ms Buxton, Mr Moss referred to Mr Ho's proposition that there was not an interlocutory application (whether "renewed" or otherwise) for the non-parties to oppose. Mr Moss characterised that submission as a "form over substance" argument which should be rejected having regard to what the liquidator is now seeking.

[51] Mr Moss referred also to Associate Judge Andrew's strike-out judgment (above at [13] and n 6). In the introduction to the strike-out judgment, his Honour recorded (in relation to this matter) that "the liquidator filed an application (by memorandum) seeking directions for what he says are Ms Buxton's non-compliance…".[33]

[52] Mr Moss described the documents sought through the liquidator's memorandum as:

> a significant number of new categories of documents which were neither applied for before Associate Judge Osborne nor made the subject of the production orders.

[53] Mr Moss correctly pointed to the extent to which the documents sought related to other parties (in relation to which Ms Buxton had not been ordered to provide documents).

[54] In the alternative, Mr Moss submitted that even were the Court to find that the liquidator's request is a continuation of the production order, rather than a further directions application, the Court was still entitled to give the non-parties a right to be heard on that matter. Mr Moss invoked an observation I made in a minute on 12 November 2018 identifying the right of the Court in this context to determine its own procedure.[34]

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33 Strike-out judgment, above n 6, at [3].

34 *Commissioner of Inland Revenue v Livingspace Properties Ltd (in liq)*, above n 23, at [9].

Res judicata

[55] Mr Moss first submitted that the liquidator's res judicata argument was premature when the only consideration at present is that the non-parties have been given the right to be heard.

[56] Mr Moss submitted, in any event, that authorities such as *Shiels v Blakeley* are distinguishable because the present is not a situation where the non-parties are seeking to be heard on a final judicial decision.[35]

[57] Mr Moss referred to the six requirements of res judicata estoppel referred to in *Spencer Bower and Handley: Res Judicata*.[36] This list of requirements was cited by the Court of Appeal with implicit approval in *Butcher v Body Corporate 342525*.[37] The six requirements are as follows:

> (i) the decision … was judicial in the relevant sense;
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> (ii) it was in fact pronounced;
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> (iii) the tribunal had jurisdiction over the parties and the subject matter;
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> (iv) the decision was —
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> (1) final;
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> (2) on the merits;
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> (v) it determined a question raised in the later litigation; and
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> (vi) the parties are the same or their privies, or the earlier decision was *in rem*.

[58] Mr Moss submitted that the liquidator's res judicata argument fails for five reasons:

> (a) the further directions sought by the liquidator constitute a new application;

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35 *Shiels v Blakeley,* above n 21.

36 K R Handley *Spencer Bower and Handley: Res Judicata* (4th ed, Butterworths, London, 2009) at [1.02] (footnote omitted).

37 *Butcher v Body Corporate 342525* [2018] NZCA 19 at [43]–[62].

(b) the parties are not the same, each of the non-parties being their own entities. The production order relates to Ms Buxton. The third requirement in *Butcher* – jurisdiction over the parties and the subject matter – is missing;

(c) the non-parties are not seeking to re-argue the issue determined in the earlier litigation, namely the production order, which was directed to Ms Buxton in her capacity as a director of RFD. The non-parties seek to be heard only in relation to 27 fresh categories;

(d) in terms of the fourth requirement in *Butcher* – finality – the production order was not final in that leave was reserved for further directions; and

(e) in terms of the sixth requirement – privity – there is not a mutuality of interest between Ms Buxton and the non-parties because the further directions sought relate to them individually. Each has their own characteristics and interests (such as in relation to confidentiality).

[59] Mr Moss submitted in conclusion that each entity has a right to be heard on whether the documents sought from them individually should be produced.

Right of intervention under *Capital and Merchant Finance*

[60] Mr Moss noted that the liquidator's submissions to Associate Judge Johnston had included the proposition that the non-parties' application for joinder could more properly be considered as an application to intervene in Ms Buxton's applications. Mr Moss rejected that proposition as what the non-parties wish to do is to be heard in respect of the liquidator's application (not Ms Buxton's applications). The non-parties wish to be heard, Mr Moss says, because it is the liquidator who has sought their documents (without making an application against them).

[61] Mr Moss submitted that *Capital and Merchant Finance* is in any event distinguishable – the present case involves a party "having its documents interrogated", whereas *Capital and Merchant Finance* concerns rights of

intervention.[38] Mr Moss submitted that, to the extent that *Capital and Merchant Finance* might be relevant, it is for the overriding principle that the applicant must show that its legal rights in relation to the subject matter will be directly affected. Mr Moss submits that is the case here because any action the liquidator takes in relation to the documents sought will almost certainly directly affect the non-parties.

Analysis

Scope of the production judgment

[62] This hearing and judgment are evidence of the extent to which the liquidation of Livingspace, ordered almost 10 years ago, has become mired in applications, cross-applications, and wide-ranging legal argument. For the resolution of the present arguments, the production order made almost two years ago is of central importance. It is not nearly so wide in its scope as the arguments advanced by the parties (and their counsel) would appear to assume.

[63] The production order against Ms Buxton was made under s 266 of the Act, but the starting point lies in s 261 of the Act as orders may be made under s 266 only where a person has failed to comply with a requirement under s 261.

The statutory regime

[64] Section 261 of the Act empowers a liquidator to obtain documents of the company in liquidation from its director or other persons, and in particular provides:

> **261 Power to obtain documents and information**
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> (1) A liquidator may, from time to time, by notice in writing, require a director or shareholder of the company or any other person to deliver to the liquidator such books, records, or documents of the company in that person's possession or under that person's control as the liquidator requires.
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> …

[38] *Capital and Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd*, above n 8.

[65] Section 266 of the Act gives the Court powers in relation to the obtaining of documents and other information relating to the business, accounts, or affairs of the company in liquidation. Section 266 provides:

> **266 Powers of court**
>
> (1) The court may, on the application of the liquidator, order a person who has failed to comply with a requirement of the liquidator under section 261 to comply with that requirement.
>
> (2) The court may, on the application of the liquidator, order a person to whom section 261 applies to—
>
> (a) attend before the court and be examined on oath or affirmation by the court or the liquidator or a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:
>
> (b) produce any books, records, or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.
>
> (3) Where a person is examined under subsection (2)(a),—
>
> (a) the examination must be recorded in writing; and
>
> (b) the person examined must sign the record.
>
> (4) Subject to any directions by the court, a record of an examination under this section is admissible in evidence in any proceedings under this Part, section 383, subpart 6 of Part 8 of the Financial Markets Conduct Act 2013, or section 44F of the Takeovers Act 1993.

The basis of the liquidator's application for the production order

[66] The liquidator's focus was on a period from 2010 to 2012 when RFD was in possession of Livingspace's property. The liquidator wished to identify and realise legal claims that may belong to Livingspace from that period.

[67] From December 2014, Ms Buxton has been the director of RFD. This led the liquidator (unsuccessfully) to invoke s 261 of the Act in order to obtain directly from Ms Buxton RFD's documents relating to the affairs of Livingspace and, subsequently, to make the application to the Court for a production order under s 266 of the Act (combined with an application for an order also under s 266 that Ms Buxton be examined on oath).

[68] The application for production of documents was focused on RFD's records. The liquidator applied for an order that Ms Buxton:[39]

> (b) Produce originals or copies of all books, records and/or documents relating to the business, accounts, or affairs of the Company in Ms Buxton's possession or under her control, including but not limited to the following matters:
>
> (i) Any statement of account detailing the transactions between the Company and RFD Finance Limited (RFD);
>
> (ii) Any accounting records that RFD must keep as mortgagee in possession of the Company's mortgaged land, goods or accounts receivable required by s 160 of the Property Law Act 2007;
>
> (together, Documents)

[69] The Court, immediately after the order identifying the documents to be produced by Ms Buxton, made additional orders including that:[40]

(a) Ms Buxton produce the documents to the liquidator in a defined manner;

(b) Ms Buxton provide to the liquidator details of her reasonable out of pocket expenses; and

(c) the liquidator promptly thereafter pay Ms Buxton's expenses.

[70] The Court additionally reserved leave in relation to two matters –

(a) Ms Buxton had leave to request, in relation to any documents to be produced, the Court's direction designed to protect RFD's legitimate commercial sensitivity or confidentiality in relation to any document; and

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39 Production judgment, above n 4, at [3].
40 At [38(b)-(d)].

(b) leave was reserved to the parties to apply for further directions in relation to the orders at [38(a)–(d)], being those broadly summarised at [68]-[69] above.

[71] These orders were sealed and were not the subject of appeal.

[72] To summarise the position to that point, the liquidator, under s 261 of the Act, had sought from Ms Buxton as director of RFD such books, records or documents of the company as were in her possession or under her control. Following Ms Buxton's default, the liquidator, by applying on notice under s 266 of the Act, obtained the production order which (inter alia) required Ms Buxton to produce documents relating to the business of Livingspace within her possession or under her control and identified (without limiting the order to these categories) the statement of account of transactions between Livingspace and RFD and the accounting records that RFD had been required to keep as mortgagee in possession. The ambit of the production order is further explained in the leave which was reserved to Ms Buxton, which was for the purposes of protecting the legitimate commercial sensitivity or confidentiality of documents of RFD.

[73] At no point of the production judgment did the Court contemplate that the production order would cover the documents of companies other than Livingspace and RFD (whether or not Ms Buxton was an office holder or otherwise a representative of that other entity).

[74] The leave reserved to the parties under [38(f)] of the production judgment was expressly "to apply for further directions in relation to the orders in paragraph [38(a)–(d)]". The reservation of leave could not be read as applying to an entity other than Livingspace or RFD, not being the subject of any consideration in the judgment.

[75] At [81] below, I return to a discussion of the further directions sought by the liquidator as they relate to any documents of the non-parties other than RFD. At this point, it is necessary to focus on RFD alone.

Requested further directions affecting RFD's documents

[76] It was common ground between counsel that the production order was directed at Ms Buxton in her capacity as sole director of RFD. At the 2018 hearing, Ms Buxton (in her evidence and through counsel) took as grounds of opposition matters intended to protect the interests of RFD. Those related particularly to RFD's "internal documents" and the need for restrictions to protect matters of RFD's commercial sensitivity and confidentiality.[41]

[77] Contrary to Mr Moss's submission, the production order obtained by the liquidator against Ms Buxton was a final decision of this Court pursuant to s 266 of the Act.

[78] That leaves the question as to whether RFD was in terms of *Shiels v Blakeley* a privy in interest so as to be estopped from putting its own arguments forward at a later date.

[79] While it was recognised by the Court of Appeal in *Shiels v Blakeley* that the degree or nature of the link between the two parties in question is scarcely definable, the touchstone will usually be the community or mutuality of interest between the two.[42] Mr Moss's submissions in relation to mutuality of interest did not focus on RFD. Rather, his submission was that the non-parties are their own entities with their own structures and businesses and may take different positions in relation to documents. That submission cannot be applied on the facts to Ms Buxton and RFD. They plainly adopted a community or mutuality of interest approach to the 2018 application. The orders made were specifically tailored to protect the proprietary and confidentiality interests of RFD.

[80] It will produce a fair and just result as between the liquidator on the one hand and Ms Buxton and RFD on the other that RFD be estopped from pursuing an outcome inconsistent with the production order.

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41 Production judgment, above n 4, at [30]–[31].
42 *Shiels v Blakeley*, above n 21, at 268.

Non-parties other than RFD

[81] That leaves for consideration Mr Ho's submission that the remaining non-parties – Mr Henderson, Castle and Tay – were (in the making of the production orders) privies in interest with Ms Buxton.

[82] That is plainly not so. The interests of those other non-parties were not touched upon in the production judgment. If there had been some focus in the 2018 application on the documents of Castle or Tay which were controlled by Ms Buxton, there may have been some basis for an argument based on privity. But the mere fact that Ms Buxton was the sole director of Castle and Tay (as well as RFD) does not connect Castle and Tay to the 2018 application in a way that makes it fair and just to estop them from asserting their interests at this point. The same applies to Mr Henderson's interests – it is insufficient in relation to the 2018 application to constitute a "mutuality of interest" that he and Ms Buxton are husband and wife.

Recapping

[83] It is appropriate to recap at this point. The production order binds Ms Buxton and, through the doctrine of estoppel per rem judicatam, RFD. The production order required that Ms Buxton produce the documents identified in the order. Those were documents relating to the business, accounts or affairs of Livingspace in Ms Buxton's possession or under her control including particularly two categories of documents of RFD.

[84] The leave reserved under [38(f)] of the production judgment was for further directions "in relation to the orders in [38(a)-(d)]". The liquidator was not thereby reserved leave to apply for orders against other entities (either directly or through Ms Buxton as a director). The s 266 procedure was available to the liquidator precisely because Ms Buxton had failed to comply with a notice (under s 261) requiring production of records of Livingspace, including RFD's accounting records. There is no suggestion that the liquidator has made a parallel s 261 application in relation to the records of Castle, Tay or Mr Henderson which, if not complied with, would have triggered the liquidator's right to seek orders as to examination and/or production under s 266 of the Act. Understandably, the legislation makes a prior

(unfulfilled) request under s 261 a prerequisite to an order under s 266, but that step has not been taken by the liquidator in relation to the documents of Castle, Tay or Mr Henderson.

A supplementing procedure goes off the rails

[85] Of the 27 categories of documents sought by the liquidator in his request for further directions, the table presented by Mr Moss identifies nine categories as involving exclusively RFD documents, three categories involving both RFD and Livingspace documents and an additional two categories as involving Tay and Castle documents (as well as RFD and Livingspace documents). One category is shown as involving Livingspace documents alone.

[86] One further category involved documents of Ms Buxton personally and of Livingspace (as well as documents of Mr Henderson and Mr Hyndman).

[87] By reason of the production order and the estoppel per rem judicatam which applies to RFD documents, the production order applied to those 16 categories of documents to the extent they were the documents of Livingspace, RFD and/or Ms Buxton personally.

[88] From the outset of Ms Buxton's opposition to the request for further directions, it has been her consistent position that the request should be treated as a fresh application.

[89] The remaining categories of documents sought by the liquidator (with ownership variously attributed to Tay, Castle, Spinach Design Ltd, AFB Treasury Ltd, Mr Henderson and Mr Hyndman) fell outside the compass of the leave reserved to the parties to request further directions. In that sense, it already was (as Mr Moss submitted) in substance a fresh application.

[90] Accordingly, at that point it was not open to the liquidator to pursue the documents of the non-parties (other than RFD) through a request for further directions. If the liquidator wished to pursue such documents, it ought as a matter of jurisdiction to have been through either of two productions:

(a) a fresh s 261 notice to the non-parties (and for Ms Buxton in her capacity as a director of one of the companies) followed if necessary by an application under s 266(1) of the Act against those non-parties, directed to their documents; or

(b) an application made and served upon the non-parties under s 266(2)(b) of the Act.

[91] It was at the point of the liquidator requesting further directions, however, that the process went off the rails as regards the non-parties. This could never have been a successful application against the non-parties (other than RFD) under s 266(1) of the Act because they were not persons, in terms of s 266(1), who had failed to comply with the requirements of the liquidator under s 261 of the Act. To the extent that the liquidator sought further directions purportedly under the original production order, it was not appropriate to pursue a document held or controlled by people or entities other than Ms Buxton.

[92] But, at that point, Ms Buxton sought to protect the interests of the non-parties by seeking to have them joined, a step which Associate Judge Johnston refused, instead directing service of all documents on the non-parties who would have the right to file a notice of opposition and to appear.

[93] As a result, the parties now have a situation where, in relation to the existing proceedings which are concerned with the documents of Livingspace and RFD over which Ms Buxton has control, three non-parties are to have rights to be heard and, as Mr Ho submits, would therefore have consequential appeal rights.

Outcome to this point

[94] Ms Buxton's application in relation to the non-parties was specifically for joinder under r 4.56 High Court Rules.

[95] Albeit for reasons which differ from those of the Associate Judge, I conclude that his Honour was correct not to make an order of joinder.

[96] In relation to RFD, that is because RFD is estopped per rem judicatam from pursuing a procedure which does not comply with that laid out in the production order. Matters of protecting RFD's confidentiality interests thereunder are for Ms Buxton to take up. She has that ability through the leave reserved.

[97] As regards the other non-parties, their joinder to the proceeding cannot be regarded as necessary to adjudicate on and settle all questions involved in the proceeding.[43] Were they to be joined, it would be for the purpose of responding to the expanded orders sought against Ms Buxton in relation to such documents as she (or someone else on behalf of each non-party) deposes is the property of the non-party alone (and not that of Livingspace). But joinder for that purpose is unnecessary if, as is the case, the leave reserved to seek further directions in relation to the production order does not extend to the documents of the non-parties or to Ms Buxton in her capacity as director of those non-parties. The position concerning any documents of Mr Henderson is at one remove again – it cannot be asserted that Ms Buxton has any governance or legal control over Mr Henderson.

[98] The Associate Judge declined to join the non-parties as parties because he viewed the request for further directions as it affected them as being akin to an application for discovery against a non-party, in which event the non-party does not become a party to the proceeding itself.[44]

[99] His Honour might equally have declined the application for the reason identified above, namely that the non-parties' joinder was unnecessary.

[100] Associate Judge Johnston nevertheless adopted the alternative course of granting the non-parties a right to be heard (after service of the documents upon them). His Honour did so because he accepted, "for present purposes, that they may have legitimate interests in relation to the documentation sought".[45]

[101] I am satisfied, albeit for reasons not advanced in the liquidator's opposition, that the orders in relation to service and right of audience were unnecessary, for the

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43 High Court Rules 2016, r 4.56(1)(b)(ii).
44 Judgment, above n 1, at [37].
45 At [36].

same reason that an order of joinder was unnecessary. The liquidator's request for further directions confirming any documents of the non-parties could not be granted under the umbrella of the production judgment. It would require a different procedure.

[102] It had, from the beginning, been a central proposition of Ms Buxton's cross applications that the majority of documents now sought by the liquidator go beyond the existing Court order. In his submissions in support of joinder, Mr Moss similarly submitted that the liquidator's request for further directions was not "a continuance of the production order". While that submission identified the very conclusion I have reached above, the submissions at the hearing before me did not further engage with that issue, counsel instead turning to a discussion on the merits of joinder (with the apparent assumption for the time being that the liquidator's "application" was valid).

[103] As the issues before the Court for the time being are as between the liquidator and Ms Buxton (as cross-applicant) and any question of invalidity is capable of being determined now as between those two parties, it would be an unnecessary enlargement of the proceeding to have entities other than Ms Buxton (the respondent party to the production order) appearing and being heard.

[104] In these circumstances, after I had reserved and was reflecting on this judgment, I invited developed submissions from counsel as to whether the Court could, under the umbrella of the production order, make extended directions affecting the documents of the non-parties. I received such additional submissions as recorded at the start of this judgment. I have taken those submissions into account in reaching the determination at [101] above. The submissions for the liquidator and Ms Buxton respectively may be summarised as:

Liquidator

[105] For the liquidator, Mr Norling correctly identified that the production order was made with reference to the wording of s 266(2)(b) of the Act, the liquidator's application having been made under s 266.

[106] Mr Norling then drew a distinction between an order under s 266(2) – focusing on records relating to *the business accounts, or affairs of the company* (emphasis added) – and an order made under s 266(1) which, by its relationship to s 261, focuses on records *of the company* (emphasis added).

[107] Mr Norling submitted that as the concept involved in documents relating to the business, accounts, or affairs of the company is broader than the concept of documents of the company, the documents which Ms Buxton was directed to produce did not need to fall within the description of "company records".

[108] Turning to the requirements of notice, Mr Norling submitted that the Court's powers under s 266(2) do not depend on the existence of a prior notice under s 261 of the Act. Nor (alternatively if the Court were to reject that submission) was there a requirement to issue a notice to any non-parties specifically as the Court had granted orders under s 266 against Ms Buxton. Mr Norling stated that the liquidator was only seeking from Ms Buxton such documents as were in her possession or under her control which "might relate or belong to other entities".

[109] Mr Norling recorded the liquidator's acceptance that he had not served a s 261 notice on any of the non-parties, explaining that the liquidator had been unaware of those entities' involvement with Livingspace at the time. Mr Norling noted that the production order reserved provision for Ms Buxton to apply for confidentiality protection for any specific documents that could contain information of third parties. Mr Norling submitted that Ms Buxton should have utilised this reservation in order to protect any confidentiality and that it was not open to the non-parties to do so in relation to a production order not addressed to them.

[110] The liquidator invokes the doctrine of res judicata as an important consideration, submitting that Ms Buxton is attempting to relitigate matters previously determined.

Ms Buxton

[111] For Ms Buxton, Mr Moss raised two preliminary matters.

[112] First Mr Moss noted correctly that there was a focus in the liquidator's submissions on the original production order. Mr Moss submitted that such detracted from the proper focus upon the extent to which the additional orders sought by the liquidator went well outside the scope of the original production order, seeking the documents of non-parties, not held by Ms Buxton in her capacity as director of RFD.

[113] Secondly, Mr Moss objected to Mr Norling's inclusion of a four page chronology in his additional submissions, expressly pursuant to instructions from the liquidator. I accept Mr Moss' objection to the late introduction of that material, which was not material invited by the Court. It did not in any event assist in relation to the specific matters on which the Court sought additional assistance.

[114] Mr Moss noted that in terms of the record the production order was made against Ms Buxton under s 266 of the Act upon the basis that she had failed to comply with a s 261 notice. Further, that the order had been made against Ms Buxton in her capacity as director of RFD. Mr Moss adopted the Court's tentative conclusion that, as the non-parties had not been given notice under s 261 of the Act let alone failed to comply with such notice, s 266(1) of the Act was not engaged and had no application to the non-parties.

[115] In Mr Moss' submission, the only basis upon which the Court could then make orders relating to the production of documents, relating to the business accounts or affairs of the company under s 266, was in terms of s 266(2)(b) of the Act (which had been invoked as against Ms Buxton through the production order). But in relation to the non-parties, the liquidator had not made and served an application upon those non-parties under s 266(2). The liquidator had instead purported to rely upon the previous application made and served upon Ms Buxton alone.

[116] Mr Moss noted, as I have found, that a significant number of the documents in the 27 categories sought by the liquidator are not documents belonging to RFD. He submitted as I found that only some of the additional documents sought belong to RFD and fall within the scope of the original production order.

[117] Against that background Mr Moss submitted the Court has three available options:

(a) option 1 – to proceed to a hearing of the additional directions application as it currently stands;

(b) option 2 – to strike out the additional directions application as misconceived, invoking r 15.1 High Court Rules; or

(c) option 3 – to stay all or part of the proceeding, pursuant to r 15.1(3) High Court Rules, providing say 10 working days to the liquidator to file an amended application seeking only such documents from Ms Buxton as fall within the scope of the original production order.

Mr Moss submitted that the most appropriate course was for the entire request for additional directions to be struck out (leaving as the only outstanding matter the removal application).

Outcome

[118] For the reasons I have given at [95]–[101] above, the review application will be allowed to the extent of rescinding the service and audience directions because there is no realistic prospect that the further directions sought can be made under the production order so as to affect the documents of the non-parties (other than RFD). The production order was not made against Ms Buxton other than in her capacity as a director of RFD.

[119] To the extent that the liquidator under the cover of further directions was seeking the documents of other non-parties, such a request was clearly outside the scope of the leave reserved. For the documents of any other non-party to become the subject of a court order would have required an application made against that party, on notice, under s 266 of the Act.

[120] In the context of the present review, this is not an appropriate time to engage with Mr Moss' second option, by which the request for further directions would be

struck out entirely. I accept that Mr Moss' third option is the appropriate course – the request for further directions will be stayed for a period of 20 working days to enable the liquidator to file an amended request for further directions limited to such documents as are in Ms Buxton's possession or under her control in her capacity as director of RFD and as relate to the business, accounts, or affairs of Livingspace.

The removal of the liquidator

The application

[121] Ms Buxton and the non-parties applied for leave for FTG to bring an application to remove Mr Walker as liquidator of Livingspace, and if granted, for an order of removal.

[122] For standing, the applicants asserted that they are each the subject of Mr Walker's applications in the liquidation. In the case of Mr Henderson, it was additionally asserted that he is a former director of "the companies". For the Court's jurisdiction to make such orders, FTG invoked ss 280 and 284 of the Act. Additionally, the inherent jurisdiction of the Court to supervise the conduct of liquidators as officers of the Court was relied on by all applicants.

[123] The application was opposed by the liquidator. In relation to standing, he asserted that none of the applicants has standing under s 284(1) of the Act as none is a creditor, shareholder, director or other entitled person in terms of the definition in s 2 of the Act. The liquidator also opposed the application on substantive grounds.

The limited removal issue before the Associate Judge

[124] The hearing of the removal application before the Associate Judge was limited to the question of the standing of Ms Buxton and the non-parties to apply for an order of removal.

[125] His Honour concluded that the Court has inherent jurisdiction to remove a liquidator and to entertain applications for leave to apply for such removal by persons who do not fall within the categories identified in s 284(1) of the Act.[46]

[126] Associate Judge Johnston first considered the position of FTG specifically, as it was claimed for FTG that it was a "creditor" of Livingspace in terms of s 284 of the Act. His Honour examined the evidence adduced.[47] His Honour was not satisfied that FTG is a creditor of Livingspace with entitlement to seek leave under s 284(1) of the Act.[48]

[127] His Honour then considered the Court's inherent jurisdiction.[49]

[128] Associate Judge Johnston expressly recognised that the inherent jurisdiction may be excluded where Parliament has clearly and unambiguously prescribed the Court's jurisdiction in relation to a particular area of substantive law.[50]

[129] His Honour, however, found a number of matters pointed to the subsistence of the inherent jurisdiction in relation to the removal of liquidators –

(a) the language used by Parliament in pt 16 of the Act suggests that room was deliberately left for the Court to continue exercising its supervisory role where necessary;[51]

(b) that it is an area where the Court must retain broad jurisdiction in preventing misconduct by its officers (a liquidator being an officer of the Court);[52]

(c) the interests of Mr Henderson, who was a director of Livingspace until about two weeks before its liquidation, are not likely to be less affected

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46 Judgment, above n 1, at [71(c)].
47 At [50]–[57].
48 At [58].
49 At [59]–[69].
50 At [63].
51 At [64], citing s 284(2) Companies Act 1993.
52 At [64].

than those of a person who qualifies as a "director" under s 284(1) of the Act;[53] and

(d) where allegations of misconduct are made, the Court should not trifle over the standing of the party bringing the complaint, with the Court able to prevent floodgate issues by entertaining only properly founded allegations.[54]

[130] These matters led Associate Judge Johnston to conclude that the Court had inherent jurisdiction to entertain applications for leave to apply for the removal of a liquidator, including by persons who do not fall within the categories identified in s 284(1) of the Act.[55]

[131] In reaching this conclusion, his Honour referred to the conclusion of Heath J in *ANZ National Bank Ltd v Sheahan*, that Parliament did not, in enacting s 284(1) of the Act, intend to exclude the Court's inherent jurisdiction.[56] His Honour preferred that conclusion to the doubt expressed by Mallon J in *Official Assignee v Norris*.[57]

Submissions for the liquidator

[132] Mr Ho's submissions at the hearing in relation to the inherent jurisdiction were brief.

[133] The liquidator, by his notice of opposition, asserted that the inherent jurisdiction could not be invoked as the applicants were outside the category of those entitled to apply for leave for orders under s 284(1) of the Act. That remained the liquidator's primary position in the hearing before Associate Judge Johnston.

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53 At [65].

54 At [66]–[68], citing *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263,917 (HC), confirmed by the Court of Appeal in *Trinity Foundation (Services No 1) Ltd v Downey* (2006) 3 NZCCLR 401 (CA).

55 At [69], [71(c)].

56 At [59], citing *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [127]–[129].

57 At [61], citing *Official Assignee v Norris* [2012] NZHC 961, [2012] NZCCLR 10 at [17]–[34].

[134] In his review application, the liquidator's primary point remained that the Court does not have inherent jurisdiction (to remove liquidators) on the application of Ms Buxton or the non-parties because they fall outside the categories of persons entitled to apply for supervisory orders under s 284(1) of the Act. However, before the review hearing the submissions filed by Mr Ho on behalf of the liquidator contained the altered propositions that:

(a) the liquidator accepted that the Court must have inherent jurisdiction in relation to the supervision of liquidators (ie beyond those powers identified in s 284(1) of the Act); but

(b) the Court does not have power under s 284 of the Act to remove a liquidator; because

(c) the Court's sole power to remove a liquidator is contained in s 286(4) of the Act.

[135] Mr Ho invoked observations of Mander J in *Shafik v Makary* (where the Court had been invited to stay a District Court judgment as a matter of the inherent jurisdiction (the High Court Rules providing only for the stay of a High Court judgment)).[58] His Honour observed:

> [18] While powers arising from the Court's inherent jurisdiction are wider than those contained in the rules and are capable of filling gaps that may arise in respect of those rules, where an issue before the Court is already the subject of prescription, the Court will rarely choose to exercise its inherent powers. The jurisdiction should only be developed and exercised in harmony with relevant legislation.
>
> (footnote omitted)

[136] Mr Ho submitted that there was no power under s 284 of the Act to remove a liquidator. He submitted that the Court's single source of statutory power to remove a liquidator is s 286(4) of the Act which provides that:

> (4) A court may, in relation to a person who fails to comply with an order made under subsection (3), or is or becomes disqualified under section 280 to become or remain a liquidator,—

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58 *Shafik v Makary* [2015] NZHC 2194, [2015] NZAR 1596.

(a) remove the liquidator from office; or

(b) order that the person may be appointed and act, or may continue to act, as liquidator, notwithstanding the provisions of section 280.

[137] Mr Ho noted that the heading to s 284 of the Act reads: "Court supervision of liquidation". He contrasted that subject matter with removal, which is the subject of s 286(4)(a) of the Act. He submitted that the two provisions are complementary, one dealing with and limited to supervision and one dealing with removal, leaving no gap.

[138] Mr Ho cited the Westlaw commentary in relation to the removal power in s 286(4) of the Act, which reads (emphasis as added by Mr Ho):[59]

> The court has power to remove a liquidator from office *only* if:
>
> (a) It has made a compliance order under subs (3) and the person against whom it is made has failed to comply with that order; or
>
> (b) The person concerned is, or becomes, disqualified to act as a liquidator under s 280.

[139] Mr Ho cited *Newman v Norrie* as an example of the application of s 286(4) of the Act, where the section was relied on to remove a liquidator based on allegations that the liquidator lacked independence.[60]

[140] By way of clarification of his submissions, Mr Ho noted that the liquidator accepted that the Court must have inherent jurisdiction in relation to the supervision of liquidators (but not in relation to their removal).

Submissions for Ms Buxton and the non-parties

[141] Mr Moss referred to the steps in Associate Judge Johnston's reasoning in relation to the inherent jurisdiction to remove liquidators. He submitted that his Honour's reasoning at each point was correct.

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59 *Insolvency Law & Practice* (online ed, Thomson Reuters) at [CA286.03].
60 *Newman v Norrie* [2014] NZHC 648, [2014] NZCCLR 15.

[142] Mr Moss additionally invoked the principles identified by the Supreme Court in *Zaoui v Attorney General*.[61] There, the Supreme Court was determining whether the High Court retained an inherent jurisdiction to grant bail, notwithstanding the procedure laid down under pt 4A Immigration Act 1987. In the High Court, it had been determined that any such residual inherent jurisdiction to grant bail in a non-ancillary case was precluded by implication from the provisions of pt 4A.[62] In the Court of Appeal, McGrath J reached the same conclusion "with reluctance" but O'Regan J disagreed.[63] Hammond J did not deal with the point.

[143] The Supreme Court identified that the inherent substantive jurisdiction of the High Court to grant bail may be excluded by statute, provided the statutory purpose is plain.[64] The Court cited the test identified by Lord Russell CJ in relation to the inherent jurisdiction to grant bail, as affected by statute:[65]

> Therefore the case ought to be looked at in this way: does the Act of Parliament, either expressly or by necessary implication, deprive the Court of that power?

[144] The Supreme Court for its part stated the test in similar terms:[66]

> For such a jurisdiction [protecting the basic liberty of the individual] to be taken away, clear statutory wording is required.

[145] The Supreme Court, having reviewed pt 4A Immigration Act, concluded that the jurisdiction to grant bail in a non-ancillary case was not clearly excluded, expressly or by necessary implication.[67]

[146] Mr Moss noted also the settled principle of statutory interpretation which declares that clear words are required to take away an existing jurisdictional power, as

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61 *Zaoui v Attorney General* [2005] 1 NZLR 577 (SC).
62 *Zaoui v Attorney-General* HC Auckland, CIV-2004-404-2309, 16 July 2004 at [60].
63 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [68]–[70] and [271].
64 *Zaoui v Attorney General*, above n 61, at [37].
65 At [37], citing *R v Spilsbury* [1898] 2 QB 615 at 620.
66 At [44].
67 At [53]–[69].

discussed in Rosara Joseph's article "Inherent Jurisdiction and Inherent Powers in New Zealand".[68]

[147] Mr Moss submitted that Associate Judge Johnston's conclusion that the language of s 284 "suggests that room was deliberately left for the Court to continue exercising its supervisory role" (including in relation to preventing misconduct by its officers) was correct.[69] Although Associate Judge Johnston had not referred to any particular aspect of the language in s 284, Mr Moss drew support from the observation of Heath J in *Sheahan*, where his Honour observed:[70]

> The wider powers of statutory supervision conferred by s 284(1) of the 1993 Act are stated to be "in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators".

[148] In Mr Moss's submission, one such other power lies in the inherent jurisdiction.

[149] To meet any "floodgates" argument, Mr Moss adopted the Associate Judge's conclusion that the strict nature of the leave requirement (under s 284(1)) will result in the Court only entertaining properly founded allegations.[71] Mr Moss submitted that in this way the Court will filter out claims that could not meet the leave threshold (under s 284 of the Act). Mr Moss referred to observations of Dunningham J in *Walker v Gibbston Water Services Ltd*, in which her Honour observed that it does not follow that, in the exercise of a power within the Court's inherent jurisdiction, the Court would entertain an application which does not meet the test for leave under s 284 of the Act.[72]

[150] Mr Moss submitted that Associate Judge Johnston was correct not to embrace the doubt expressed by Mallon J in *Norris* as to whether there remained a subsisting inherent jurisdiction. Mr Moss submitted that, in addition to the points identified by the Associate Judge, *Official Assignee v Norris* was a case in which a party who fell

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68 Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Canterbury Law Review 220 at 232, citing *Jacobs v Brett* (1875) LR 20 Eq 1 at 6 and *Henderson v Wangapeka Gold-Dredging Co Ltd* (1904) 23 NZLR 833 (SC) at 835-836.

69 Judgment, above n 1, at [64].

70 *ANZ National Bank Ltd v Sheahan,* above 56, at [128].

71 Judgment, above n 1, at [68].

72 *Walker v Gibbston Water Services Ltd* [2014] NZHC 494 at [44].

within the qualifying categories of s 284(1) of the Act was trying to avoid the leave requirements by invoking the inherent jurisdiction.[73] Mr Moss submitted that a class of person expressly identified in s 284(1) is not going to be able to circumvent the statutory intention by trying to invoke the inherent jurisdiction.

[151] Mr Moss noted that the liquidator's argument on review in relation to removal of a liquidator under s 284 of the Act has changed. Whereas that jurisdiction had been accepted before Associate Judge Johnston, the liquidator on this appeal has sought to resile from that position without identifying that change in his review application.

[152] Mr Moss submitted that the liquidator's changed stance in relation to s 284 is incorrect. He referred to *Hyndman v Newson*, *Walker v Gibbston Water Services Ltd* and *Katavich v Meltzer* as being three cases in which the courts have recognised the jurisdiction to make a removal order under s 284 of the Act.[74]

[153] Mr Moss submitted that s 286 of the Act, which Mr Ho suggests is the only source of jurisdiction to remove a liquidator, is not a strict code intended to constrain the Court's ability to remove an officer of the Court. The focus of s 286 is on a process by which a liquidator's failure to comply with duties may be notified and enforced. The remedy of removal is simply one solution open to the Court. Ms Moss submits that there is nothing in s 286 of the Act to suggest it has become the only avenue under which the Court may remove a liquidator.

Supplementary written submissions

Counsel at the hearing did not make any submissions as to any authorities (dealing with the inherent jurisdiction) in a comparable jurisdiction. By a minute following the hearing, I invited additional written submissions as to any non-New Zealand authorities relevant to the issue of inherent jurisdiction, with the liquidator's

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73 *Official Assignee v Norris*, above n 57.

74 *Hyndman v Newson* [2014] NZHC 2513 at [42]; *Walker v Gibbston Water Services Ltd*, above n 72, at [31]; *Katavich v Meltzer* [2011] NZCCLR 8 (HC) at [39].

submissions to be filed first.[75]

Supplementary submissions for the liquidator

[154] Mr Ho identified the legislative provisions in England and Wales, and under the previous provisions of the Corporations Act 2001 (Cth) as not being of assistance here as the Court was left to determine who may make a removal application. Similarly, Mr Ho observed that the provisions which have replaced the previous sections of the Corporations Act are not of direct relevance as both provisions (s 45-1 – registered liquidators and s 90-15 – external administrations (contained in sch 2 – Insolvency Practice Schedule)) expressly preserve the Court's powers "under any other law", which must include the inherent jurisdiction.

[155] Mr Ho was unable to locate any Australian cases in which the inherent jurisdiction had been invoked under the reserved powers in either s 45-1 or s 90-15.

[156] Mr Ho submitted that assistance might be drawn from *Hoath v Comcen Pty Ltd,* a decision of the Supreme Court of New South Wales (on an application under ss 445D and 445G Corporations Act) to set aside or terminate a deed of company arrangement.[76] In that case, the Court held that a person filing an application under s 445D must be a creditor of the company as the applicant class was defined in the section itself. The Court did not draw on its inherent jurisdiction to expand upon the statutory category.

[157] Mr Ho submitted that further assistance might be obtained from the decision of the Supreme Court of New South Wales in *Australian Securities and Investments Commission v Wily*.[77] The Court was there asked to exercise the powers under the then-section 536 Corporations Act to take action in relation to a liquidator on a complaint made to it with respect to the conduct of the liquidator. The Court analysed

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75 Mr Ho's supplementary submissions included reference to a further New Zealand authority, *Commissioner of Inland Revenue v Kamal* [2016] NZHC 1053, (2016) NZTC 22-050. Mr Moss, in his reply, objected to the uninvited reference to a further New Zealand authority. He appropriately nevertheless included a submission to the effect that *Kamal* is both distinguishable and supportive of Ms Buxton's case. Given the centrality of the issue as to the inherent jurisdiction, I have by leave considered the submissions on *Kamal.*

76 *Hoath v Comcen Pty Ltd* [2005] NSWSC 477.

77 *Australian Securities and Investments Commission v Wily* [2019] NSWSC 521.

whether there was a "complaint" within the meaning of the section without discussion of the availability of the inherent jurisdiction as to whether or not a qualifying complaint had been made.

[158] The balance of Mr Ho's supplementary submissions was in relation to *Commissioner of Inland Revenue v Kamal*.[78] In *Kamal,* the Commissioner (as a creditor in two company liquidations) had applied for prohibition orders under s 286 of the Companies Act. The Commissioner's status as a creditor to make application under s 286(5) of the Act was clearly established. Mr Kamal nevertheless applied for orders striking out claims against him. Associate Judge Smith held that, as matters alleged against Mr Kamal (convictions under the Tax Administration Act 1994) were not expressly included within the disqualifying criteria set out in s 280 of the Companies Act, there was no basis on which the Court could make a prohibition order under s 286(5) of the Act.[79] In other words, s 286(5) did not import a generally applicable fit and proper person test to supplement the specific disqualifying factors for liquidators set out in s 280 of the Act.

[159] In relation to s 280, the Commissioner had relied upon *ANZ National Bank Ltd v Sheahan* to assert that the Court may invoke its inherent jurisdiction to expand the list of disqualifying characteristics in s 280 of the Act.[80] In rejecting the Commissioner's submission, Associate Judge Smith held that:[81]

> No provision in the Act which would create any such additional disqualifying circumstance has been identified by the Commissioner, and in circumstances where Parliament has set out a lengthy and detailed list of disqualifying circumstances I do not consider that it would be a proper exercise of either the Court's inherent jurisdiction or of its supervisory function to add to that list.

[160] Mr Ho noted that the Court had then considered whether there was a continuing failure under s 286 by Mr Kamal to comply with his duties to disqualify himself from appointment. The Court held that Mr Kamal was no longer bound by the duties under the Companies Act once he resigned and that s 284 could not be called upon to overcome the plain words of s 286(2). His Honour observed:

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78 *Commissioner of Inland Revenue v Kamal,* above n 75.
79 At [58].
80 *ANZ National Bank Ltd v Sheahan,* above n 56.
81 *Commissioner of Inland Revenue v Kamal,* above n 75, at [57]; see also [59]–[62].

> [75] The Commissioner refers to the Court's inherent jurisdiction over liquidators in their capacity as officers of the Court. But I do not think the inherent jurisdiction that has filled the gap in cases like *ANZ National Bank Ltd v Sheahan* can be invoked to give the Court any jurisdiction over a liquidator which would be contrary to the way Parliament has chosen to structure the Court's powers (in this case, the specific procedure prescribed in s 286 for the making of prohibition orders). Also, the Court's supervisory powers over its officers, whatever might be their extent, cannot in my view be exercised in respect of those who *were* officers of the Court but are no longer in that position (including liquidators who have resigned).
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> [78] … the Court's power to impose a prohibition order (at least on the application of a creditor) appears to have been deliberately limited to those situations where a recalcitrant liquidator has (i) failed to heed the creditor/plaintiff's notice and (ii) remained in office. If that limitation was not in fact intended, I think that is something to be corrected by the legislature; the wording of the statute cannot in my view be stretched to bear a contrary interpretation.

[161] Mr Ho submitted that the decision in *Kamal* accordingly is persuasive authority for the proposition that the Court's inherent jurisdiction should be invoked only to fill "gaps". In *Kamal,* the disqualifying factors under s 280 were found to be exhaustive. Here, Mr Ho submitted that the specified classes of applicants should similarly have been held to be exhaustive.

Supporting submissions for Ms Buxton

[162] In his supplementary submissions, Mr Moss referred to the legislative position in a number of Commonwealth jurisdictions. He observed that the inherent jurisdiction to supervise liquidators has not been discussed in the case law in Canada, Singapore or the United Kingdom, where the applicable legislation does not restrict the class of persons who may apply for removal of liquidators. Mr Moss referred to the decision of the Privy Council in *Deloitte & Touche AG v Johnson* as one which contains useful comments in relation to the inherent jurisdiction of the Court and its application in parallel with a legislative provision for a removal of a liquidator.[82] The case was on appeal from a judgment of the Court of Appeal of the Cayman Islands.

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82 *Deloitte & Touche AG v Johnson* [1999] 4 LRC 281.

The relevant statutory provision did not restrict the class of persons who might apply for removal of an official liquidator.[83]

[163] Nevertheless, the Privy Council observed that, notwithstanding the lack of a restricted class of applicants, not every person would be allowed to make an application. The Court differentiated an application under statutory provision and an application under the Court's inherent jurisdiction:[84]

> In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.

[164] Mr Moss submitted that the decision is authority for the proposition that, notwithstanding the encompassing nature of the relevant statutory provision in the Cayman Islands, there remained a parallel inherent jurisdiction. He submitted that the Privy Council had restricted the categories of applicants not by reference to the class to which they belong but according to their interest in the liquidation and the effect of the liquidator's actions on them. In other words, under the inherent jurisdiction, the class of applicant was unrestricted but any applicant still had to meet the minimum requirement of being a "proper person".

[165] Mr Moss submitted that the Privy Council's approach to the inherent jurisdiction accords with that which Ms Buxton has accepted should be applied in relation to the liquidator's removal, namely that Ms Buxton has to satisfy the Court

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83 Companies Law (1995) Revision, s 106(1); see *Deloitte & Touche AG v Johnson,* above n 82, at 286.

84 At 288.

that those requirements for leave which apply under s 284 of the Companies Act would be met in support of an application based on the inherent jurisdiction.

[166] Mr Moss then turned to Australian authority. Mr Moss referred in particular to the judgment of the Supreme Court of New South Wales in *Re United Medical Protection (No 3)*.[85] Under s 479(3) Corporations Act 2001, an application to the Court for directions in relation to a liquidation was permitted to be made by "a liquidator, or any contributory or creditor". Austin J found it to be unclear whether a "liquidator" included a provisional liquidator, which led his Honour to consider the matter of inherent jurisdiction:[86]

> As to directions under s 479 (3), it is not entirely clear that this section is available in the case of a provisional liquidator, as opposed to a liquidator after a winding up order has been made. … However, the Court has inherent jurisdiction to provide directions to an official liquidator appointed as provisional liquidator, because an official liquidator is an officer of the Court … Therefore I am satisfied that I have the power to give directions to Mr Lombe as provisional liquidator, on his application, either under s 479 (3) or in the exercise of the Court's inherent jurisdiction …

[167] In short, it was found (notwithstanding the express reference to applications by three identified classes of person) that directions were able to be given, by way of supervising the liquidation, within the inherent jurisdiction of the Court.[87]

Analysis – the inherent jurisdiction

[168] This Court had a long-established inherent jurisdiction to supervise court-ordered liquidation processes and court-appointed liquidators.[88] As identified by Heath J in *ANZ National Bank Ltd v Sheahan,* the inherent jurisdiction had for instance been invoked in 1978 in *Re Securitibank Ltd (in liq),* where Barker J held that the Court had an inherent jurisdiction to give directions to "its officer, the liquidator", a jurisdiction distinct from that conferred by s 241(3) Companies Act 1955.[89] Where

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85 *Re United Medical Protection (No 3)* [2002] NSWSC 488.

86 At [26].

87 A similar approach to that of the Supreme Court of New South Wales was adopted by the Supreme Court of Queensland in *Re Rothwells Ltd* [1990] 2 Qd R 181.

88 See the review of the authorities in *ANZ National Bank Ltd v Sheahan*, above n 56, at [122]–[139].

89 *Re Security Bank Ltd (in liq)* [1978] 1 NZLR 97 (SC) at 106; *ANZ National Bank Ltd v Sheahan,* above n 56, at [129]. See also Ian Fletcher *The Law of Insolvency* (5th ed, Sweet & Maxwell, London, 2017) at [1-024].

the Court has been dealing with a court-ordered liquidation, a line of cases commencing with *Re Condon, ex parte James* established that the liquidator is subject to supervision as an officer of the Court.[90]

[169] As Livingspace was put into liquidation by order of this Court, the authorities establish that the Court possesses inherent jurisdiction to supervise this liquidator and liquidation unless that jurisdiction has been excluded by the provisions of the Companies Act.

[170] Associate Judge Johnston (before concluding that the inherent jurisdiction to supervise liquidators had not been limited) recognised Parliament's power to do so through legislation:[91]

> Where the legislature has clearly and unambiguously prescribed the Court's jurisdiction in relation to a particular area of substantive law, there is no scope for the Court to call on its inherent jurisdiction to claim jurisdiction beyond the four corners of the legislative prescription (except perhaps in extreme circumstances such as those contemplated by Cooke P in *Taylor v New Zealand Poultry Board)*.[92]

[171] In *Zaoui v Attorney-General,* the Supreme Court considered the inherent jurisdiction to grant bail in light of the statutory regime under pt 4A of the Immigration Act.[93] The Court held:

(a) The inherent jurisdiction can be displaced by legislation.[94]

(b) The inherent jurisdiction (to grant bail) can be excluded by statute provided the statutory purpose is plain.[95]

(c) Clear statutory wording is required to take away the inherent jurisdiction.[96]

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90 *Re Condon, ex parte James* (1874) LR 9 Ch App 609 (CA); *Re David A Hamilton and Co Ltd (in liq)* [1928] NZLR 419 (SC).
91 Judgment, above n 1, at [63].
92 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.
93 *Zaoui v Attorney-General*, above n 61.
94 At [36].
95 At [37].
96 At [44].

[172] Here, the inherent jurisdiction to be examined is in relation to the Court's supervision (including removal) of a court-appointed liquidator. In the application relating to removal, Ms Buxton had expressly invoked the inherent jurisdiction of the Court to supervise the conduct of liquidators as officers of the Court. Mr Moss submitted that the inherent jurisdiction was not displaced by the provision of pt 16 of the Act.

Supervision of liquidators under the Companies Act 1993

[173] Sections 240–316B comprise pt 16 of the Act. Associate Judge Johnston correctly identified that pt 16 of the Act was in part intended to reduce the degree of court involvement in the day-to-day conduct of liquidations.[97]

[174] The guiding influence upon the 1993 statutory amendments is well-summarised by the authors of *Insolvency Law & Practice*:[98]

> One of the dominant themes of the company insolvency law reform has been the reduction of the role of the court in the everyday course of liquidations. Previously, the court's involvement in a liquidation (especially in a compulsory winding up) often required liquidators to make frequent applications to the court. …
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> …
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> The scheme of pt 16 of the Companies Act 1993 is to permit the liquidator to proceed with the liquidation with as little interference from the court as practicable, but providing for a supervisory procedure whereby interested persons may apply to the court for a review of the liquidator's actions.

[175] As described by Toogood J in *Levin v Lawrence,* the supervisory jurisdiction under s 284 of the Act has a particular focus in relation to the decisions to be made in the course of a liquidation:[99]

> The Court is required to exercise a supervisory jurisdiction over liquidations and to intervene when it is appropriate to do so. But the statutory regime under the Companies Act favours allowing liquidators to make business decisions which they, as the persons appointed to exercise statutory responsibilities, are better qualified than the Courts to make. Without abrogating its supervisory obligations, the Court should be slow to intervene where matters of judgment

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97 Judgment, above 1, at [64], citing Companies Bill 1990 (50-1) (explanatory note) at ix and *Walker v Gibbston Water Services Ltd*, above n 72, at [29].

98 *Insolvency Law & Practice* (online ed, Thomson Reuters) at [CA284.01].

99 *Levin v Lawrence* [2012] NZHC 1452 at [54] (footnotes omitted).

> and assessment on commercial matters are concerned. That includes assessing how far to investigate possible avenues of recovery of funds for distribution. Weighing the likely cost of pursuing such avenues against the prospects of success and the amount which may be recovered are matters for judgment which are squarely within a liquidator's domain.

[176] It may be considered somewhat surprising that the removal of a liquidator was not expressly included as one of the listed directions or orders provided for in s 284(1) of the Act. The Court has nevertheless recognised that an order of removal (following valid appointment) falls within the power to "give directions in relation to any matter arising in connection with the liquidation" under s 284(1)(a).[100]

[177] The Court's resort to s 284(1) as the source of statutory jurisdiction to remove a liquidator is explicable by the narrow circumstances which may give rise to an order removing the liquidator from office under s 286(4) of the Act. As the heading to s 286 of the Act indicates, the section is concerned with "orders to enforce liquidator's duties". The self-evident, central purpose of the section is to provide a procedure by which a liquidator may be ordered to comply with their duties. The statutory power under s 286(3)(c) – to remove the liquidator from office – is but one of four forms of resolution which may be ordered on an application made by one of the classes of individuals identified in s 286(1). By reason of s 286(2), any applicant other than a liquidator, before making an application under s 286 of the Act, must first have given notice of the failure to comply to the liquidator with at least five days of continuing failure then following.

[178] As such, s 286 of the Act cannot be viewed as a comprehensive statutory regime for the removal of liquidators for the range of circumstances which might make appropriate the consideration of removal. For example, the liquidator's fitness to hold office in relation to a particular liquidation might flow from a one-off event which demonstrates unfitness but which event, by its nature, will not be continuing. Associate Judge Johnston's observations as to the importance of the Court being able to investigate (properly made) allegations of misconduct on the part of a liquidator involve the recognition that not all instances of misconduct or unfitness will

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[100] *Katavich v Meltzer*, above n 74, at [38]–[39]; *West v Grant* [2013] NZHC 3043 at [15]; *Hyndman v Newson*, above n 74, at [47]–[51]. I nevertheless recognise that a contrary conclusion has been reached by Associate Judge Bell in *McMahon v Ah Sam* [2014] NZHC 659 and in subsequent decisions.

unnecessarily fall within the regime of the statutory procedure.[101] Those types of situation explain why the broader provision for the Court's supervision of liquidation as contained in s 284 of the Act has work to do in relation to removal.

[179] The statutory regime considered in *Commissioner of Inland Revenue v Kamal* is of a nature distinguishable from the Court's supervision of a liquidation.[102] It concerns what is very much a creature of statute – a regime for prohibiting persons from acting as liquidators (whether currently engaged on the conduct of a liquidation). Such was recognised as a determining aspect of the application in *Kamal*.[103]

[180] I accordingly reject the submission of Mr Ho as developed at the review hearing, that s 286(4) of the Act provides the only statutory basis for removal of the liquidator, with no such power existing under s 284 of the Act.

[181] Notwithstanding the rejection of that central aspect of Mr Ho's submissions, this still leaves for review the issue as to whether pt 16 of the Act (particularly in ss 284 and 286) had the plain purpose of excluding the inherent jurisdiction.

[182] Both Associate Judge Johnston in the judgment under review and Heath J in *ANZ National Bank Ltd v Sheahan* referred particularly to the language used by Parliament in s 284(2) of the Act. Section 284(2), it will be recalled, is that which provides:

> The powers given by subsection (1) are in addition to any other powers a court may exercise in its jurisdiction relating to liquidators under this Part, and may be exercised in relation to a matter occurring either before or after the commencement of the liquidation, or the removal of the company from the New Zealand register, and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.

[183] Associate Judge Johnston found s 284(2) to support the continued availability of the inherent jurisdiction, stating:[104]

> While pt 16 of the Companies Act was in part intended to reduce the degree of court involvement in the day-to-day conduct of liquidations, the language

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101 Judgment, above n 1, at [66].
102 *Commissioner of Inland Revenue v Kamal,* above n 75, discussed at [159]–[162] above.
103 At [75], quoted at [161] above.
104 Judgment, above n 1, at [64] (footnotes omitted).

> used by Parliament [in s 284(2)] suggests that room was deliberately left for the Court to continue exercising its supervisory role where necessary.

[184] Previously, in *ANZ National Bank Ltd v Sheahan,* Heath J found s 284(2) to be relevant. His Honour observed that the wider powers of statutory supervision conferred by s 284(1) of the 1993 Act were stated to be "in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators".[105]

[185] I respectfully disagree with the conclusion that the reservations in s 284(2) of the Act can contribute to a conclusion that Parliament was in pt 16 of the Act deliberately preserving the inherent jurisdiction as a basis of removal of liquidators. The powers referred to in s 284(2) are expressly defined to be "in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under *this Part of this Act*" (emphasis added). Section 284(2) does not contain an express preservation of powers generally – it is expressly a preservation of powers the Court may exercise under pt 16 of the Act.

[186] However, the test (as identified in *Zaoui*) is not whether Parliament has expressed an intention to preserve the inherent jurisdiction. Rather, it is whether Parliament has, by clear statutory wording, expressed an intention to take away the inherent jurisdiction.[106]

[187] None of the various overseas decisions to which I was referred provide assistance. They turn on their own legislation for the specific outcome. They generally serve to indicate that there is a consistent approach to determining whether the inherent jurisdiction remains, and that it accords with the position established in New Zealand, as enunciated in *Zaoui.*

[188] For the liquidator, Mr Ho emphasised Parliament's specific listing of classes of applicant for each of ss 284 and 286. Mr Ho invoked the doubt expressed by Mallon J in *Official Assignee v Norris* as to whether the Official Assignee could invoke the Court's inherent jurisdiction as a way around the limits (expressed by classes of

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105 *ANZ National Bank Ltd v Sheahan*, above n 56, at [128].
106 *Zaoui v Attorney-General,* above n 61, at [44].

applicant) prescribed by the statute.[107] In the event, the Court in *Official Assignee v Norris* does not appear to have been required to make a final determination in relation to the subsistence of the continuing availability of the inherent jurisdiction.

[189] I am not persuaded that Parliament, in pt 16 of the Act, has clearly excluded the operation of the inherent jurisdiction in relation to the removal of liquidators. I deliberately refrain from reaching a parallel conclusion in relation to the general supervision of the process of liquidation, which was the express subject-matter of s 284. Matters relating to a liquidator's fitness to be officer in relation to a particular liquidation may stem more from general behaviour or characteristics of the liquidator than from their conduct in the particular liquidation itself. It is not possible to anticipate every situation in which a liquidator's conduct or propensities may, through the conduct of a liquidation, impact on others. In the exercise of the inherent jurisdiction, courts develop their own tests and thresholds before particular orders will be considered. The fact that Parliament, in providing a statutory regime, has imposed a threshold in relation to applicant classes does not drive a single conclusion that Parliament thereby intended to oust the Court's inherent jurisdiction (whether broader or otherwise). In the event, albeit for slightly different reasons, I find the Associate Judge correctly concluded that the Court retains its inherent jurisdiction to entertain applications for the removal of a liquidator, including by persons who do not fall within the categories identified in s 284(1) of the Act.

[190] Associate Judge Johnston concluded that an applicant, when invoking the inherent jurisdiction, must first seek leave to apply for an order of removal (in parallel with the process under s 284 of the Act). As the Court has inherent powers in relation to its procedures, that approach to a leave application was one within the Court's powers. His Honour accordingly made no error in requiring a leave application before a removal application itself is entertained.

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[107] *Official Assignee v Norris*, above n 57, at [29].

Orders

[191] As a consequence of these findings, in relation to the orders under review, I direct:

(a) at [71(a)] – the refusal of joinder is confirmed;

(b) at [71(b)] – the directions for service and appearance are rescinded;

(c) at [71(c)] – the liquidator's request for further directions is stayed for a period of 20 working days, with the liquidator in that period to file and serve a fresh request limited to records in the possession or under the control of Kristina Buxton in her capacity as a director of RFD Finance Limited which relate to the business, accounts, or affairs of Livingspace Properties Limited (in rec and in liq);

(d) at [71(c)] – the finding of inherent jurisdiction (on its terms) is confirmed;

(e) at [71(d)] – the timetable direction for any removal application is amended to apply to the period within 15 working days of this judgment; and

(f) at [71(e)] – the costs of the 6 September 2019 judgment remain reserved, but are to be dealt with if not resolved by memoranda filed also in relation to the costs of this review.

Osborne J

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