IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-208
2016] NZHC 1053

UNDER	the Companies Act 1993
IN THE MATTER OF	an application for orders under s 286(5)
BETWEEN	THE COMMISSIONER OF INLAND REVENUE Plaintiff
AND	IMRAN MOHAMMED KAMAL Defendant

CIV-2015-485-210

UNDER	the Companies Act 1993
IN THE MATTER OF	an application for orders under s 286(5)
BETWEEN	THE COMMISSIONER OF INLAND REVENUE Plaintiff
AND	IMRAN MOHAMMED KAMAL Defendant

Hearing:	26 February 2016
Counsel:	P Courtney and C Kern for the Plaintiff/Respondent J Mahuta-Coyle for the Defendant/Applicant
Judgment:	19 May 2016

JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] Mr Kamal applies to strike out certain claims made against him by the plaintiff (the Commissioner) under the Companies Act 1993 (the Act).

Background

[2] Mr Kamal has acted on a number of occasions as a company liquidator. In the two proceedings now before the Court, the Commissioner seeks orders under s 286(5) of the Act prohibiting Mr Kamal from acting as a company liquidator for a period of up to five years.

[3] Proceeding CIV-2015-485-208 (which I will call the Hillman proceeding) is concerned with Mr Kamal's acts or omissions in his capacity as liquidator of a company called Hillman Ltd (Hillman), which was put into voluntary liquidation on 26 June 2014. Proceeding CIV-2015-485-210 (the GDZ proceeding) is concerned with Mr Kamal's acts or omissions in his capacity as liquidator of a company called GDZ Ltd (GDZ), which was put into voluntary liquidation on 11 July 2014.

[4] The Commissioner is a creditor who lodged claims in the liquidations of both Hillman and GDZ. As such, she has standing to apply for the orders sought under s 286(5) of the Act.

[5] In each of the proceedings, the Commissioner alleges that Mr Kamal is unfit to act as a company liquidator. She refers to his convictions for various offences against the Tax Administration Act 1994 (the TAA), which she says were dishonesty offences that constituted a fraud on the revenue.

[6] In late 2012 or early 2013 Mr Kamal pleaded guilty to six charges under the TAA of aiding and abetting Accountants First Ltd (AFL), a company of which he was sole director, in providing false income tax and GST returns, and in providing misleading information to the Commissioner by way of altered tax invoices. On 15 February 2013 Mr Kamal was sentenced to three months' home detention and 150 hours of community work.

[7] On 19 February 2014 the Commissioner removed AFL from her list of approved tax agents. AFL unsuccessfully sought judicial review of that decision.[1] An appeal was filed, but it was abandoned by AFL on 6 November 2015.

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[1] *Accountants First Ltd v Commissioner of Inland Revenue* [2014] NZHC 2446.

[8] In addition to the convictions under the TAA, the Commissioner pleads a number of other matters which she say render Mr Kamal unfit to accept appointment or act as a liquidator.

[9] In the Hillman proceeding, she says that Mr Kamal should have disqualified himself from accepting appointment, and from continuing to act as liquidator, as he and AFL had a continuing business relationship with a director of Hillman, Mr Gould. She says that Mr Kamal either failed to certify, or incorrectly certified in writing, that he was not disqualified from accepting appointment as liquidator under s 280(4) of the Act. She then contends that Mr Kamal did not give notice calling a creditors' meeting to appoint replacement liquidators after he had received from the Commissioner a valid notice dated 22 July 2014 requiring him to call such a meeting.

[10] In the GDZ proceeding, the Commissioner refers to Mr Kamal's alleged failure to disqualify himself from accepting appointment as liquidator of GDZ, on account of an alleged continuing business relationship between AFL and a company incorporated by Mr and Mrs Hoffman, who were directors of GDZ. Mr Hoffman was the sole director of the new company. The Commissioner says that Mr Kamal either failed to certify, or incorrectly certified in writing, that he was not disqualified from accepting appointment as liquidator under s 280(4) of the Act. As in the Hillman proceeding, she alleges that Mr Kamal wrongly failed to call a meeting of GDZ's creditors after receiving valid notices from her requiring him to do so and asking him to include as an agenda item the appointment of another insolvency specialist to replace Mr Kamal as liquidator.

[11] The Commissioner issued a Notice on 19 August 2014 advising Mr Kamal that she considered he was in breach of his duty to hold a creditors' meeting for GDZ. She invited him to rectify that breach, and foreshadowed legal action failing rectification.

[12] In both the Hillman and the GDZ proceedings, the Commissioner also alleges breaches by Mr Kamal in the discharge of his responsibilities as liquidator of another company, JDH Holdings Ltd (JDH). She alleges that Mr Kamal wrongly failed to

disclose an alleged continuing business relationship with a company owned and controlled by a director of JDH, and that he failed to file the liquidator's six-monthly report which was due on 10 November 2014. The Commissioner has commenced a proceeding against Mr Kamal relating to JDH (the JDH proceeding) which is similar in many respects to the Hillman proceeding and the GDZ proceeding. However the JDH proceeding differs in one important respect: Mr Kamal had not resigned as liquidator of JDH when the Commissioner filed the proceeding. Mr Kamal has not applied to strike out the claims made against him in the JDH proceeding.

[13] In his statements of defence, Mr Kamal admits the convictions and penalties imposed under the TAA, and acknowledges that he did not call creditors' meetings for Hillman or GDZ. (He says that the costs of creditors' meetings were not justified given the relatively small sizes of the liquidations). He denies that he or any of his family, or AFL or any employee of AFL, ever had any prior relationship with the directors of Hillman or GDZ as pleaded by the Commissioner.

[14] In both proceedings Mr Kamal pleads affirmatively that he resigned as liquidator before the Commissioner commenced the proceedings and that, in the absence of any continuing non-compliance with his duties as liquidator under the Act at that point, there is no basis for the prohibition order the Commissioner now seeks.

Prohibition orders under s 286

[15] Section 286(1) of the Act lists the parties who may apply for a prohibition order under the section, based on a liquidator's failure to comply with a relevant duty. The list includes a "creditor". But a creditor may not make such an application unless notice of the alleged failure to comply has been served on the liquidator not less than five working days before the date of the application and, as at the date of the application, there is a continuing failure to comply.[2]

[16] "Failure to comply" is defined in s 285 of the Act. Unless the context otherwise requires, for the purposes of s 286 a failure to comply means a failure of a liquidator to comply with a relevant duty arising –

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2 Section 286(2) of the Companies Act 1993.

(1) under this or any other Act or rule of law or rules of court; or

(2) under any order or direction of a court other than an order to comply made under that section.

[17] "Comply", "compliance", and "failed to comply" have corresponding meanings.

[18] Section 286(5) of the Act then provides:

> (5) If the court is satisfied that a person is unfit to act as a liquidator by reason of persistent failures to comply or the seriousness of a failure to comply,—
>
> (a) the court must make a prohibition order; and
>
> (b) the period of the order is a matter for the discretion of the court but the court may make a prohibition period for an indefinite period.

The Commissioner's notices under s 286(2)

[19] The Commissioner served notices on Mr Kamal under s 286(2) of the Act in respect of both Hillman and GDZ on 3 December 2014. The notices advised Mr Kamal that he:

(1) was alleged to have failed to comply with his duty by not calling creditors' meetings after receiving notices requiring him to do so;

(2) should have disqualified himself from accepting the appointments as liquidator because of the alleged continuing business relationships referred to above;

(3) was considered unfit to accept appointment, or to act as, a liquidator generally.

[20] The Commissioner's notices invited Mr Kamal to rectify the failures by (i) immediately resigning as liquidator of GDZ and Hillman, and (ii) providing a written

undertaking that he would not accept appointments as liquidator of any company within five years of the date of the notices.

[21] The Commissioner's notices advised that if Mr Kamal did not provide written confirmation that he would comply with the notices, she would apply for a prohibition order under s 286(5) of the Act.

Mr Kamal's response to the Commissioner's notices

[22] Within five days of receipt of the Commissioner's notices, Mr Kamal resigned as liquidator of Hillman and GDZ and appointed a replacement liquidator under s 283(2) of the Act. The Commissioner has not raised any issue over the validity of his resignation. But he declined to give any undertaking that he would not accept appointments as liquidator for the five year period sought by the Commissioner.

[23] The Commissioner commenced these proceedings on 13 March 2015.

The strike-out applications and notices of opposition

[24] Mr Kamal applies to strike out those parts of the Commissioner's statements of claim which plead his past convictions and allege that those convictions preclude him from acting as a liquidator under the Act. He also applies to strike-out the allegations in the statements of claim that he failed to comply with the Commissioner's notices issued on 3 December 2014, giving rise to continuing breaches of his duties as liquidator. He identifies particular paragraphs in the statements of claim in which those matters are traversed, which he says should be struck out.

[25] In her notice of opposition, the Commissioner contends that the parts of the statements of claim which Mr Kamal applies to have struck out disclose reasonable causes of action, and are not so clearly untenable that they cannot succeed. She also pleads that the Court should be slow to strike-out the specified parts of the statements of claim as they involve a developing area of law.

[26] On the subject of Mr Kamal's convictions under the TAA, the Commissioner contends that the offences were serious offences involving fraud on the revenue, which provide objective evidence of dishonesty sufficient to establish that Mr Kamal is unfit to act as a liquidator. The Commissioner contends that, on a purposive interpretation of the Act, and in the public interest, there should be no distinction between convictions for offences involving dishonesty under the Crimes Act 1961 and convictions for similar offences committed under a revenue statute such as the TAA.

[27] The Commissioner further contends that the Court's supervisory jurisdiction continues despite Mr Kamal having resigned as liquidator: if the Court is satisfied of the seriousness of a failure by Mr Kamal to comply, it must make a prohibition order. The period of prohibition is at the Court's discretion.

Applications to strike-out pleadings – general principles

[28] The Court may strike out a plaintiff's statement of claim either in the exercise of its inherent jurisdiction, or under the express provisions of r 15.1 of the High Court Rules. Under that rule, the Court may strike out all or part of a pleading if it:

> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[29] In *Couch v Attorney-General*, the Supreme Court affirmed the following principles applicable to a defendant's strike-out application, as summarised in *McGechan on Procedure*:[3]

[3] *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33], referred to in *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR15.1.02(1)].

(i) The cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.

(ii) The jurisdiction is to be exercised sparingly, and only in clear cases. This principle reflects the Court's reluctance to terminate a claim or defence short of trial.

The issues to be decided on Mr Kamal's strike-out application

[30] The following are the issues to be determined:

(1) is it reasonably arguable for the Commissioner that any general unfitness of Mr Kamal to accept appointment, or act as, liquidator, amounted to a failure to comply with a "duty" as defined in s 285 of the Act?

(2) if the answer to issue (1) is "yes", is it reasonably arguable for the Commissioner that Mr Kamal was guilty of a continuing breach of that duty at the time these proceedings were commenced?

(3) is it reasonably arguable for the Commissioner that, at the time these proceedings were commenced, there was a continuing failure by Mr Kamal to comply:

(i) with a duty to disqualify himself from appointment as liquidator of Hillman and/or GDZ on account of his alleged continuing business relationships with directors of those companies (and/or with companies owned or controlled by those directors)

and/or

(ii) with a duty to convene meetings of the creditors of Hillman and/or GDZ?

(4) if it is reasonably arguable for the Commissioner that when these proceedings were issued Mr Kamal was guilty of a continuing failure to comply with a relevant duty or duties, is it also reasonably arguable for the Commissioner that the seriousness or persistence of the failure or failures was such as to make Mr Kamal unfit to act as a liquidator?

Issue 1: is it reasonably arguable for the Commissioner that any general unfitness of Mr Kamal to accept appointment, or act as, liquidator, amounted to a failure to comply with a "duty" as defined in s 285 of the Act?

Mr Kamal's submissions

[31] Mr Mahuta-Coyle submits that the starting (and finishing) point is s 280 of the Act. The section excludes certain categories of persons from appointment as liquidator, but does not impose any general standard of "fitness", and does not preclude the appointment as liquidator of a person who has convictions for offences against the TAA, whether or not those offences involved dishonesty. In the absence of any express reference in s 280 to offences of the kind which resulted in Mr Kamal's convictions, there was nothing to prevent him from accepting appointment as liquidator of Hillman, GDZ and JDH, and from continuing in office as liquidator of those companies.

[32] Mr Mahuta-Coyle submits that the enactment of s 280 of the Act marked a deliberate change in regulatory approach. Under the Companies Act 1955, the Court was authorised to appoint as provisional liquidator the Official Assignee or "any other fit person".[4] There is no such broad "fit person" requirement in the Act.

[33] Mr Mahuta-Coyle refers to the report of the Justice and Law Reform Select Committee on what was then the Companies Bill 1992. The Committee referred in its report to a report of the Law Commission in the following terms:

> The Law Commission, in its report number 9, required the liquidator to be an experienced insolvency practitioner. Such a person would have substantial experience in administering or advising on the insolvency of individuals, or liquidations of companies or receiverships. The Bill does not carry forward this requirement. The committee believes that, not only would such criteria

[4] Companies Act 1955, s 234(1).

> be difficult to define, it may require some type of occupational regulation. The committee has not therefore suggested its inclusion in the Bill.

[34] Mr Mahuta-Coyle submits that the Court should not give an interpretation to s 280 that ignores the distinction between offences under the Crimes Act involving dishonesty, and offences under the TAA involving dishonesty. The Court is not permitted to read words into an Act that are not there, or to "fill gaps". Section 280 is clear on the matters which are bases for disqualification, and offences against the TAA are not among them.

[35] Mr Mahuta-Coyle refers to *R v Joyce*, a Court of Appeal decision in which the Court dealt with a scenario which Mr Mahuta-Coyle submits is similar to the facts in this case.[5] At the time *R v Joyce* was decided, s 24 of the Crimes Act 1961 made compulsion a defence to a criminal charge, with the exception of a number of listed serious offences. For reasons which were unclear, the offence of aggravated robbery was not one of the listed exceptions, notwithstanding that it was a more serious offence than some of the other listed serious offences (such as robbery). The Court held that it could not include aggravated robbery as an additional exception to the availability of the compulsion defence – that would have amounted to judicially amending the section, not interpreting it. The particularly important matter was that the legislature had seen fit to enumerate particular crimes in respect of which the defence of compulsion would be available, and it was not for the Court in carrying out its statutory interpretation function to add to the list.

The Commissioner's submissions

[36] The Commissioner accepts that convictions under the TAA are not specifically referred to in s 280, but she denies that the list of disqualifying characteristics specified in s 280 is exhaustive. She submits that it is implicit in the purposes and statutory scheme of the Act, and in the terms of specific provisions of the Act to which she refers, that a person convicted of offences involving dishonesty and/or fraud is not a suitable person to manage a company and to act as liquidator. She relies in part on s 286(5) itself, submitting that the test of "unfit to act as a

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5 *R v Joyce* [1968] NZLR 1070 (CA).

liquidator" in the subsection encompasses within its ordinary meaning actions by which a person has been objectively held to be guilty of dishonesty and/or fraud.

[37] Ms Courtney also refers to the Court's inherent jurisdiction to supervise the conduct of liquidators, however they were appointed, as officers of the Court,[6] and to section s 284 of the Act. That section confers on the Court certain specific functions concerned with the supervision of a liquidation. Section 284(1) provides:

> **284 Court supervision of liquidation**
>
> (1) On the application of the liquidator, a liquidation committee, or, with the leave of the court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the court may—
>
> (a) give directions in relation to any matter arising in connection with the liquidation:
>
> (b) confirm, reverse, or modify an act or decision of the liquidator:
>
> (c) order an audit of the accounts of the liquidation:
>
> (d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests:
>
> (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances:
>
> (f) to the extent that an amount retained by the liquidator as remuneration is found by the court to be unreasonable in the circumstances, order the liquidator to refund the amount:
>
> (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property:
>
> (h) make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.

[38] Section 284(2) goes on to provide that the powers given by s 284(1) are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under pt 16 of the Act, and may be exercised whether or not the liquidator has ceased to act as liquidator when the application or the order is made.

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[6] Citing *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [122]-[139].

[39] Ms Courtney emphasises the Court's power in s 284(1)(g) to exercise jurisdiction even though a liquidator may not have been validly appointed, and the s 284(2) jurisdiction in respect of relevant matters even when the liquidator has ceased to act. In her submission these provisions provide support for the Commissioner's argument that the Court's supervisory jurisdiction over liquidators may extend to the situation where a (validly appointed) liquidator has resigned.

[40] Overall, Ms Courtney submits that the statutory scheme, considered with the Court's inherent jurisdiction, confers on the Court the necessary jurisdiction to make the prohibition orders the Commissioner seeks.

Discussion and conclusions on issue (1)

[41] Section 280 of the Act excludes certain categories of persons from appointment as liquidator. The section provides:

> **280 Qualifications of liquidators**
>
> (1) Unless the court orders otherwise, none of the following persons may be appointed or act as a liquidator of a company:
>
> (a) a person less than 18 years old:
>
> (b) a creditor of the company in liquidation:
>
> (c) a person who has, within the 2 years immediately preceding the commencement of the liquidation, been a shareholder, director, auditor, or receiver of the company or of a related company:
>
> (ca) a person who has, or whose firm has, within the 2 years immediately before the commencement of the liquidation, provided professional services to the company, unless, within 20 working days before the appointment of the liquidator, the board of the company resolves that the company will, on the appointment of the liquidator, be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration:
>
> (cb) a person who has, or whose firm has, within the 2 years immediately before the commencement of the liquidation, had a continuing business relationship (other than through the provision of banking or financial services) with the company, its majority shareholder, any of its directors, or any of its secured creditors, unless, within 20 working days before the appointment of the liquidator, the board of the

company resolves that the company will, on the appointment of the liquidator, be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration:

(d) an undischarged bankrupt:

(e) a person who is, or is deemed to be, subject to a compulsory treatment order made under Part 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992:

(f) a person in respect of whom an order has been made under section 30 or section 31 of the Protection of Personal and Property Rights Act 1988:

(g) a person in respect of whom [a prohibition] order has been made under section 286(5):

(h) a person in respect of whom an order has been made under section 37(6) of the Receiverships Act 1993:

…

(k) a person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 382, 383, 385, or 385AA:

(kaa) a person who is prohibited from being a general partner or promoter of, or being concerned or taking part in the management of, a limited partnership under section 103A, 103B, 103D, or 103E of the Limited Partnerships Act 2008:

(ka) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Financial Markets Conduct Act 2013, or the Takeovers Act 1993:

(l) a person who is prohibited under section 299(1)(c) of the Insolvency Act 2006 from acting as a director or taking part directly or indirectly in the management of any company or class of company:

(m) a person who is prohibited from being administrator or deed administrator under section 239ADV.

(1A) Subsection (1)(ca) or (cb) does not apply if all the creditors consent to the appointment of the person in question.

(2) A body corporate must not be appointed or act as a liquidator.

(3) A person who contravenes subsection (1) or subsection (2) commits an offence and is liable on conviction to the penalty set out in section 373(2).

> (4) A person other than the Official Assignee must not be appointed a liquidator unless he or she has first certified in writing that he or she is not disqualified under subsection (1).

[42] The section sets out what appears to have been a carefully considered list of circumstances which disqualify someone from accepting appointment as a liquidator. Having convictions for offences involving dishonesty under the TAA is not one of the listed circumstances, and Ms Courtney accepts that that is the position. Nor does she rely (on this issue) on any of the other circumstances listed in s 280(1). (She does not contend, for example, that Mr Kamal's convictions under the TAA disqualified him from accepting appointment as liquidator under any of paras (k)-(m) of s 280(1)). Her argument is essentially that the list of disqualifying circumstances is s 280 is not exhaustive, and is intended only to be indicative of the kinds of circumstances which will make someone unsuitable for appointment as liquidator.

[43] Section 286(4) does specifically empower the Court to make an order removing a liquidator from office on the grounds that he or she is or has become disqualified from becoming or remaining a liquidator, but the liquidator must be (or have become) disqualified *under s 280*, and the Court has a discretion under s 286(4)(b) to permit the liquidator to remain in office "notwithstanding the provisions of section 280 of the Act". The references to s 280 in this subsection appears to suggest that the s 286(4) removal power is limited to the particular circumstances which are identified, in s 280, as disqualifying circumstances. If there were a broader disqualifying ground of "unfit for appointment as liquidator generally", as Ms Courtney submits, it is difficult to see why Parliament would have limited the relevant part of s 286(4) to disqualification under s 280.

[44] The very length of the list of disqualifying circumstances in s 280, coupled with the absence of any words suggesting that the list was intended to be merely illustrative of the kinds of circumstances which would disqualify some persons, supports Mr Mahuta-Coyle's submission that Parliament intended to create a "negative licensing regime" to identify those who could and those who could not accept appointment as liquidator. A prospective liquidator who was not expressly disqualified by s 280 was intended to be free to accept appointment, subject only to

review by the creditors (in the case of an appointment by the company), and to the overall supervisory jurisdiction of the Court.

[45] I do not believe the Commissioner is entitled to look to s 286(5) itself to found a broad "duty" on a liquidator to be (and presumably remain) "fit" to act as liquidator.

[46] Looking at the specific wording of s 286(5), I think the words "by reason of" are important. Those words make it clear that there must be linkage between the acts or omissions which are said to have amounted to a failure or failures (persistent or serious) to comply with some relevant duty, and the Court's determination that the person is unfit to act as liquidator. Put another way, the relevant failure or failures to comply with a duty must *lead to* the "unfit person" determination. The "unfit person" determination must be based upon a relevant failure.

[47] The Commissioner's argument that a general unfitness to act as liquidator may, in and of itself, amount to a serious "failure to comply", would appear to result in a tautology – the Court being satisfied that a particular state of affairs exists "by reason of" the fact that that state of affairs exists. That would be a strange and unnatural construction of s 286(5), and I am not attracted to it.

[48] I accept Mr Mahuta-Coyle's broad submission that the enactment of s 280 marked a deliberate change in the regulatory approach to the appointment of liquidators in New Zealand. As Mr Mahuta-Coyle noted, the Law Commission had recommended that a liquidator should be an experienced insolvency practitioner. However the Justice and Law Reform Select Committee elected not to carry forward that requirement in its report on the Bill, believing that "experienced insolvency practitioner" would be difficult to define, and might require some kind of occupational regulation. The Committee, and subsequently Parliament when it enacted the Act, appears to have set its face against a licensing regime for liquidators of the kind which exists in Australia and in the United Kingdom.[7]

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[7] Companies Bill 1992 (50-2) (Select Committee report) at 15.

[49] In *ANZ National Bank Ltd v Sheahan*,[8] Heath J noted the absence of any provision in the Act stipulating that only experienced practitioners could act as liquidator.[9] His Honour considered that that omission, coupled with the evident intention in the Act not to discriminate between liquidators appointed by the Court and those appointed by the shareholders, suggests that the intention was to place greater weight on the Court's extended power of supervision over all liquidators, for the purpose of safeguarding the interests of parties who might be affected adversely by the liquidation process. In that context, his Honour referred to the wider powers of statutory supervision conferred on liquidators by s 284(1) of the Act, and to the fact that those statutory provisions apply in addition to any other powers the Court may exercise in its jurisdiction relating to liquidators.[10]

[50] Heath J acknowledged the Court's inherent jurisdiction to supervise liquidators, noting that Parliament clearly intended that the Court should have a general supervisory function in respect of all liquidators, whether appointed by the Court or not.

[51] I accept that the Court retains a broad supervisory jurisdiction over liquidators, whether appointed by the Court or not, but I do not believe that the existence of that supervisory jurisdiction creates (or otherwise provides support for the existence of) an implied general duty to be a "fit person", the breach of which would expose the liquidator to the risk of action under s 286 for a prohibition order.

[52] It is one thing for the Court to exercise its broad supervisory jurisdiction by removing an unfit liquidator under s 284(1)(a) (assuming, without deciding, that the ambit of s 284(1)(a) is wide enough to allow the Court to remove a liquidator), but we are not concerned here with the supervision of a particular liquidation, but with an order, possibly extending indefinitely into the future, which would prevent someone accepting appointment as liquidator of *any* company. In my view that is not a situation with which s 284 is concerned,[11] or indeed with which the Court's inherent jurisdiction to supervise particular liquidations is concerned.

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8 *ANZ National Bank Ltd v Sheahan*, above n 6.
9 At [127].
10 Section 284(2) of the Act
11 Under s 284(1)(a) the Court's direction must be in relation to a matter arising in connection with

[53] Under s 285 the relevant duty must be a duty "under [the Act] or any other Act or rule of law or rules of Court". In my view the fact that jurisdiction might exist for the Court to remove the liquidator of a particular company in appropriate circumstances is not enough to create some new, additional, duty of fitness with which all liquidators would presumably be required to comply.

[54] The jurisdiction to make a prohibition order under s 286(5) arises only where there has been a "failure to comply", as defined in s 285 of the Act, and to my mind the concept of "complying with a duty" necessarily involves taking some particular action, or refraining from taking that action. "Complying with a relevant duty" is not in my view an expression which is apt to describe particular *qualities* a person may or may not have (in this case, fitness to act as a liquidator).

[55] If there is no relevant duty to be a "fit person" in the Act, or in any other Act or in any relevant rule of law, the Commissioner cannot in my view access the s 286(5) prohibition order jurisdiction solely on the basis of Mr Kamal's convictions under the TAA. Prohibition is a serious matter which is likely to affect a liquidator's livelihood, and in my view the structure of the Act is that if prohibition is not automatic (as it is under certain provisions of the Act which are not applicable in this case),[12] the liquidator is entitled to the safeguards provided by s 286, including proof of an identified breach of duty and (in the case of a creditor's application) the opportunity to rectify that breach before any application is made.

[56] I accept that a liquidator who has accepted appointment notwithstanding the existence of a disqualifying circumstance under s 280 may be said to have breached a relevant duty for the purposes of ss 285 and 286 of the Act. The failure of such a person to resign as liquidator might also constitute a continuing breach of duty for the purposes of ss 285 and 286. But that is not the issue with which I am concerned under issue (1). The question posed by issue (1) is essentially whether it is arguable that there is an additional, broader, disqualifying circumstance, which is not expressly stated in s 280.

"the liquidation". And the s 284(1)(g) jurisdiction clearly relates to the appointment of a liquidator of a specific company.

12 See for example Companies Act 1993, s 382.

[57] 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.

[58] The answer on issue (1), then, is "no": the Act does not impose any general requirement of fitness on liquidators, and it would be beyond the Court's function to add an overarching "fitness" requirement to the detailed list of disqualifying circumstances which Parliament has prescribed in s 280. To do that would effectively be to alter the regulatory regime for the appointment of liquidators which Parliament enacted in s 280 of the Act. The convictions under the TAA do not, of themselves, amount to a failure to comply with a duty (as defined in s 285), and on their own they cannot provide a basis on which the Court could make a prohibition order under s 286(5).

[59] It follows that there was no continuing failure by Mr Kamal to comply with a general duty to be a fit person to accept appointment as, or to act as, liquidator, at the time the Commissioner commenced these proceedings.

Issue (2): If the answer to issue (1) is "yes", is it reasonably arguable for the Commissioner that Mr Kamal was guilty of a continuing breach of that duty at the time these proceedings were commenced?

[60] In view of the conclusion I have reached on issue (1), it is not necessary to answer this question.

Issue (3): Is it reasonably arguable for the Commissioner that, at the time these proceedings were commenced, there was a continuing failure by Mr Kamal to comply:

> **(i) with a duty to disqualify himself from appointment as liquidator of Hillman and/or GDZ on account of his alleged continuing business relationships with directors of those companies (and/or with companies owned or controlled by those directors) and/or**
>
> **(ii) with a duty to convene meetings of the creditors of Hillman and/or GDZ?**

The Commissioner's submissions

[61] Ms Courtney acknowledges that in *Official Assignee v Norris*, the High Court held that an application under s 286 made by a creditor must relate back to the creditor's notice.[13] That follows from the purpose of the notice requirement which is to provide an opportunity for the liquidator to remedy the failure and thereby avoid the need for Court involvement in respect of that failure.

[62] However she notes that the debts remained outstanding after Mr Kamal's resignations, so the Commissioner still had standing as a creditor to bring the proceedings. She submits that it would be unsatisfactory if the Court's "supervision" function could be defeated by the act of a liquidator choosing to resign. She refers in support to the Court's supervisory jurisdiction under s 284, and notes the Court's inherent jurisdiction to supervise the conduct of liquidators as officers of the Court.[14] She also points to the fact that the liability of a liquidator for acts carried out in the course of the liquidation continue beyond the completion of the liquidation, subject only to the operation of the Limitation Act 1950.[15] Implicit in her submissions, and in particular in her reliance on those parts of s 284 that give the Court jurisdiction even after a liquidator has ceased to act, is the contention that Mr Kamal's resignations did not "cure" the breaches with which this issue is concerned.

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13 *Official Assignee v Norris* [2012] NZHC 961, [2012] NZCCLR 10.
14 Citing *ANZ National Bank Ltd v Sheahan*, above n 6, at [122]-139].
15 Citing *Brookers Company Law* (online looseleaf ed, Westlaw) at [CA 279.01].

Mr Kamal's submissions

[63] Mr Mahuta-Coyle submits that, apart from the alleged disqualification on account of Mr Kamal's convictions under the TAA, Mr Kamal did exactly what was intended by the statute: he rectified any error of duty by resigning in order to avoid the Court's involvement. He relies on the decision of Mallon J in *Official Assignee v Norris*, submitting that the creditor's notice required by s 286(2) of the Act must fairly inform the liquidator of the duty alleged to have been breached and how it was breached, so that the liquidator may determine what he or she needs to do to avoid an application to the Court.[16]

[64] Mr Mahuta-Coyle submits that the Commissioner's s 286(2) notice had to draw a suitable link between the alleged breach and the requested remedy. He submits that, in this case, the notices appeared to link the alleged duty to call creditors' meetings to the demand for Mr Kamal's resignations as liquidator of GDZ and Hillman. He submits that Mr Kamal's resignations did effectively remedy the alleged breaches of duty relating to the alleged continuing business relationships and the failures to convene creditors' meetings.

Discussion and conclusions on issue (3)

[65] For the purposes of the strike-out application, I proceed on the basis that the allegations that Mr Kamal should have disqualified himself as liquidator of the three companies, and should have held creditors' meetings in accordance with his obligations under ss 243 and 245 of the Act,[17] may be proved by the Commissioner at trial.

[66] Section 286(2) of the Act reads:

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16 *Official Assignee v Norris*, above n 13, at [43].

17 Broadly, s 243 required a liquidator in Mr Kamal's position to call meetings of creditors, unless he considered, having regard to the assets and liabilities of the company, the likely result of the liquidation of the company, and any other relevant matters, that no such meeting should be held. If Mr Kamal came to that view, he was required under s 245 of the Act to give notice to creditors stating that he did not consider that a meeting should be held, setting out reasons for that view. The creditors then had the right under s 245(1)(b)(iii) to give notice to the liquidator within 10 working days, requiring the liquidator to convene a creditors' meeting. In this case, notices requiring the convening of a creditors' meeting were given by the Commissioner within the prescribed period of 10 working days.

> No application may be made to a court by a person other than a liquidator in relation to a failure to comply unless notice of the failure to comply has been served on the liquidator not less than 5 working days before the date of the application and, as at the date of the application, there is a continuing failure to comply.

[67] The question under this issue is whether it is clear (to the point where the Commissioner can have no reasonable argument to the contrary) that Mr Kamal's alleged "failures to comply" were "continuing" when the Commissioner's proceedings were filed.

[68] Mr Kamal's resignations may not have had the effect of curing the breaches relied upon by the Commissioner (for example, they did not cause creditors' meetings to be convened), but I think they did have the effect that there could be no continuing failure to comply with the relevant duties. Once Mr Kamal had resigned he was no longer bound by the duties on which the Commissioner relies: in those circumstances, breaches of those duties could not form the basis for the applications for prohibition orders.

[69] The Commissioner refers to s 284(2), and its provision that the Court may exercise its supervisory jurisdiction whether or not the liquidator of the company has ceased to hold office. But s 284(2) applies only to s 284(1). It does not apply to s 286, under which prohibition orders are available. I do not see s 284(2) as providing any support for interpreting s 286, which is concerned not with the supervision of the liquidation of a particular company, but with the question of whether a particular liquidator's (unremedied) breaches of duty have been so serious or persistent that he or she should be prohibited from acting as liquidator of *any* company.

[70] The fundamental problem with the Commissioner's argument that s 284(2) applies by analogy, so that the Court's jurisdiction to make a prohibition order under s 286(5) survives notwithstanding the liquidators' resignation prior to the commencement of the creditor's proceeding, is that argument runs hard up against the s 286(2) requirement that there be a *continuing failure to comply* when the creditor's proceeding is issued. No argument by analogy with s 284(2) can be accepted if it is inconsistent with the express provisions of s 286(2). If Mr Kamal

was no longer bound by the relevant duties when he resigned, which I think was the case, s 284(2) cannot be called in aid to overcome the plain words of s 286(2).

[71] On the question of the extent to which a liquidator's duties may continue after his or her resignation, I note that section 283(9) states:

> A person vacating the office of liquidator must, where practicable, provide such information and give such assistance to that person's successor as he or she reasonably requires in taking over the duties of liquidator.

[72] This wording points against any continuing duty or ability of the liquidator to take substantive steps, such as calling creditors' meetings: the liquidator would simply have no authority to do so. As the Court of Appeal noted in *Norris v Gemmell & Cain*, "[when] the office of liquidator became vacant under s 283(1) … Mr Norris' subsequent acts could have no effect".[18]

[73] The differing nature of the orders available under ss 284 and 286 also underline the point that s 284 cannot assist in this case. At least some of the s 284 powers simply must be available after resignation. For example, it would not make sense if resignation prevented the Court from adjusting the departing liquidator's remuneration. Section 286 on the other hand, is concerned (as the section title indicates)[19] with breaches of duty which occur while a person remains a liquidator. The relevant duties can only exist while the person holds office as a liquidator, because it is only when in the office that the person can exercise the powers of the liquidator. Upon resignation, the appointed successor becomes the liquidator and bears the attendant duties.

[74] I think the foregoing views are consistent with the statement of Mallon J in *Official Assignee v Norris* that the purpose of the s 286(2) notice requirement is "to provide an opportunity for the liquidator to remedy the failure and thereby avoid the need for court involvement in respect of that failure".[20] It seems to me that the Commissioner's complaint that Mr Kamal should not have assumed office as

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18 *Norris v Gemmell* [2014] NZCA 490 at [31]. Mr Norris was a liquidator whose conviction for theft under s 220 of the Crimes Act 1961 had the effect that he could no longer lawfully act as liquidator.

19 Under s 5 of the Interpretation Act 1999, the heading of a section may be considered in ascertaining its meaning.

20 *Official Assignee v Norris*, above n 13, at [59].

liquidator could only be remedied by resignation, and that is what he did. However I do not think the Judge's reference to "remedying the failure" can be read as a substitute for the ultimate requirement in s 286(2), namely that there must be a "continuing failure to comply" at the date the creditor's proceeding is filed.

[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).

[76] The answer to issue (3), then, is no.

[77] I acknowledge the Commissioner's concern that the (arguably unfortunate) consequence of the view to which I have come is that a defaulting liquidator will always be able to avoid a prohibition order by the simple expedient of resigning before the creditor's proceeding is commenced.

[78] That may be the case, but 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.

Issue (4): If the answer to issue (3) is yes, is it reasonably arguable for the Commissioner that the seriousness or persistence of the failure or failures was such as to make Mr Kamal unfit to act as a liquidator?

[79] My conclusion on issue (3) means that there is no need to resolve this issue. However in case I am wrong in my view on issue (3), I add that I would not have

considered this question suitable for determination on a strike-out application. It is an issue which I think could only properly be considered with the benefit of all of the evidence, including evidence given under cross-examination at trial.

Orders

[80] In his strike-out application, Mr Kamal originally asked for orders striking out numerous paragraphs of the Commissioner's statement of claim. However in his written submissions Mr Mahuta-Coyle submitted that if his arguments were accepted, the appropriate relief would be an order striking out both proceedings.

[81] On the view to which I have come, I do not think the statements of claim can survive – it is not in my view reasonably arguable that the statements of claim identify any "failures to comply" by Mr Kamal that were continuing failures as at the date of the Commissioner's applications. The appropriate relief is the striking out of the statements of claim in each of the Hillman and GDZ proceedings. I make orders accordingly.

[82] My preliminary view is that costs should be reserved, to be dealt with at the hearing or earlier determination of the JDH proceeding (which has been case managed with the Hillman and GDZ proceedings, addresses similar issues, and remains to be resolved). However counsel may file memoranda if they wish to advance any contrary view. Any memorandum for Mr Kamal is to be filed and served within 15 working days, and any memorandum for the Commissioner in response within 15 working days after the service of Mr Kamal's memorandum.

Associate Judge Smith

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