IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2016-454-69
CIV-2016-454-70
CIV-2016-454-71
[2016] NZHC 2085

UNDER	the Companies Act 1993
IN THE MATTER	of applications under sections 241AA and 283, 248, and 256
BETWEEN	PALMERSTON NORTH CITY COUNCIL First applicant
	MANAWATU WHANGANUI REGIONAL COUNCIL Second applicant
AND	FARM HOLDINGS (4) LIMITED (IN LIQUIDATION) First respondent
	IMRAN MOHAMMED KAMAL Second respondent
	MOHAMMED SHAFI MAZHAR Third respondent

Hearing: 26 August 2016

Appearances: N Jessen for the applicants
K Sullivan for the respondents
G Woollaston for the creditor, PFDL(5) Limited

Judgment: 5 September 2016

JUDGMENT OF ASSOCIATE JUDGE SMITH

Introduction

[1] On 25 May 2016 the first respondent (Farm Holdings) was put into voluntary liquidation by resolution of its shareholders. The second and third respondents, Messers Kamal and Mazhar, were appointed liquidators. Three proceedings have been initiated relating to this liquidation.

[2] In the first proceeding (the review proceeding), the Palmertson North City Council (the Council) has applied under ss 283(4) and 241AA(3) of the Companies Act 1993 (the Act) seeking review by the Court of the appointment of the liquidators. The Council asks for orders removing Mr Kamal and Mr Mazhar as liquidators of Farm Holdings and appointing named replacement liquidators. The liquidators have filed a notice of opposition.

[3] In the second proceeding (the information proceeding), the Council, along with the Manawatu Whanganui Regional Council (Horizons), has applied under s 256 of the Act for orders seeking certain information relating to the liquidation. The liquidators have filed a notice of opposition.

[4] In the third proceeding (the continuation proceeding), the Council and Horizons have applied under s 248 of the Act for leave to continue enforcement proceedings against Farm Holdings while it is in liquidation. The liquidators again opposed this application. I am not concerned with the continuation proceeding in this judgment.

[5] At a hearing on 28 July 2016, I directed that the applications could proceed as originating applications under pt 19 of the High Court Rules. At the hearing, counsel for the respondents sought an order that the proceedings be served on all creditors of Farm Holdings. I adjourned that application, and a number of other applications, to a telephone conference to be convened after 15 August 2016.

[6] The conference was convened on 17 August 2016. Shortly before the conference, one of Farm Holdings' creditors, PFDL(5) Ltd (PFDL), had applied for an order joining it as a respondent in the review and information proceedings. That application is opposed by the Council and Horizons.

[7] At the conference, I directed that the application by PFDL would be heard (on a defended basis) on 26 August 2016. I also directed the liquidators to notify all creditors of that hearing date and that any creditor wishing to be joined in the proceedings was to file an application for joinder by 23 August 2016. All joinder applications would be heard on 26 August 2016.

[8] No other creditor has applied to be joined as a party to any of the proceedings.

[9] I now give judgment on PFDL's joinder application.

Background to the proceedings

[10] The following is taken from the affidavits of Mr Bevan, a regulatory manager at Horizons, and Mr Eathorne, general manager of the Council. (The respondents have not yet been required to file affidavits in the substantive proceedings, and elected not to file any affidavits on PFDL's joinder application).

[11] Farm Holdings was a landholding entity. It owned parcels of land in Palmerston North which were being developed.

[12] The Council has filed Environment Court proceedings against Farm Holdings, inter alia relating to a pond which allegedly constitutes an immediate environmental hazard.

[13] On 2 May 2016 the Council applied for an order liquidating Farm Holdings. The liquidation application was based on a judgment the Council had obtained in certain District Court proceedings.

[14] The Council withdrew its application for a liquidation order when Farm Holdings' shareholders, acting within the period of ten working days after service of the liquidation claim within which the shareholders of a company may put the

company into voluntary liquidation,[1] resolved to appoint Mr Kamal and Mr Mazhar as liquidators of Farm Holdings.

[15] At the time of the liquidation, Horizons was pursuing two actions against Farm Holdings. One related to the enforcement of an Environment Court judgment against Farm Holdings, arising from environmental hazards created by earthworks on certain land owned by Farm Holdings. Costs had been awarded to Horizons. The second was a District Court prosecution of Farm Holdings for alleged offences under the Resource Management Act 1991.

[16] Horizons is an unsecured creditor in the liquidation.

[17] Following the liquidation the Council asked the liquidators to provide copies of various documents, including a list of Farm Holdings' assets and liabilities, all creditor claim forms received by the liquidators, copies of all documents claimed to be confidential, and copies of any resolutions relied upon to establish the authority of the liquidators. It also asked the liquidators to call a meeting of creditors.

[18] The liquidators declined the requests for information, but they did convene a creditors' meeting. It was held on 29 June 2016, and representatives from the Council and Horizons attended. At the meeting, a resolution was put to appoint a replacement liquidator. The Council and Horizons voted in favour, but the resolution was defeated. One of those voting against the motion was PFDL.

[19] Mr Eathorne says that the Council is concerned that the liquidators have been appointed to avoid a robust investigation of Farm Holdings' affairs, and to avoid environmental responsibility for substandard development work. Mr Eathorne says that the Council suspects that a mortgage over land owned by Farm Holdings secures a non-existent, or "sham", debt, and was registered purely with a view to extracting assets from Farm Holdings at the expense of the company's legitimate creditors.

---

1 Companies Act 1993, s 241AA (2).

The application to be joined

[20] PFDL applies to be joined as a party in the review and information proceedings. The grounds relied on in support of the application are:

(a) That PFDL's presence before the Court is necessary or desirable for the Court to adjudicate and determine the questions in the proceedings.

(b) The proceedings touch on PFDL's rights, interests and entitlements as a creditor of Farm Holdings, and it is therefore just and equitable that it be joined.

(c) No material prejudice will be caused to the Council or Horizons by PFDL being joined.

(d) The further grounds set out in the affidavit of Mr Fugle, the sole director of PFDL and the owner of 50 percent of the shares in PFDL, filed with the application.

[21] Mr Fugle's affidavit adds the following contentions:

(a) The applications in the review and information proceedings are an attempt by the applicants to undermine the outcome of the voting at the creditors' meeting of 29 June 2016. Removal of the liquidators by any order made in the review proceeding would grant minority creditors greater rights than the majority creditors.

(b) Mr Fugle objects to allegations made by the applicants that he was the controlling mind of Farm Holdings, that that he or PFDL colluded with creditors other than the Council and Horizons to defeat the interests of those creditors.

(c) The liquidators were validly appointed and should not be removed.

[22] Counsel for PFDL also filed a notice of intention to appear in both the review and information proceedings. The purpose of filing this document was evidently to seek a lesser right of audience if one or both of the joinder applications was/were declined.

The applicants' opposition

[23] The applicants oppose the application by PFDL to be joined as a party in either proceeding. They would, however, consent to the joinder of Mr Fugle if he were to make an application for joinder. The applicants say that PFDL's presence before the Court will not be necessary for the Court to adjudicate on and settle all questions involved in the proceedings.

The Law relating to joining additional parties in a court proceeding

[24] Adding a party to an existing proceeding is governed by r 4.56 of the High Court Rules:

> **4.56 Striking out and adding parties**
>
> (1) A Judge may, at any stage of a proceeding, order that—
>
> (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
>
> (b) the name of a person be added as a plaintiff or defendant because—
>
> (i) the person ought to have been joined; or
>
> (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
>
> (2) An order does not require an application and may be made on terms the court considers just.
>
> (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[25] In *Capital + Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* Thomas J provided the following summary of the principles which emerge from the case law on joinder of interveners and interested parties:[2]

(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.

---

2 *Capital + Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* [2014] NZHC 3205, [2015] NZAR 228 at [41].

Submissions on joinder in the review proceeding

[26] The principal thrust of PFDL's submissions is that it has a legal right that will be directly affected by the review proceeding. Its vote at the creditors' meeting of 29 June 2016 (in favour of retaining Mr Kamal and Mr Mazhar as liquidators) would effectively be reversed if the Court made the orders sought by the Council.

[27] Counsel for PFDL made the following submission which I record in full:

> The premise upon which PFDL seeks to be joined is that its "presence before the Court may be necessary" for the efficient disposition of the Proceedings, which premise is buttressed, it says insofar as the Proceedings pertain to matters in which it has a proper interest (principally as it is a creditor of [Farm Holdings] having exercised statutorily reserved entitlements to participate at and to attend and vote at a meeting of creditors called as required pursuant to section 243 of [the Act].

[28] Counsel elaborates:

> 27. PFDL says, essentially, that the right to attend and participate at a creditors' meeting is afforded by statute. Such right was exercised by it, and a concomitant of that right was voting pertaining to the removal (or otherwise) of the [liquidators] as the extant liquidators of [Farm Holdings].
>
> 28. The net effect of the exercise by the various creditors of the statutory rights afforded to them under s 243 et al of [the Act] was confirmation of the [liquidators] as liquidators, conversely the net effect of [an order made in the review proceeding removing he liquidators] would be the reversal of the outcome of the creditors' decision to confirm the [liquidators'] appointment as liquidators.
>
> 29. PFDL thus submits if it is to be afforded creditors' standing to vote as to the probity or otherwise of the continuation of the liquidators' appointment for the purposes of section 243, as it has been, it is seized of a legal right, entitlement or interest, with respect to which [the review proceeding] has a direct nexus in that [the review proceeding] seeks to impugn the veracity of the voting process (and aligned exercise of creditors rights) reserved to [PFDL] under s 243 of [the Act].

[29] Counsel for Council submitted that the target of the review proceeding is the decision of the shareholders of Farm Holdings to put Farm Holdings into voluntary liquidation. The review proceeding does not affect PFDL's rights under the Act, which have been exercised and exhausted. The review of an appointed liquidator pursuant to ss 283(4) and 241AA(3) does not overrule the creditors' vote. Rather, it

is an independent statutory power that could be exercised at any time during the liquidation process, regardless of creditor voting.

[30] It follows, counsel submitted, that PFDL's status as a creditor does not justify joinder. All creditors have voting rights under the Act, and if that were sufficient to give rise to a right or interest justifying joinder, every proceeding under the Act which might affect a matter which had been the subject of a vote by creditors would have to be served on all creditors. The Act does not impose any such service obligation.

[31] As to whether PFDL could provide information of assistance in the review proceeding, counsel submitted that, because PFDL is not a director or shareholder of Farm Holdings, it cannot have valuable information that would assist the Court. Mr Fugle, on the other hand, could provide such information. The Council would accordingly consent to his joinder.

[32] In response to Mr Fugle's affidavit, counsel submitted that the views expressed are personal to Mr Fugle. Those views might justify his presence before the Court, but not that of PFDL. PFDL should not be used as a vehicle for the communication of Mr Fugle's views, especially as any of his views which might justify his presence as party do not arise from any of his capacities relating to PFDL.

The information proceeding – application and notice of opposition

[33] In their application filed in the information proceeding, the Council and Horizons seek orders under s 256(1)(a)(ii) of the Act that:

(a) Mr Kamal and Mr Mazhar provide them with a "complete record of any and all documents relating to the indebtedness of [Farm Holdings] to all creditors" and [copies] of all correspondence sent or received by Mr Kamal and Mr Mazhar in relation to Farm Holdings.

(b) Farm Holdings provide them with documentation relating to the "purported indebtedness" of Farm Holdings to six named parties; and

(c) Mr Kamal and Mr Mazhar provide them with "all accounts and records of the liquidation kept pursuant to [s 256(1)(a) of the Act], and the accounts and records of Farm Holdings."

[34] The respondents have filed a notice of opposition in which they contend, inter alia, that the request for information is too broad and "amounts to a fishing expedition without good cause and in circumstances where the liquidator is yet to formally admit all claims in the liquidations". They also say that the application seeks disclosure of information that is commercially sensitive to third party creditors who do not presently have standing to appear and be heard on the application.

Submissions on joinder in the information proceeding

[35] Counsel for PFDL submitted that the information held by Farm Holdings which is the subject of the information proceeding entails data directly pertaining to PFDL, including information relating to its "costings/pricing formulations".

[36] That information, counsel submitted, is ordinarily treated as commercially sensitive, and its "dissemination controlled by PFDL". Counsel advised that PFDL asserts it "has privacy rights/expectations at issue in such proceedings (and property in the information sought, insofar as it pertains to PFDL)."

[37] The Council rejects the argument that any commercial sensitivity of information held by the respondents would provide a basis for PFDL being joined in the information proceeding. Counsel for the Council reiterated his submission that no information could reasonably be expected to be gained from joining PFDL: not being a shareholder or director of Farm Holdings, PFDL has nothing of relevance to tell the Court (though Mr Fugle might).

[38] The Court will be a sufficient guardian of privacy and commercially sensitive information. Counsel also submitted that he was not aware of any legal right of a creditor, or other third party, to prevent the release of material held by a company in liquidation.

Discussion and conclusions

The review proceeding

[39] The issue for determination is whether PFDL's presence before the court may be necessary to adjudicate on and settle all questions involved in the review proceeding. The critical issue will be whether it would be unjust to adjudicate on the issues in the review proceeding without PFDL being heard.

[40] The application for replacement of the liquidators is made under ss 283(4) of the Act. That subsection provides:

> The Court may, on the application of the company, or a shareholder or other entitled person, or a director or creditor of the company, review the appointment of a successor to a liquidator and may appoint any person who could be appointed as liquidator under paragraph (a) or (b) or paragraph (c), as the case may be, of subsection (2) of section 241 to be the liquidator of the company.

[41] The provision does not apply only to successor liquidators. By virtue of s 241AA(3) of the Act, it applies also to liquidators appointed by resolution of shareholders, or by the board of a company. That subsection provides:

> If a liquidator is appointed under section 241(2)(a) or (b), the creditor who filed [a prior application to the court for an order appointing a liquidator] may apply to the court under section 283(4) for the review of his or her appointment as if the words "successor to a liquidator" in section 283(4) read "liquidator".

[42] The Council being the creditor who filed the liquidation claim in this case, and the subsequent appointment of Mr Kamal and Mr Mazhar as liquidators having been made under s 241(2)(a) of the Act, there is no clear dispute that the Council has standing to apply for the review of the appointment of Mr Kamal and Mr Mazhar as liquidators (the respondents do refer to the vote at the creditors' meeting in their notice of opposition, but apparently only as a factor the Court should take into account in the exercise of its discretion).

[43] The following factors identified in *Jacobsen Creative Surfaces Ltd v Smiths City Ltd* may be relevant to the exercise of the discretion under s 283(4):[3]

---

[3] *Jacobsen Creative Surfaces Ltd v Smiths City Ltd* [1994] 1 NZLR 128 (HC), cited in *Fisher*

1. Independence. There must be on the part of the liquidator the ability to make informed and unbiased decisions in the interest of all groups.

2. The resources of the liquidator.

3. The wishes of the creditors and contributories. This may include the indications given at the hearing where there has been a change of heart since the creditors' meeting. It is not a matter that of necessity requires adherence to the strict arithmetical calculation.

4. The competence and experience of the liquidator. This will be his ability to carry out the task required in an efficient manner, and in complex cases will include consideration of his commercial experience.

5. The requisite speed with which the liquidation can be carried out.

6. On occasions, the liquidator's familiarity with the company will be of relevance.

[44] The test for removal of a liquidator on review pursuant to these provisions is the existence of "a body of suspicion", with at least some factual foundation, about the impartiality of the liquidator, sufficient to make his or her appointment undesirable. In *Jacobsen*, John Hansen J said: [4]

> I take the view that where there is a body of suspicion, whether in the end justified or not, but with some factual foundation on which suspicion may be built, then it is undesirable that a liquidator should be appointed. There will be left in the minds of creditors a sense of dissatisfaction that an appointee of the Court may not have been totally impartial in the performance of his duties. I have endeavoured to express those views in a recent decision of my own, *Re Halford Ornowski and Associates Ltd* [HC Auckland M666/90, 15/2/91] this year where the circumstances were rather different, but where nevertheless the anxiety on my part to ensure that total independence and impartiality were seen to have been exercised was a prime consideration.

[45] Asher J elaborated on the "suspicion" test in *WHK (NZ) Ltd v Retail Media Ltd (in rec and in liq)*. His Honour said: [5]

> [25] It could well be that the approach set out in *Re Trafalgar Supply Limited* should be adopted in considering an application under s 241AA, although the matter has not been fully argued before me, and I express no final view on it. Even on such an approach, mere suspicion is not in itself enough. There must be a factual foundation for the suspicion, which could be

---

International Trustees Ltd v Waterloo Buildings Ltd (in liq) HC Auckland CIV-2009-404-6640, 12 November 2009 at [22].

4 *Re Trafalgar Supply Co Ltd (in liq)* [1991] MCLR 293 (HC) at 296, cited in *Baker v Gilbert* [2015] NZHC 3311 at [33].

5 *WHK (NZ) Ltd v Retail Media Ltd (in rec and in liq)* (2009) 19 PRNZ 527 (HC).

> expressed as there being a serious question to be tried as to whether the liquidators would carry out their duties, and show the requisite objectivity and independence. That objectivity and independence is important where they will have, as here, the role of a watchdog over the activities of the receiver.
>
> [26] Nevertheless, the liquidators are entitled to have the opportunity to explain their actions fully, and to have them analysed with care before any determination is made. The fact that the threshold of suspicion is low may mean that in certain circumstances where the lack of independence is overwhelmingly demonstrated and there is great urgency, that a Court might make orders replacing a liquidator after a truncated hearing. However, I do not consider that the situation here, with the interim orders in place, is so extreme as to deny the existing liquidators the opportunity to fully answer the allegations against them.

[46] That cautious approach was endorsed by White J in *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liq)*. The learned judge said: [6]

> [I]n the normal case an applicant for the review of the appointment of a liquidator under s 283(4) and for an order appointing a replacement liquidator would need to establish on the balance of probabilities that the person who had been appointed did not have the necessary qualifications, experience, independence and impartiality, and should be replaced by a person who did satisfy these requirements.

[47] White J did not determine the application in that case, adjourning the application until the liquidator had an opportunity to arrange representation and file a response to the application. His Honour observed that the liquidator should ordinarily have the opportunity to provide the Court with evidence of his or her qualifications, experience, resources, independence and impartiality.[7] But his Honour noted that certain factors identified by the applicant did appear to provide a factual foundation for the suspicion that the liquidator lacked the necessary qualifications, experience, resources, independence and impartiality. One of those factors was the liquidator's relationship with the former director of the company in liquidation.

[48] When the review proceeding comes on for hearing, I think the principal matters affecting the Court's exercise of its discretion under s 283(4) are likely to relate to the qualifications and impartiality of the liquidators. The factors identified as relevant in *Jacobsen* concern creditors only in a limited way – factor three being

---

6 *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liq)* HC Auckland CIV-2009-404-6640, 12 November 2009 at [25].

7 At [28].

the "wishes of the creditors and contributories". But Hansen J qualified that factor as being "not a matter that of necessity requires adherence to the strict arithmetical calculation."

[49] While the views of the creditors might be a relevant factual matter to take into consideration when exercising the discretion, I do not accept the argument that participation in a vote under s 243 of the Act for the replacement of a liquidator creates any legal right or interest sufficient to justify party status in a subsequent application for review of the appointment by another creditor. I think that must be the position, even if the practical effect of the exercise of the Court's discretion might be to disturb the outcome of that vote.

[50] The statutory process which permits creditors to vote on replacing a liquidator, and the process for review of the appointment of a liquidator by the Court, are separate and distinct processes, and I have not been referred to any authority which would suggest that the protection given to the petitioning creditor by s 241AA is abrogated or removed by any subsequent creditors' vote (although the outcome of that creditors' vote may be a matter going to the exercise of the Court's discretion). Necessarily the outcome of the Court's review might be inconsistent with the wishes of a majority of the creditors, and in those circumstances I do not think the outcome of the creditors' vote can confer any "legal right" on a creditor who happens to have been in the majority.

[51] Furthermore the views of the creditors in this case (the majority prefer the present liquidators) are plainly discernible from the failure of the Council's resolution to replace the liquidators. And there is nothing to suggest that any creditor may have changed his or her mind since the meeting of 29 June 2016. The applicants and PFDL have clearly maintained their respective views on the appointment of Mr Kamal and Mr Mazhar as liquidators, and no other creditor has taken up the opportunity (afforded by the Court's directions given on 17 August 2016) to apply to be joined. The liquidators have filed a notice of opposition, and I think it can be expected that, to the extent PFDL has an interest in

the liquidators remaining in office, that interest will be sufficiently protected by the liquidators' prosecution of their opposition to the review proceeding.[8]

[52] I accept that the Council's allegations in this case are very serious, in that the impartiality alleged against Mr Kamal and Mr Mazhar appears to extend to an allegation that they have colluded with certain creditors, including PFDL, with a view to defeating the claims or interests of legitimate creditors such as the Council.

[53] It might be thought that if serious allegations are likely to be made against non-parties to a proceeding, those non-parties should be entitled to participate in the proceeding (with party status). But I do not believe that is what the cases say – reputational interests will only justify joinder in exceptional circumstances.[9] And Mr Woollaston did not put his case for joinder on the basis of PFDL having a right or interest because the Council will or may allege at the hearing that PFDL was a party (with the liquidators) to some fraudulent scheme designed to defeat the interests of the genuine creditors of PFDL. The case was essentially that PFDL's successful opposition to the Council's motion to replace the liquidators conferred on it a sufficient legal right or interest to justify joining it as a party. As stated above, I do not believe the voting *did* confer any such right or interest on PFDL.

[54] As for the qualifications of the liquidators, there is nothing to suggest that the Court will not be adequately informed of all relevant information by the Council and the liquidators. And PFDL has not been able to identify in a sufficiently specific way any further information it might provide touching any of the issues of liquidator objectively, independence and competence, with which the review proceeding will be primarily concerned.

[55] It follows that it is not necessary for PFDL to be before the Court for the just determination of the review proceeding. PFDL's application to be joined as a party in that proceeding will be dismissed accordingly.

---

8 A relevant consideration under *Capital + Merchant Finance*; see [16](c) above.

9 See *Capital + Merchant Finance Ltd (in rec. and in liq.) v Perpetual Trust Ltd*, above n 2, factor (a) (referred to at para [25(a)] of this judgment.

[56] For completeness, I add that Mr Woollaston did not seek to argue that the vote at the creditors' meeting affected the Court's jurisdiction to make a removal order under ss 241AA and 283(4). That is understandable, as even if there were any merit in such an argument it could not have provided PFDL with any "legal right" sufficient to justify joinder.

The information proceeding

[57] Section 256 of the Act prescribes certain duties of a liquidator in relation to accounts:

> **256 Duties in relation to accounts**
>
> (1) Subject to subsection (2) of this section, the liquidator of a company must—
>
> (a) Keep accounts and records of the liquidation and permit those accounts and records, and the accounts and records in the company, to be inspected by—
>
> (i) Any liquidation committee appointed under section 314 of this Act, unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; and
>
> (ii) If the Court so orders, a creditor or shareholder; and
>
> (b) Retain the accounts and records of the liquidation and of the company for not less than 1 year after completion of the liquidation.
>
> (2) The Registrar may, whether before or after the completion of the liquidation,—
>
> (a) Authorise the disposal of any accounts and records; and
>
> (b) Require any accounts or records to be retained for longer than 1 year after the completion of the liquidation.

[58] A liquidation committee appointed by the creditors under s 314 of the Act may access the information, unless there are reasonable grounds for believing that would prejudice the liquidation.

[59] I note that orders for inspection by creditors under s 256(1)(a)(ii) will not be made without good reason.[10] The Court of Appeal has elaborated on what "good reason" may mean:[11]

> [53] … While no inflexible rules can or should be laid down, we think the "good reason" test can be elaborated to this extent:
>
> (a) Mere suspicion or assertion by a creditor that a liquidator has not undertaken – or is not undertaking – the liquidator's statutory task properly is not sufficient.
>
> (b) It is not permissible for a creditor to apply merely in order to embark on a fishing expedition – in order to sift through the accounts and records of the liquidation to see if that might turn something up.
>
> (c) As a minimum, the applicant must put forward some persuasive, tangible or concrete reason why inspection should be granted. An example might be where the creditor, from its own dealings with the company in liquidation, has a genuine concern about a particular aspect of the company's affairs. If the liquidator declined to investigate this area, or declined to say whether it had been investigated, we think the s 256(1)(a)(ii) threshold would be crossed.

[60] In that decision the Court of Appeal traversed the legislative history of s 256. The Court did not make any mention of privacy or proprietary interests in information about accounts held by a company in liquidation. Nor has PFDL pointed to any authority for the assertion that the information about creditors, creditor claims and similar matters, were confidential to it, or inconsistent with its expectation of privacy (or that this information is otherwise its property).

[61] In my view, it was for PFDL to put up a cogent reason for joinder. The assertion of confidentiality in certain documents held by Farm Holdings is brief and far too vague. In any case, it remains open to PFDL to make representations to the liquidators as to documents in which it considers there is an obligation of confidence. In that way, the liquidators may respond to the information application and the Court will be informed of how any potential orders under s 256(1)(a)(ii) should be tailored to ensure the information is used only for legitimate purposes.

[62] Accordingly I can see no basis for concluding, in the terms used in *Capital + Merchant Finance Ltd*, that PBFL has rights against, or liabilities in relation to, the

---

10 *Levin v Lawrence* [2013] NZCA 394, (2013) 11 NZCLC 98-018 at [53].
11 *Levin v Lawrence* [2013] NZCA 394, (2013) 11 NZCLC 98-018.

subject matter of the information proceeding that will be directly affected by the determination of the information proceeding. The application by PFDL to be joined as a party in the information proceeding will accordingly be dismissed.

Result

[63] The applications by PFDL to be joined as a party in the review proceeding and the information proceeding are dismissed.

[64] The applicants are entitled to one set of costs, covering both proceedings, on a 2B basis, plus disbursements to be fixed by the registrar. Those costs are to be paid by PFDL. Leave is reserved to the applicants to apply by memorandum, to be filed within 15 working days of the date of this judgment, in the event of any issue arising over the apportionment of those costs as between the Council and Horizons.

[65] Given my conclusion on the applications, I see no basis for granting PFDL any lesser right of audience in the proceedings, short of joinder as a party.

[66] At this stage I do not see any basis for an order for costs in favour of the respondents. Although counsel appeared for the respondents at the hearing, the argument was substantially carried by Mr Woollaston and Mr Jessen. And to the extent the respondents did participate (for example, in filing a memorandum on 15 August 2015), they effectively cast their lot with PFDL, whose application for joinder has been unsuccessful.

[67] In case there are considerations which might justify an order for costs in favour of the respondents, however, I reserve leave to the respondents to apply by memorandum for costs. Any such memorandum is to be filed and served within 15 working days of the date of this judgment. If the respondents apply for costs, PFDL may file and serve a memorandum in reply within 15 working days of its receipt of the respondents' memorandum.

Associate Judge Smith