IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2011-442-80
[2012] NZHC 961

	BETWEEN	THE OFFICIAL ASSIGNEE Plaintiff
	AND	PATRICK DEAN NORRIS Defendant

Hearing: 13 March 2012
(Heard at Wellington)

Counsel: W Fortherby for the plaintiff
Defendant in person

Judgment: 8 May 2012

JUDGMENT OF MALLON J

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Introduction

[1] The Official Assignee has brought proceedings against Mr Norris in respect of his actions as a liquidator of eight companies. The Official Assignee contends that Mr Norris breached duties he owed as a liquidator and seeks orders under ss 284 and 286 of the Companies Act 1993. These include orders that Mr Norris refund fees, and that he be removed as liquidator and be prohibited from acting as a liquidator for an indefinite period. Mr Norris denies any breach of his duties and contends that the proceedings have not been brought in accordance with the requirement of ss 284 and 286.

[2] The proceeding is at the interlocutory stage. Before me is Mr Norris' application for review of three judgments of the Associate Judge, namely:

(a) A judgment dated 3 August 2011 directing Mr Norris to provide general discovery ("the discovery judgment");

(b) A judgment dated 10 February 2012 striking out two prayers for relief in seven of the nine causes of action and declining to strike out the other prayers for relief ("the strike out judgment");

(c) A judgment dated 24 February 2012 declining Mr Norris' application to restrain publication of the strike out judgment ("the publication judgment").

[3] Mr Norris contends that general discovery is oppressive, particularly in light of the investigatory powers of the Registrar of Companies. He contends that the claim is defective and should be struck out because the Official Assignee does not have standing under s 284, failed to give proper notice as required by s 286 and seeks relief under s 286 that is not available. He contends that publication of the strike out judgment ought to be restrained because of its prejudicial impact on his business. The Official Assignee contends that Mr Norris cannot establish any error by the Associate Judge.

[4] Mr Norris' review applications in respect of the discovery judgment and the strike out application are out-of-time. Mr Norris therefore applies for leave to bring those review applications out-of-time. Leave is opposed by the Official Assignee.

The background and the pleadings

[5] In June and July 2010 the Registrar of Companies received complaints about Mr Norris. As a result of those complaints the Registrar commenced an investigation into Mr Norris. For this purpose Mr McPherson (an investigating accountant) and Mr Ramsay (a solicitor) were authorised, under s 365 of the Companies Act, to inspect all the companies in liquidation that were being managed by Mr Norris' liquidation company. The information obtained from that investigation was referred to the Official Assignee under s 366 of the Companies Act.

[6] As a result of the information received, on 1 December 2010 the Official Assignee advised Mr Norris (via their respective solicitors) that it intended to commence proceedings against him. The letter was said to be notice, pursuant to s 286(2) of the Companies Act, of Mr Norris' "failures to comply with his duties as liquidator under the Companies Act". The letter said that the notice and intended proceedings related to seven companies, which were listed.[1] The letter referred to an attached draft statement of claim "which contains details of the failures by [Mr Norris] and the remedies sought". It concluded that if "after five working days there is a continuing failure to comply" by Mr Norris, the Official Assignee would finalise, file and serve the statement of claim.

[7] By letter dated 7 December 2010 Mr Norris responded (again via solicitors) that the draft statement of claim lacked particulars. Particulars in respect of a number of the allegations were sought. It was said that Mr Norris would respond to the allegations within five working days of receiving the requested particulars.

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[1] The seven named companies were Murchison Buses Ltd (in liquidation), Tyreworld (NZ) Ltd (previously in liquidation and now struck off), Haven Marine and Engineering Solutions Ltd (in liquidation), Collins Homes Ltd (previously in liquidation and now struck off), Frost Steel Compactors Ltd (in liquidation), Just Tees Ltd (previously in liquidation, now struck off) and Trafalgar Top Ltd (in liquidation).

[8] On 23 December 2010, the Official Assignee provided a further draft statement of claim (dated 22 December 2010) to Mr Norris. It is this draft claim that is now said to be the notice required by s 286(2) of the Companies Act and which is challenged by Mr Norris on this application (see below). As with the earlier draft claim, it related to the liquidation of seven companies. It contained one cause of action which set out the date that each liquidation commenced, and the amounts received from the realisation of assets and the total costs and expenses of each liquidation. There were particular matters also set out in respect of some of the liquidations:

(a) In relation to Murchison Buses Ltd (in liquidation): it was said that Mr Norris did not advise the shareholders of what the liquidation would involve; disposed of the company's assets without proper valuations, at undervalue and to parties associated with Mr Norris; and failed to pay GST to the Inland Revenue.

(b) In relation to Frost Steel Compactors Ltd (in liquidation): it was said that Mr Norris "seized goods that were possibly not owned by Frost Steel and sold those goods as liquidator despite the protestations of the alleged owner of the goods".

(c) In relation to Just Tees Ltd (previously in liquidation, now struck off): it was said that Mr Norris reported that he was independent when a director and shareholder of the company was his daughter's former partner; and that Mr Norris did not charge any fees, did not pay any dividend and did not pay tax in relation to the sale of the business or the liquidation.

(d) In relation to Trafalgar Top Ltd (in liquidation): it was said that Mr Norris failed to keep accurate records, because his July 2009 and 2010 reports recorded the same total figure for distributions but the amounts were differently constituted.

[9] The draft claim alleges that in respect of the liquidations of the seven companies, Mr Norris:

(a) Failed to comply with his principal duty as a liquidator under s 253 of the Companies Act;

(b) Failed to act in good faith and for a proper purpose;

(c) When disposing of the vehicles, failed to obtain the best price reasonably obtainable at the time of the sale;

(d) Failed to ensure the liquidation was completed in a reasonable time;

(e) Failed to keep full and accurate records;

(f) Failed to deposit funds of each company into a bank account to the credit of the company or a trust account at a registered bank (and to produce records as to the funds held for each entity on any given date or other reconciliation of the funds);

(g) Failed to hold sufficient credit funds for the companies;

(h) Combined the funds of the companies and his own business;

(i) Combined the GST affairs of the companies and his own business;

(j) Charged unreasonable and excessive fees, accepted benefits beyond his entitlement, paid the accounts of others that should have been performed by him as part of his ordinary duties, charged additional fees, and became involved and benefited as a purchaser of assets;

(k) Gave up his fees in respect of Just Tees, and failed to act independently; and

(l) Failed to comply with the Financial Reporting Act 1993 and ss 189, 194 and 196 of the Companies Act in respect of his liquidation company.

[10] For these alleged breaches the draft claim sought the following remedies:

(a) A declaration that Mr Norris failed to comply with his duties arising under the Companies Act 1993 in respect of these companies;

(b) An order pursuant to ss 284 and/or 286 of the Companies Act removing Mr Norris as liquidator from these companies;

(c) An order that the Official Assignee be appointed as the liquidator in respect of each company;

(d) An order pursuant to s 284 of the Companies Act requiring Mr Norris to repay such sum charged as fees as the Court considers just in respect of each of these companies;

(e) An enquiry into the sums charged as expenses in relation to each of the companies;

(f) An order that any sums improperly charged as expenses be refunded;

(g) A prohibition order prohibiting Mr Norris from acting as liquidator for an indefinite period or such other period as the Court considers just;

(h) An order setting aside the transfer of one of Murchison Buses Ltd's vehicles; and

(i) Costs.

[11] Mr Norris' response was by letter dated 21 January 2011. The letter said that it could not be discerned in respect of a number of the liquidations how the pleaded facts could constitute a breach of Mr Norris' duties as a liquidator. It was said that,

in those circumstances, "the claim does not constitute a proper Notice of Failure to Comply under section 286(2) of the Act". "Without prejudice to that position" the letter went on to provide detailed comments on the allegations in the draft statement of claim. Most of these comments set out why the allegations were incorrect. It was accepted that in the past the company had banked all the liquidation monies in the one account but it was said that, following discussions with Mr McPherson and Mr Ramsay, individual accounts were now maintained. The letter concluded that there was "no tenable basis for the Official Assignee to seek the orders set out in the Claim".

[12] A statement of claim dated 28 February 2011 was served on Mr Norris on 8 March 2011. This was similar to the 22 December 2010 draft claim but it set out separate causes of action for each of the seven companies and in respect of the affairs of Mr Norris' liquidation company.

[13] An amended statement of claim dated 20 May 2011 was filed and served. This amended statement of claim remains the current pleading. The points to note about this pleading are that:

(a) It alleges that "on or about 22 December 2010 a notice of the defendant's failure to comply with a liquidator's duties pursuant to section 286 of the Companies Act 1993 (as set out in this statement of claim) was served on the defendant."

(b) It has nine causes of action: the first to seventh causes of action are for each of the seven companies referred to in the earlier draft claims and the 28 February 2011 statement of claim; the eighth cause of action relates to another company, Astra Enterprises Ltd (in liquidation); and the ninth cause of action relates to Mr Norris' liquidation company and refers to all the allegations in the first to eighth causes of action. Apart from the addition of the Astra Enterprises Ltd, the allegations in the amended statement of claim are essentially the same as the 22 December 2010 draft claim and the 28 February 2011 statement of claim.

(c) The relief claimed in respect of the first to sixth and the eighth causes of action (relating to the liquidations of seven companies) is the same as set out in the 22 December 2010 draft claim, except that no prohibition order is sought.

(d) The relief claimed in respect of the seventh cause of action (relating to the liquidation of Just Tees Ltd) seeks only a declaration that Mr Norris has failed to comply with his duties, orders removing and replacing him as liquidator, and costs.

(e) The relief claimed in respect of the ninth cause of action (which refers to the conduct of Mr Norris' liquidation company and the alleged breaches of duty in respect of the eight liquidations referred to in the other causes of action) is a prohibition order under s 286(5) of the Companies Act and costs.

Power to review

[14] A decision of an Associate Judge may be reviewed by a High Court Judge. An application is to be filed and served within five working days of the decision of the Associate Judge "[u]nless a Judge or Associate Judge directs otherwise".[2] In this case review of the discovery and strike out judgments was sought outside the five working day limit. Mr Norris therefore needs leave to review those judgments. Although the Official Assignee opposed leave, the merits of the review were also argued. As the merits are relevant to whether leave should be granted I will proceed to consider the merits.

[15] Where the order or decision being reviewed was made following a defended hearing and is supported by documented reasons, as was the case here, the review proceeds as a rehearing.[3] The Judge may, if she thinks it is in the interests of justice,

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2 Rule 2.3(2) of the High Court Rules 2008.

3 The review is essentially appellate in character, with the applicant for review having the burden of persuading the Court that the decision under review is wrong. The approach of a Court on a general appeal is as set out in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. In accordance with that decision, where the decision under review is concerned with whether a statutory/procedural test is met the High Court will form its own view

rehear the whole or part of the evidence or receive further evidence.[4] In this case the review proceeded on the basis of the affidavit evidence before the Associate Judge.

Strike out application

Issues

[16] Mr Norris raises three issues in support of his application for review of the strike out judgment. They are as follows:

(a) Does the Official Assignee have standing to apply under s 284 of the Companies Act;

(b) Has the plaintiff given proper notice under s 286(2) of the Companies Act;

(c) Can the Official Assignee establish, at the date of the application to the Court, any continuing failure to comply under s 286; and

(d) Does a prohibition order under s 286 require that there be a failure to comply with a court order under s 286.

Standing under s 284

[17] One of the provisions relied on by the Official Assignee for the relief it seeks is s 284 of the Companies Act. That section provides for Court supervision of liquidations. So far as is presently relevant it provides as follows:

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on that. See for example, *Cooper v Peach Cornwall & Partners* HC Wanganui CIV-2009-483-325, 3 November 2011; *Top One Real Estate Ltd v Prema Developments Ltd* HC Auckland CIV-2009-404-6008, 16 September 2011; *Burmeister v O'Brien* [2008] 3 NZLR 842 (HC). Where the review challenges the exercise of a discretion the applicant must show that the Associate Judge acted on a wrong principle, failed to take into account a relevant consideration, took into account an irrelevant consideration or was plainly wrong. See for example, *Deliu v Hong* HC Auckland CIV-2010-494-6349, 21 December 2011.

4 Rule 2.3(4) of the High Court Rules 2008.

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:

...

(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:

...

(2) The powers given by subsection (1) of this section are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under this Part of this Act, 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.

....

[18] It can be seen that s 284(1) lists parties (a liquidator or a liquidation committee) who can apply for relief as of right, and lists others (a creditor, shareholder, other "entitled person", or director) who may apply for relief if they have leave. Where leave is sought under s 284(1), the likely merits of the application are considered as part of that decision.[5] In this way there is "a filtering mechanism" which is "designed to ensure that the leave to challenge the acts or decisions of a Liquidator is only given in appropriate cases."[6] I would add that

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5 In *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263,917 (HC) at [21] the High Court considered that the applicant for leave would need to show that its claim had a credible factual basis and a reasonable likelihood that the Court would make the order sought. On appeal, the Court of Appeal at [23], [36] and [39] cited the High Court's comments about this, found that there was a credible basis for challenging the liquidator's decision in that case and that the challenge was "sufficiently arguable to warrant the granting of leave.": *Trinity Foundation (Services No 1) Ltd v Downey* (2006) 3 NZCCLR 401 (CA).

6 *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263,917 (HC) at [21] referred to in *Trinity Foundation (Services No 1) Ltd v Downey* (2006) 3 NZCCLR 401 (CA) at [23].

s 284(1) is also designed to ensure that such challenges are brought only by those with a sufficiently direct interest in the liquidation.

[19] The Official Assignee is not referred to as a person that can make an application under s 284. The possibility that the Official Assignee might qualify as an "entitled person" seems to have been mentioned at the hearing before the Associate Judge, but was not determined because it was common ground that no leave had been sought.

[20] Mr Norris does not accept that the Official Assignee is an "entitled person". In that he seems to be correct. That term is defined in s 2 of the Companies Act as meaning "[a] shareholder" and "[a] person upon whom the constitution confers any of the rights and powers of a shareholder". The Official Assignee might only come within s 284 if he becomes the liquidator on an application to remove Mr Norris under s 286. There was no submission advanced about this on behalf of the Official Assignee because, as had been advanced at the hearing of the Associate Judge, the Official Assignee says that he will replead to seek relief under the Court's inherent jurisdiction.

[21] The Associate Judge accepted that the pleading might be amended. He ordered that the specific references to s 284 in the prayers for relief be struck out. As to the rest of the claim, he said that the causes of action sought extensive remedies other than under s 284 and "the pleading can be amended to seek remedies under the inherent jurisdiction of the Court, if it is the [Official Assignee's] decision to proceed with a request for such relief".

[22] Mr Norris submits that the Associate Judge was wrong to strike out only the references to s 284 in the prayers for relief and not also the allegations on which the relief under s 284 was sought. He submits that there can be no inherent jurisdiction to seek orders equivalent to orders under s 284, when s 284 specifically deals with when such orders can be sought. The Official Assignee responds that all liquidators are officers of the Court and as such, the Court has the ability to supervise its officers. The Official Assignee says that, as part of that supervision, the Court could make orders which are similar to s 284 of the Companies Act.

[23] The Official Assignee supports his submission with reference to a passage in *Heath & Whale on Insolvency.*[7] That passage in turn cites *Cassin v Richardson*[8] as authority for the point that a Court has inherent jurisdiction to give directions to persons appointed as officers of the court, such as a liquidator, because such persons remain subject to the Court's supervision. The commentary in *Heath & Whale on Insolvency* goes on to suggest that this may also be the case in respect of liquidators who are not appointed by the Court (as is the case here).

[24] *Cassin v Richardson* concerned a matrimonial property dispute. The Court ordered that the value of a shareholding, which was the subject of that dispute, was to be determined by an expert. An expert was appointed by the parties pursuant to that order. An issue arose between the parties as to whether they had entered into an agreement which potentially impacted on the expert's valuation. The expert sought directions from the Court. The High Court Judge considered that there was jurisdiction to give directions to the expert because he had only become involved by reason of a court order. The Judge directed that the validity or otherwise of the alleged agreement, if challenged, was to be set down for hearing by the Court.

[25] The parties appealed these directions. One of the issues on the appeal was whether the High Court had jurisdiction to make these directions. The Court of Appeal agreed with the High Court Judge that there was jurisdiction. The Court of Appeal referred to *Re Securitibank Ltd (in liq)*[9] in which the High Court had said that it had "inherent jurisdiction to give directions to its officer, the liquidator".[10] In *Cassin* there was said to be jurisdiction to give directions to the expert "because he has been appointed by the Court and remains subject to the Court's supervision."[11]

[26] In *Re Securitibank Ltd (in liq)* the Court had ordered the winding up of Securitibank and other companies in the group and the liquidator applied for directions on a number of complex matters. The directions were sought under s 241(3) of the Companies Act 1955. That section provided that "[t]he liquidator

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7 Paul Heath and Michael Whale (eds) *Heath and Whale Insolvency Law in New Zealand* (LexisNexis, Wellington, 2011) at 494.
8 *Cassin v Richardson* [2006] NZFLR 1068 (CA) at [38]-[42].
9 *Re Securitibank Ltd (in liq)* [1978] 1 NZLR 97 (SC).
10 At 106.
11 *Cassin v Richardson*, above n 8, at [42].

may apply to the Court ... for directions in relation to any particular matter arising under the winding-up." An issue arose as to whether an appeal would lie from directions made under that section. The Court expected the parties to be concerned about the existence of an appeal because there was a vast amount of money at stake and difficult legal points involved.

[27] The Court in *Re Securitibank Ltd (in liq)* was satisfied that it had inherent jurisdiction to give the directions that could be given under s 241(3). This was because the winding-up was pursuant to a court order and the liquidator was the Court's officer pursuant to that order. The Court considered that it was preferable to invoke its inherent jurisdiction to give the directions, rather than to give the directions under s 241(3), because it considered it more likely that such directions would be appealable.

[28] The present case differs from *Cassin* and *Re Securitibank* in that in those cases it was the officer of the court that was seeking the Court's direction. Here the Official Assignee is not the liquidator (court appointed or otherwise) but is seeking that the Court intervene to control the actions of the liquidator. Although the Court has power to control liquidations, s 284 of the Companies Act provides who may seek the exercise of the Court's power. The Official Assignee is not one of them.

[29] In the present case the Official Assignee seeks to rely on the Court's inherent jurisdiction (or its inherent power to regulate its proceedings)[12] as a way around the limits of s 284. Those limits have been set by the legislature. The Associate Judge did not consider the merits of any such repleading. Counsel for the Official Assignee submits that this should be considered once the pleading has been amended. The Associate Judge was not necessarily wrong to allow the Official Assignee to have the opportunity to replead, because the issue of whether there would be inherent

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[12] In Isaac Jacob "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23, Jacob suggests that the Court's inherent jurisdiction might be grouped broadly into cases concerning the control over the court's processes, control over persons (which include officers of the court) and the control over processes of inferior courts and tribunals. Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Canta LR 220 at 221 argues that inherent jurisdiction and inherent powers are different concepts and the latter is concerned with the powers that every court enjoys in order to function fairly and efficiently.

jurisdiction does not seem to have been fully argued before him. Such argument could still take place in light of the amended pleading.

[30] I therefore consider that the Associate Judge was not wrong to allow the pleading to stand, in so far as it relied on matters covered by s 284, on the basis that it could be repleaded as a claim under the Court's inherent jurisdiction. That said, any such amended pleading may not survive a further strike out application. In my view, if the Official Assignee wishes to seek relief under s 284, he can do so by obtaining an order removing Mr Norris as a liquidator (under s 286), through the liquidator who replaces Mr Norris. I have real doubts about a pleading that seeks to rely on the Court's inherent jurisdiction as a way around the limits prescribed by statute.

[31] If the Official Assignee cannot seek relief under s 284, and no proper alternative basis for that relief is pleaded, those parts of the claim that relate to s 284 matters cannot stand either. The first to sixth, and the eighth causes of action all refer to the fees charged by Mr Norris. They allege that the fees were unreasonable (by reference to the comparison between the fees charged and the gross realisation of assets). It is these allegations that appear intended to support the Official Assignee's claim for an order under s 284 that the liquidator refund "such sum charged as fees as the Court deems just". They cannot stand if there is no proper alternative basis pleaded for that relief.

[32] There are also allegations that Mr Norris charged fees for things which were part of his ordinary duties; and that he charged fees separate to his remuneration which ought to have been included in his remuneration. (These seem to be different ways of pleading the same allegations.) As well as an order under s 284 for a refund of such fees as the Court deems just, the Official Assignee seeks an "enquiry into the sums charged as expenses" and an order that any sums improperly charged as expenses be refunded. It is unclear whether these remedies are sought under s 284.

[33] It has been said that "remuneration" in s 284 does not include a liquidator's "expenses".[13] However, as the claim is that the expenses should have been included

[13] *Flynn v Mccallum* HC Tauranga CIV-2005-470-611, 17 December 2009.

in the liquidator's remuneration, it seems to me that it could be part of a review under s 284(1)(e). It could also be the subjection of directions under s 284(1)(a). It is not relief framed in terms of a Court order under s 286(3) (discussed further below). If the Official Assignee cannot or does not replead the basis on which this relief is sought, these allegations cannot survive either.

[34] I therefore consider that the Associate Judge was not wrong to strike out the parts of the relief claimed that specifically referred to s 284, without also striking out the allegations as to the fees and expenses charged in respect of each company. However those allegations may not survive when the claim is repleaded and the matter is considered again.

Notice under s 286

[35] The remaining issues raised on the review of the strike out application concern s 286. That section is concerned with applications made to enforce the duties of a liquidator. It provides:

> **286 Orders to enforce liquidator's duties**
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> (1) An application for an order under this section may be made by—
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> ...
>
> (h) an Official Assignee.
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> (2) 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.
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> (3) If the Court is satisfied that there is, or has been, a failure to comply, the Court may—
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> (a) relieve the liquidator of the duty to comply wholly or in part; or
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> (b) without prejudice to any other remedy which may be available in relation to a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order.
>
> (4) A Court may, in relation to a person who fails to comply with an order made under subsection (3) of this section, or is or becomes disqualified under section 280 of this Act to become or remain a liquidator,—

(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 of this Act.

(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.

(6) A person to whom a prohibition order applies must not—

(a) act as a liquidator in a current or other liquidation; or

(b) act as a receiver in a current or other receivership.

(7) Evidence that, on 2 or more occasions,—

(a) a Court has made an order to comply under this section in respect of the same person; or

(b) an application for an order to comply under this section has been made in respect of the same person and that in each case the person has complied after the making of the application and before the hearing,—

is, in the absence of special reasons to the contrary, evidence of persistent failures to comply for the purposes of this section.

(8) In making an order under this section a Court may, if it thinks fit,—

(a) make an order extending the time for compliance; or

(b) impose a term or condition; or

(c) make an ancillary order.

(9) A copy of every order made under subsection (5) of this section must, within 10 working days of the order being made, be delivered by the applicant to the Official Assignee for New Zealand who must keep it on a file indexed by reference to the name of the liquidator concerned.

[36] It can be seen that:

(a) the Official Assignee can apply to the Court under s 286;

(b) an application cannot be made unless notice has been given in terms of s 286(2);

(c) the Court can make orders under s 286(3) on such an application if it is satisfied that there has been a "failure to comply". If the liquidator fails to comply with an order under s 286(3), the Court may, under s 286(4), remove the liquidator from office;

(d) there is also a power under s 286(5) to make a prohibition order.

[37] A "failure to comply" is defined in s 285 as follows:

> **285 Meaning of "failure to comply"**
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> (1) In section 286 of this Act unless the context otherwise requires, **failure to comply** means a failure of a liquidator to comply with a relevant duty arising—
>
> (a) under this or any other Act or rule of law or Rules of Court; or
>
> (b) under any order or direction of a Court other than an order to comply made under that section;—
>
> and **comply**, **compliance**, and **failed to comply** have corresponding meanings.
>
> (2) In subsection (1), **relevant duty** includes the duty of a person in his or her capacity as administrator or deed administrator of a company.

[38] The first issue raised in respect of s 286 is whether the Official Assignee gave notice as is required where relief is sought under s 286 of the Companies Act. As to the notice, the terms of s 286(2) require only that:

(a) the notice be "of the failure to comply";

(b) the notice be served no less than 5 working days before the date of the application; and

(c) at the date of the application "there is a continuing failure to comply."

[39] Mr Norris submits that the notice must contain and detail the following:

(a) the name of the defaulting party;

(b) the address of the defaulting party, and the address for service;

(c) the statutory authority and identity of the claimant issuing the notice;

(d) the specific statutory default of the duty imposed by ss 253 to 258A of the Companies Act;

(e) what is required to comply with the terms of the notice;

(f) the period in which the defaulting party must comply;

(g) the consequences of failing to comply with the notice; and

(h) the date, signature, identity and contact details of the authority issuing the notice.

[40] In making that submission Mr Norris drew an analogy with notices given under the Property Law Act 2007. However that Act specifies what the notice must contain: that is, the nature and extent of the default, the action required to remedy the default (if it can be), the period within which the person has to remedy the default, the consequences if it is not remedied and, where applicable, the right the person may have to apply for relief.[14]

[41] It would be open to a would-be applicant under s 286 to include the sort of detail that is required in a Property Law Act notice. Such detail might make it easier for the liquidator to remedy the failure and thereby avoid the need to go to the Court for an order. However s 286 does not specify that this detail be provided. Therefore a notice under s 286 will not necessarily be defective because it does not include all of the things that must be included in a Property Law Act notice.

[42] What is required is a notice that meets the purpose of s 286(2). The purpose of the notice is to enable the liquidator (if they are able and willing to do so) to

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[14] See ss 120, 129, 245 and 246 of the Property Law Act 2007.

remedy the alleged failure and thereby avoid the Court's involvement. That this is the purpose follows from the requirements that:

(a) the notice must be given before an application is made;

(b) the application can only be made if there is a continuing failure to comply; and

(c) on an application the Court is empowered to relieve the liquidator of the duty to comply or order the liquidator to comply.

[43] To achieve its purpose, the notice must fairly inform the liquidator of the duty they are alleged to have breached and how they are alleged to have breached that duty, so that the liquidator is able to determine what he or she needs to do if they are to avoid an application to the Court.

[44] The Official Assignee submits that its letter of 22 December 2010 enclosing a draft statement of claim was "notice" for the purposes of s 286(2). Mr Norris says that this was not notice because it did not set out how he was to remedy any breach. Mr Norris says that the draft statement of claim sought court orders by way of relief and he could not comply with court orders which were non-existent. Mr Norris says that this issue cannot be corrected by the filing of amended statements of claim because a notice must precede the application to the Court.

[45] The Associate Judge held that Mr Norris' point was answered by the pleading. He said that the pleading was that notice had been given. He said that for the purposes of a strike out application this allegation of fact was to be taken as correct. He said that he was therefore proceeding on the basis that notice was given. His focus on what was pleaded was understandable given that the issue came before the Associate Judge by way of a strike out application. However, on a strike out application, the Court "is entitled to receive affidavit evidence ... and will do so in a proper case."[15] The Associate Judge did not go on to consider whether this was a proper case.

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[15] *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

[46] There is no dispute between the parties that the alleged notice was given by way of the 22 December 2010 draft statement of claim. There is no dispute as to the content of that draft statement of claim. The issue between the parties is whether that was "notice" for the purposes of s 286(2). If it was not, the application was not able to be brought. That is an issue that can be determined on an interlocutory application on the basis of uncontested affidavit evidence. The question that then arises is whether a strike application is the appropriate application on which to determine the issue.

[47] The Official Assignee submits that a strike out application is not the proper application to determine whether the notice given was sufficient for the purposes of s 286(2). This is said to be because of the "relatively cursory approach" that is taken on a strike out application. I do not agree with that reasoning. A "relatively cursory approach" might be appropriate where it is plain that the strike out application either cannot or must succeed, but in other cases such applications are entitled to proper examination and that may, at times, require complex and detailed analysis.[16]

[48] However I do agree with the Official Assignee that a strike out application is probably not the appropriate way to challenge the adequacy of the notice. That is because an invalid notice does not easily fit within any of the grounds on which a strike out order is made.[17] In respect of those grounds, it might be said that the pleading does not disclose a reasonably arguable cause of action because it cannot be brought unless and until s 286(2) has been complied with. Alternatively, it might be said that the pleading is an abuse of process as being brought improperly for the reason that the required notice has not been given.

[49] In my view, however, the issue of notice is one that goes to jurisdiction. That is because s 282(2) provides that "no application may be made" unless notice of the failure to comply has first been served on the liquidator. If the Official Assignee had not even purported to give notice of the failure to comply then the application cannot

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16 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) per Elias CJ and Anderson J that the jurisdiction is not excluded by the need to decide difficult questions of law, involving extensive argument.

17 Rule 15.1 of the High Court Rules permits a court to strike out a pleading if it discloses no reasonably arguable cause of action (defence or case), is likely to cause prejudice or delay, is frivolous or vexatious or is otherwise an abuse of process of the court.

be made. If the application cannot be made, then the Court lacks jurisdiction to consider the application.[18] That must also be the case where a notice has purportedly been given, but the notice does not meet what is required by the statute.

[50] In *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue*[19] the Court of Appeal gave some comparable examples where the courts have held that it lacked jurisdiction. These examples were appeals lodged without obtaining the required leave from the court below, filing an appeal from a decision of a statutory tribunal out of time and where the statute did not permit an extension of time, and making an application under ss 320 and 321 of the Companies Act 1955 when the statutory requirement was for a statement of claim.[20] The Court of Appeal in *Redcliffe* considered that in these kinds of cases, an objection to jurisdiction could be made under r 5.49 of the High Court Rules.

[51] Rule 5.49 of the High Court Rules permits a party to file a notice of appearance, instead of a statement of defence, where there is an issue of jurisdiction. An application can then be made to have the issue of jurisdiction determined by the Court at an early stage. Compliance with this rule enables a party to raise an issue as to jurisdiction without submitting to the Court's jurisdiction. In this case Mr Norris did not utilise the r 5.49 procedure. However, the procedure is not mandatory. An issue that goes to jurisdiction can be brought to the Court's attention in other ways.

[52] Here, although Mr Norris filed a statement of defence, it cannot be said that he waived the legislative requirement under s 286(2) for notice (assuming for present purposes that this requirement can be waived[21]). Mr Norris raised the issue in his responses to the two draft statements of claim (refer [7] and [11] above). Mr Norris also raised the issue in his statement of defence – he pleaded that he "has not been supplied with the list of breaches under Section 286 of the Companies Act 1993".

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18 Possibly subject to any question of waiver/submission to jurisdiction (an issue discussed in *Attorney-General v Howard* (2009) 19 PRNZ 324 (HC) and *Child Poverty Action Group Inc v Attorney-General* (2009) 19 PRNZ 689 (HC) in the context of appeals from the Human Rights Review Tribunal brought out of time).

19 *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] NZCA 638, (2011) 25 NZTC 20-100.

20 At [46].

21 Refer above n 18.

His statement of defence to the amended statement of claim[22] included a similar pleading.

[53] Does it matter that Mr Norris brought the issue of jurisdiction by way of a strike out application rather than as an application under r 5.49? In my view it does not, provided the Official Assignee was aware that the issue of notice was being raised and had the opportunity to respond to it. In this case, the Official Assignee was aware of the issue and has responded. His response is that the notice given by way of the draft statement of claim was proper notice. He says that if the statement of claim as filed was properly particularised, then it follows that the draft statement of claim, which he says was essentially the same as the statement of claim as filed, must have been proper notice.

[54] The Associate Judge dealt with the adequacy of the particulars in the statement of claim in his judgment dated 3 August 2011. He rejected the application for further and better particulars because he considered that the amended statement of claim adequately informed Mr Norris of the duties he is alleged to have breached and the ways he is alleged to have breached them. The Associate Judge noted that the pleadings did not need to disclose the evidence relied on by the Official Assignee, nor the propositions of law relied upon.

[55] Mr Norris does not challenge the Associate Judge's decision on the application for further and better particulars. However the requirements of a statement of claim are not necessarily the same as the requirements of a notice under s 286. A statement of claim must give fair notice to the defendant of the case against him. A notice under s 286 must give notice of what is alleged to be "the failure to comply" so that the liquidator has the opportunity to remedy the failure before the application is made to the Court.

[56] I can understand the Official Assignee's view that there could be no better notice of an alleged failure to comply than a draft statement of claim which sets out what will be alleged if an application to the Court is made under s 286. However that approach, while understandable, has caused confusion. Mr Norris looks at the

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[22] Mr Norris has described this as his First Amended Statement of Defence dated 13 June 2011.

relief claimed in the draft and equates that to the steps he needed to take in respect of his alleged failures if he was to avoid an application being made to the court. He then asks, how can he remedy an alleged failure to comply by, for example, making a declaration (the first item in the prayer for relief) when it is only a Court that can make such a declaration?

[57] There are other problems with the draft claim as notice. One such problem is that the draft claim included allegations about the remuneration and other fees charged by Mr Norris. As discussed above, those allegations set out the amounts actually charged and seek a review of those amounts and repayment of any amount the Court considers just. They do not state the amounts which would have been reasonable. These allegations were apparently made under s 284 (when, as discussed above, the Official Assignee does not have standing to bring an application under s 284), but they were included in what was said to be a notice under s 286. Mr Norris was left in the position of not knowing whether he was expected to refund any amounts if he was to avoid an application under s 286 and, if so, how much he needed to refund.

[58] A further problem is that in some respects it is unclear what the alleged failure to comply is. The allegations relating to Just Tees Ltd are an example of this. The Official Assignee contends that Mr Norris was not independent, but it is unclear how that is said to be a breach of any duty, especially as Mr Norris is said not to have charged any fees in this liquidation.

[59] There are also allegations in the amended statement of claim in relation to a company (Astra Enterprises Ltd) that were not made at all in the draft statement of claim. Even if the Official Assignee gave proper notice under s 286(2) of alleged failures to comply, that does not mean that the application to the Court can then extend to cover any matter. The application must relate back to the notice. That follows from the purpose of the notice requirement – ie. to provide an opportunity for the liquidator to remedy the failure and thereby avoid the need for court involvement in respect of that failure.

[60] The same point applies to the allegations in the statement of claim in relation to some of the companies that "the investigation into the conduct of [the named company] is ongoing." If this is intended to foreshadow that amendments may be made to the claim to identify further alleged breaches by Mr Norris, any such breaches will not have been the subject of a notice and there would not have been an opportunity to remedy the alleged failure.

[61] For these reasons, I consider that the notice given by way of the draft statement of claim was not "notice" as required by s 286(2). It follows that no application was able to be made to the Court for orders under s 286. That applies to any orders, whether sought under s 286(3) [order to comply], 286(4)[removal] or 286(5)[prohibition].

Continuing failure to comply under s 286(2): Companies now struck off

[62] The next issue raised by Mr Norris under s 286 relates to whether there is a "continuing failure to comply". An application under s 286 can be made to the Court if notice has been given of the failure to comply and, as at the date of the application, there is "a continuing failure to comply". Mr Norris submits that there can be no continuing failure to comply in respect of any company that has been struck off from the register. He submits that this is because, by this point, the liquidator no longer holds office[23] and a duty can no longer exist. This applies to Tyreworld (NZ) Ltd (the second cause of action), Collin Homes Ltd (the fourth cause of action) and Just Tees Ltd (the seventh cause of action).

[63] The Associate Judge dismissed this submission simply on the basis that whether there has been a continuing failure to comply in respect of the alleged breaches "are matters of fact adequately covered by the pleadings". This does not address Mr Norris' submission that there could be no continuing failure to comply in respect of companies that were struck off.

[64] Nevertheless I agree with the Associate Judge that the claims should not be struck out on the basis that there cannot be continuing failure to comply in respect of

[23] Section 279(1) of the Companies Act 1993.

these three companies. That is because Mr Norris had duties in respect of these companies when he was liquidator. Even though the companies no longer exist, the duty existed and may require remedying. If, for example, Mr Norris failed to discharge the duty to sell the assets of a company in a reasonable and efficient manner (for example, if he had kept some of the assets for himself), and he has not remedied that after being given notice of the breach under s 286(2) (for example, by selling them and distributing the proceeds), then there would be a "continuing failure to comply" with that duty as at the date of the application.

[65] That the duty still exists after a liquidation is completed is confirmed by s 279 of the Companies Act. Section 279(1) provides that a liquidator ceases to hold office in accordance with s 249 of the Act (preparing the final report and accounts, or obtaining an order exempting or modifying this, and sending the report or order to the Registrar). Section 279(2) provides that s 279(1) "does not limit section 284 or section 286 of this Act." The effect of s 279(2) is that, although the liquidation has ended and the liquidator no longer holds office, orders can still be sought under ss 284 and 286 in respect of the liquidator's actions in that liquidation.

[66] This is further confirmed by s 284(2), which provides that the Court's powers under s 284(1) may be exercised in relation to a matter occurring "either before or after ... the removal of the company from the New Zealand register". If it is necessary to apply to have the company restored, in order to give effect to the relief granted by the Court under ss 284 or 286, that can be done. The Official Assignee says that it intends to do just that. Whether it should be restored for that purpose can be considered at the time the application for restoration is made.

[67] Therefore, subject to the issue of standing (for s 284 matters) and notice (for s 286 matters), the claim can be brought in respect of the three companies that have been struck off the Register.

Prohibition order under s 286(5)

[68] The next issue Mr Norris raises concerns the prohibition order which the Official Assignee seeks under s 286(5). Mr Norris submits that there is no

jurisdiction to seek a prohibition order. His submission is on the basis of an understanding in the industry that there is a "two strikes" rule. That is, that a prohibition order can only be made if there has been two previous compliance orders made by the Court under s 286(3). The Associate Judge held that s 286(5) gives the power to make a prohibition order even if no prior breach by Mr Norris has been established or any prior order under s 286(3). I agree with the Associate Judge on this topic.

[69] As discussed above, an application to the Court can only be made under s 286 if notice has been given of a "failure to comply" and there is a "continuing failure to comply" at the date of the application. Where an application is made, and the Court is satisfied that there has been a "failure to comply", it may order the liquidator to comply (s 286(3)). If the liquidator fails to comply with the Court's order to comply, then the Court may remove the liquidator from office (s 286(4)). The exercise of that power therefore depends on there first being a Court order made under s 286(3).

[70] That is not the case with an order under s 286(5). Under that section the Court's power is to be exercised 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. It is therefore the "seriousness" or the "persisten[ce]" of the failure to comply that provides the grounds for a prohibition order. A "failure to comply" is a defined term (s 285). What constitutes evidence of "persistent failures to comply" is set out (s 286(7)).

[71] This means that if an applicant is relying on the seriousness of a failure to comply, he or she need only establish that there has been a failure to comply as defined by s 285 (which includes the failure to comply with a relevant duty arising under the Companies Act or other Act/rule of law/rule of Court) and that this failure is so serious that the person is unfit to act as a liquidator. The applicant does not need to show that the liquidator has previously been the subject of an application to the Court.

[72] The position is different where the applicant contends that it is the persistency of the failures to comply that make the person unfit to act as a liquidator. In that

case, the applicant can rely on evidence that on two or more occasions a Court has made an order to comply (under s 286(3)) in respect of the same person. Alternatively, the applicant can rely on evidence that on two or more occasions an application for an order to comply has been made in respect of the same person, and that in each case the person complied with the relevant duty after the application was made and before the hearing of the application. It is this alternative ground for a prohibition order that accords with any industry understanding that there is a "two strikes" rule.

[73] However, a persistent failure to comply may potentially be proven in other ways. Section 286(7) does not purport to provide an exhaustive definition. Rather it sets out two particular ways persistence may be proven. Those two ways will provide guidance as to what will be evidence of persistent failures to comply in other cases.

[74] The ground on which the Official Assignee seeks a prohibition order in this case is not identified in the amended statement of claim. Instead it summarises the alleged failures of the liquidator as pleaded in the other causes of actions, and says that as a result of these failures "the plaintiff considers that the defendant is unfit to act as a liquidator and should be prohibited from acting as a liquidator ...". It is therefore unclear whether the Official Assignee is relying on the seriousness of the alleged failures or their persistency. If it is the former it needs to be pleaded. If it is the latter then the pleading needs to identify the basis on which it is said that there is a persistent failure to comply.

[75] In my view, therefore, the Associate Judge was wrong to allow the Official Assignee to seek relief under s 286(5) without requiring him to plead whether it was the seriousness or the persistency of the alleged failures that is relied upon and requiring particulars of the alleged seriousness or persistency.

Further issue: order for removal

[76] The Official Assignee seeks an order "under sections 284 and/or 286" removing Mr Norris as liquidator in respect of the first to sixth and eighth causes of

action. The equivalent claim in respect of the seventh cause of action is simply for an "order removing the defendant from the office of liquidator of Just Tees Limited (previously in liquidation, now struck off)."

[77] In so far as the order is sought under s 284, removal is not one of the orders specifically available to the Court under that section. It might come within "[g]ive directions in relation to any matter arising in connection with the liquidation" but (as discussed above) the Official Assignee does not at this stage have standing to seek relief under that section. The question then is whether it is relief available under s 286.

[78] A court is specifically empowered to make an order removing a liquidator under s 286(4). But to come within that subsection the person must have "fail[ed] to comply with an order under subsection (3) of this section" or become disqualified under s 280. It is not suggested that s 280 (dealing with the qualifications of liquidators) applies here. Therefore there can only be an order for his removal if the Court has made an order under s 286(3). However, no order is sought by the Official Assignee under s 286(3) and no such order has been made. This was accepted by the Associate Judge, who made orders in respect of the first to sixth and eighth causes of action striking out the prayer for relief for an order removing the liquidator. There is no challenge to this aspect of the Associate Judge's decision.

[79] However, in respect of Just Tees Limited, the Associate Judge said:

> The prayer for relief in the seventh cause of action is phrased differently from the prayers relating to the first to sixth and eighth causes of action in that the request for an order removing the defendant from the office of liquidator of the relevant company does not make any reference to s 286(4), as the similar prayers in the other causes of action do. I have little doubt that the [Official Assignee] nonetheless seeks to rely on s 286(4) for this order, as no other foundation for the order is given. Because subs (4) is not specifically referred to, it is not appropriate to strike out this prayer, but it should be reviewed by the [Official Assignee] when the case is repleaded as a consequence of this judgment.

[80] I agree with Mr Norris that it was inconsistent to strike out the equivalent prayers for relief in the first to sixth and eighth causes of action, but to leave this prayer in the eighth cause of action to stand.

Summary of review of strike out application

[81] In my view the amended statement of claim is defective because:

(a) In so far as it relies on s 284, the Official Assignee does not yet have standing to make an application under that section;

(b) In so far as it relies on s 286, no proper notice was given of all the alleged failures to comply that are covered by the amended statement of claim;

(c) In so far as it seeks a prohibition order, the grounds for that are not properly particularised with reference to either the seriousness or the persistency of the alleged failures to comply;

(d) In so far as the Official Assignee seeks orders removing Mr Norris as a liquidator under s 286(4), there must first be non-compliance with a Court order under s 286(3).

[82] The Associate Judge directed that the Official Assignee file an amended pleading by 9 March 2012, the defence to the amended statement of claim was to be filed by 30 March 2012 and a telephone conference for further procedural directions would take place on 23 April 2012. Those directions were overtaken by Mr Norris' application for review.

[83] In my view the deficiencies in the pleading need to be rectified before any further procedural steps are taken in the proceeding. The Official Assignee needs first to file a valid notice under s 286(2). If the failures to comply are not remedied then the Official Assignee may proceed with the claim but the claim will need to be amended in accordance with this judgment. In the meantime the proceeding is stayed. The stay can be reviewed once any amended pleading is filed. The proceeding should be listed for a case management conference in about six weeks' time for this purpose.

Discovery

[84] Mr Norris objects to discovery because of the sheer quantity of documents in respect of each company, the cost of providing that discovery and because the documents have always been available for inspection by the Official Assignee.

[85] The issue of discovery arose prior to the recent changes to the discovery rules. Under the rules that applied at the time, if discovery was appropriate for a proceeding on the standard track (as this proceeding was), a Judge was to make a discovery order at the first case management conference unless there was good reason for making the order later.[24] The "default" terms of the discovery order required each party to list the documents that were or had been in that party's control and which related to a matter in question in the proceeding.[25] A party could, however, seek an order varying the default terms of the order.[26]

[86] In this case Mr Norris objected to a discovery order in terms of the default order, pointing out that the proceeding was preceded by the exercise of the Registrar of Companies' power under s 365 of the Companies Act. At the first call of the case management conference the High Court Judge said that he was satisfied that there was "good reason for deferring consideration of discovery to a contested interlocutory application."[27]

[87] Following this, the Official Assignee made his application for discovery. The application was supported by an affidavit from Mr Ramsay. Mr Ramsay set out the meetings that he and Mr McPherson had with Mr Norris during their investigation of the complaints. Mr Ramsay explained that at or after these meetings requests were made for documents and these were supplied. Mr Ramsay said that the total number of documents received as part of the investigation would have been no more than one Eastlight file. He said that:

> Apart from documents relating to Murchison Buses, Astra Enterprises and Norris Management Services Limited and some documents relating to the

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24 Rule 8.17 of the High Court Rules.
25 Rule 8.18 of the High Court Rules.
26 Rule 8.17(4) of the High Court Rules.
27 Minute of MacKenzie J dated 26 May 2011.

> tax affairs of the other companies subject to these proceedings, Mr Norris has not provided copies of any documents in relation to the other liquidations which are the subject of these proceedings.

[88] Mr Norris filed a notice setting out a number of grounds on which the application was opposed. The grounds included that further particulars of the claim were necessary and that the claim was defective because it did not provide notice of the alleged failure to comply or the continuing failure to comply under s 286 (discussed above). The grounds for opposition also included that the Official Assignee, through the Registrar of Companies, had already had access to the files and the discovery would be "oppressive, overly time consuming and extremely expensive for [Mr Norris] to undertake given the huge volume and scope of the documentation as requested".

[89] Mr Norris also filed an affidavit in response to the affidavit from Mr Ramsay. Amongst other things, Mr Norris said that he was concerned that Mr Ramsay had understated the amount of information and other documentation that had already been supplied to the Registrar of Companies during its eight month investigation. Mr Norris set out a list of what had been supplied and noted that no further requests or demands had been made of him under s 365 of the Companies Act.

[90] The opposed discovery application was heard by the Associate Judge. He dismissed the opposition on the basis that this was a civil proceeding subject to the High Court Rules under which each party may require another party to give discovery. He did not refer to the rule which permits the default terms of the order to be varied.[28] A reason for varying the terms of a discovery order under that rule is where the default terms would be oppressive.[29] The Associate Judge did not say why he considered that the default terms of the order should not be varied in light of the access the Official Assignee had to the documents pursuant to their investigation powers and the size of the discovery task.

[91] The Associate Judge noted that Mr Norris had said that the discovery exercise would be "vast", and in the case of one of the liquidations would involve three pallet

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[28] Rule 8.16 of the High Court Rules.

[29] As referred to, for example, in *Vanda Investments Ltd v Logan* HC Dunedin CIV-2009-412-219, 27 November 2009.

loads of boxes of documents. The Associate Judge said that Mr Norris needed to refer to the pleadings to assess whether the documents were or were not relevant. He then made additional orders, which it appears were intended to relieve some of the possible oppressiveness of a large discovery, and which were as follows:

(a) Documents will be presented in sequentially lettered Eastlight binders, with every page numbered.

(b) No binder is to contain documents from the defendant's files in relation to more than one liquidation.

(c) At the front of each file there will be a page describing the contents of the file with sufficient particularity so that the categories of documents within the file are readily identified.

(d) Where documents containing pages, such as receipt books, deposit books and so forth are being discovered, the same procedure will be followed only using file boxes of similar size to Eastlight binders with, again, an index page on the front, and sequential lettering. The documents, or clusters of documents within the boxes, will be sequentially numbered.

(e) The lists of documents within the sworn affidavit will refer to the lettered Eastlight binders and boxes and, in the case of each, will reproduce the particulars contained in the summary for that file/box as just described.

[92] In seeking to review the Associate Judge's decision Mr Norris makes a number of points. The most pertinent of these are that:

(a) the Associate Judge did not fully consider the oppressive nature of the discovery nor appreciate the magnitude of the task (Mr Norris says that he believes it would take him and his two assistants three months to complete discovery on the basis sought);

(b) the Registrar of Companies had earlier issued a s 365 notice and Mr Norris had complied with the requests made on behalf of the Registrar of Companies; and

(c) Mr Norris would not be eligible to claim for his reasonable costs in complying with the discovery order.

[93] This issue has been overtaken by the outcome on the review of the strike out application. However, if any application is pursued after notice has been given under s 286(2), the issue of discovery may arise again. In my view the discovery order should be set aside for the three reasons set out in the above paragraph [92].

[94] Importantly, the Registrar of Companies had the opportunity to obtain records under the Companies Act. The Official Assignee's application is not apparently confined to issues arising out of those records because in respect of a number of the companies the pleading is that the investigation is "ongoing". It rather seems as though the Official Assignee is seeking to complete the investigation begun by the Registrar of Companies through the discovery process. That does not seem to be what is envisaged by the ss 284 and 286 jurisdiction.

[95] Additionally, even with the listing of files (rather than each document) as directed by the Associate Judge, the discovery task is onerous because of the wide-ranging nature of the allegations. For example, all the causes of action contend that the remuneration was not reasonable, by way of a comparison of the remuneration and other fees charged with the amounts realised. Under the discovery rules that applied at the time, it is difficult to see how Mr Norris could avoid having to list every file he had in his possession or power in relation to each company. As Mr Norris says, he would be required to carry out the listing process at his cost. I agree with him that this is oppressive.

[96] I therefore set aside the discovery order. The scope of discovery can be reconsidered once the pleading has been settled. It is a case where "tailored" discovery, in terms of the new discovery rules, would be appropriate.

Publication judgment

[97] On 20 February 2012, Mr Norris applied for an order restraining publication of the strike out judgment. On 24 February 2012 the Associate Judge declined this application. Following Mr Norris' application for review, on 29 February 2012 the High Court made an interim order restraining publication. On 2 March 2012 the High Court extended this interim order to the publication judgment. Notwithstanding this order, it seems that the publication judgment has in fact been published, as it is available via online providers.

[98] Mr Norris sought an order restraining publication of the strike out judgment because he was concerned about the effect on his reputation if it was published that the Official Assignee was seeking a prohibition order. The Associate Judge noted that this concern arose from Mr Norris' erroneous understanding that a prohibition order could only be sought if two Court orders had already been made against Mr Norris. He also noted that little would be gained from a non-publication order when there was no court order preventing access to the Court file in accordance with the High Court Rules.

[99] The Associate Judge referred to the following statement from *Hart v Standards Committee (No 1) of the New Zealand Law Society*:[30]

> A Tribunal or Judge deciding whether to order suppression is exercising a discretion which, in a disciplinary context, must allow for any relevant statutory provisions as well as the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression. The likely particular impact of publicity on that party will always be relevant, but it is untenable to suggest that professional people of high public profile, such as the applicant, have anything approaching a presumptive entitlement to suppression.

[100] The Associate Judge concluded that open justice and that the information that could be obtained under the High Court Rules outweighed the potential adverse impact of publication of the strike out application.

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[30] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4 at [3].

[101] Mr Norris' application for review of the publication judgment is still based on his erroneous interpretation of when a prohibition order can be sought. He understands that the application for a prohibition carries with it an implication that there has been two or more court orders against him, or two or more applications made in respect of his actions previously. He considers that publication that such an order is being sought against him is extremely prejudicial to him.

[102] As already discussed, however, a prohibition order can be sought for a single "failure to comply" if it is so serious a failure that the person is unfit to act as a liquidator. It can also be sought if there is a proper basis for claiming that there has been a persistent failure to comply. In my view the Associate Judge's decision refusing to restrain publication of the strike out judgment was not wrong. He correctly identified the relevant factors, including that there could be an impact on Mr Norris' business from adverse publicity. He concluded that open justice outweighed this potential impact. Mr Norris has not advanced any basis to show that a different balance of the competing interests was required.

[103] I therefore dismiss Mr Norris' application for review of the publication judgment. The limited order put in place pending the determination of this review application is now also at an end.

Costs

[104] In the strike out judgment the Associate Judge said that costs were to lie where they fall. This was because, although Mr Norris had succeeded in part, he was a lay litigant and there were no "exceptional circumstances". Mr Norris says that this conclusion failed to take into account relevant considerations and was wrong.

[105] Mr Norris says that the Associate Judge failed to take into account that this proceeding arises because of his actions as an officer of the Court and not because he is lay litigant. However, it is the fact that he is representing himself and that he is not a lawyer that counts against him in his claim for costs. That is because the High Court Rules set up a regime under which the usual rule is that a successful party receives a contribution towards their legal costs. There is no specific provision for

contribution to be made towards the costs of a successful lay litigant. This means that any award of costs to Mr Norris is in the discretion of the Court. Relevant to the exercise of that discretion, is the established rule of practice that a lay litigant is not entitled to costs except in exceptional circumstances. That Mr Norris was acting as a liquidator is not an exceptional circumstance.

[106] Mr Norris says that the Associate Judge failed to take into account the effect of these proceedings on Mr Norris' personal financial position. He says that he has already incurred over $60,000 in legal fees. He is now representing himself because of the cost, but is also employing two staff (his employees) to assist with the work required in defending the proceedings. While lay litigants cannot usually receive a contribution towards legal costs (because none are incurred), the Court can order that their reasonable disbursements be paid by the unsuccessful party.[31] Payments made to his employees might qualify as a disbursement. This possibility has not been addressed in the submissions for either party.

[107] Mr Norris had some success before the Associate Judge. He has had greater success on this review. It may be appropriate to make an order that covers his reasonable out-of-pocket expenses in respect of his strike out application and his opposition to the discovery. My preliminary inclination is that Mr Norris could receive a contribution in an amount equivalent to 2B costs on these two applications as a way of measuring his reasonable out-of-pocket expenses. That is a preliminary view only and I leave the parties to attempt to agree on a payment along these lines. If the parties are unable to agree on an amount along these lines, then the issue of whether such a costs order should be made can be the subject of brief memoranda (no more than three pages) submitted to me for determination. Any such memoranda will need to be filed within one month of the date of this judgment.

Result

[108] The result is as follows:

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[31] *McGechan on Procedure* (online looseleaf ed, Brookers) at [HRPt14.10(2)].

(a) Mr Norris is granted leave to apply to review the discovery judgment and the strike out judgment.

(b) The strike out judgment is set aside. The pleading suffers from a number of defects which are summarised at [81] above. The proceeding is stayed pending the Official Assignee giving notice under s 286(2) and the filing of any amended pleading subsequent to that notice. There is to be a case management conference before the Associate Judge on a date in approximately six weeks' time.

(c) The discovery judgment is also set aside. The scope of discovery is to be reassessed if and when an amended pleading is filed.

(d) The application for review of the publication judgment is dismissed.

(e) Costs may be the subject of agreement as outlined in [107] above. Failing such agreement they may be referred to me for determination in the manner and time set out in [107] above.

Mallon J

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