IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-002834
[2014] NZHC 494

UNDER	the Companies Act 1993
IN THE MATTER	of GIBBSTON WATER HOLDINGS LIMITED (In Liquidation)
BETWEEN	ROBERT BRUCE WALKER as liquidator of GIBBSTON WATER HOLDINGS LIMITED Applicant
AND	GIBBSTON WATER SERVICES LIMITED First Respondent
AND	CASTLEREAGH PROPERTIES LIMITED Second Respondent
AND	KRISTINA LOUISE BUXTON Third Respondent
AND	CANTERBURY LEGAL SERVICES LIMITED Fourth Respondent

Hearing: 13 March 2014 (By way of telephone conference)

Appearances: K Sullivan for Applicant
J Moss for Respondents

Judgment: 18 March 2014

JUDGMENT OF DUNNINGHAM J

Introduction

[1] This is an application for review of the judgment of Associate Judge Osborne dated 28 February 2014 declining an application by the respondents for discovery in this proceeding.[1]

[2] The applicants for review, being the four respondents in the substantive proceeding (and whom I will refer to, for convenience, as the applicants), applied for orders for discovery on 20 December 2013. The orders for discovery still being pursued in this hearing relate to communications and documents between Mr Robert Bruce Walker, who is the liquidator of Gibbston Water Holdings Limited ("the liquidator"), and various other named parties. The applicants do not pursue their application for discovery of documents from Mr Denis Marshall.

Background

[3] It is unnecessary to traverse the full history of this matter for the purposes of this judgment. It is sufficient to say that Mr Walker was appointed as liquidator of Gibbston Water Holdings Limited (GWHL) on 10 October 2011, on the resolution of the receivers of the sole shareholder in GWHL, RFD Investments Limited (in receivership and liquidation).

[4] GWHL, in turn, is the sole shareholder in Gibbston Water Services Limited (GWSL) a company which owns rights to abstract water in the Gibbston Valley area for supply to a number of properties in the valley.

[5] On 24 August 2011, the sole director of GWHL, the third respondent Ms Buxton, purported to transfer GWHL's entire shareholding in GWSL to the second respondent, Castlereagh Properties Limited, for consideration of $1.00.

[6] The liquidator considered the purported transfer of shares was an "interested transaction" pursuant to s 139 of the Companies Act and that he was entitled to give notice of avoidance under s 141. He did so on 19 October 2011. On

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1 *Walker v Gibbston Water Services Ltd* [2014] NZHC 330.

23 December 2011 the liquidator appointed Denis William Anson Marshall as sole director of GWSL.

[7] Both those steps, and others, were contested by the applicants, so the liquidator has applied, under s 284 of the Companies Act 1993, for orders or directions confirming those decisions.

The Associate Judge's decision

[8] On 28 February 2014, Associate Judge Osborne issued his decision on the application for discovery. He began by setting out the background to the application.

[9] The application sought discovery in the context of an originating application by the liquidator under s 284 of the Companies Act 1993 for orders which included:

(a) confirming the decision of the liquidator to void the sale and purchase agreement between Gibbston Water Holdings Limited (in liquidation) (GWHL) and Castlereagh Properties Limited (CPL) dated 24 August 2011 (the sale of shares); and

(b) confirming that Denis William Anson Marshall was validly appointed as sole director of GWSL by the liquidator on 23 December 2011.

[10] Two other orders sought in the same application have already been disposed of. The application also sought alternate remedies if the decision of the Court was not to void the sale of shares, but these are not relevant for the present purposes.

[11] The two categories of documents sought in the discovery application, and which are still pursued, are as follows:

(a) all communications and documents (electronic or in writing) between Mr Robert Bruce Walker (and his staff or agents) and any persons having an interest or purported interest in the Gibbston Valley and/or in relation to the potable water scheme or shareholding or directorship

of Gibbston Water Holdings Limited or Gibbston Water Services Limited, including:

(i) Denis Marshall;

(ii) Grahame Thorne, Richard Guthrey/Remarkable Wines Limited, Tim Edney, Fraser Skinner;

(iii) Any receiver, mortgagee or representative of a mortgage including Simon Thorn formerly of Grant Thornton, and Graeme Reid of Canterbury Mortgage Trust; and

(iv) Any local territorial or government authority.

(b) All communications and documents (electronic or in writing) between Mr Robert Bruce Walker (and his staff or agents) and any person or organisation regarding any issue in this litigation outside of communications between the parties and/or their legal advisers, including communications with the media or Press and Garry Holden.

[12] The discovery application was filed shortly after the liquidator filed an amended notice of originating application. The liquidator filed a notice of opposition and evidence to the discovery application. The applicants then filed a notice of opposition to the liquidator's amended application under s 284. The applicant's notice of opposition sought that:

(a) the claims of the liquidator be dismissed;

(b) Mr Walker be removed as liquidator of GWHL and replaced with an independent liquidator;

(c) the liquidator of GWHL be required to call a meeting of creditors with the fourth respondent recognised as a creditor; and

(d) the Court confirm that the Companies Office records, in respect of the director and shareholder of GWSL, are correct.

[13] Aside from the first order, the Associate Judge identified that the orders sought were effectively cross applications and, at [22], he held "I am not required in this judgment to consider the applicants' informal request for such orders".

[14] The reason given for this conclusion was that the orders sought were by way of supervision of a liquidation under s 284 of the Companies Act 1993 and s 284(1) requires the applicants "to obtain the leave of the Court and to satisfy the Court in that context that they came within one of the identified categories of person with standing". The Associate Judge also recorded that "Mr Moss conceded that it would be inappropriate for him to expect the liquidator to meet an informal application for leave at the hearing of the discovery application and that it would be equally inappropriate to ask the Court to proceed on such an informal approach".[2] The applicants' counsel, Mr Moss, disputes that such a concession was made.

[15] Having disregarded the informal application for further orders, the Judge held that "the discovery application falls to be considered solely by reference to the liquidator's application for directions and not with any regard to a possible application under s 284 Companies Act being contemplated by the applicants".[3]

[16] The Associate Judge then concluded that:[4]

> [53] Once the concept of removal of the liquidator is removed from consideration in this proceeding, I am not satisfied that there was any demonstrated need for discovery of any of the categories of the liquidator's documents which are sought by the applicants.
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> [54] The constitutional issues involved in the two issues as to the shareholding of Water Services and as to the process of appointing a director of Water Services will not turn on whether Mr Walker was otherwise acting independently or not. If the Court finds that the appropriate constitutional position had been reached then validity will be established. In short, these are technical issues not turning on the applicants', or indeed the Courts', assessment of Mr Walker's independence.

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2 At [24].
3 At [26].
4 At [53], [54] and [59].

[17] The Associate Judge concludes that the applicants have not demonstrated the relevance of the documents requested to the issues actually before the Court. Furthermore, even if the applicants had established a marginal relevance to some of the documents requested, the requirement of proportionality of discovery under r 8.2 of the High Court Rules would not be met if an order was granted for the wide-ranging discovery sought by the applicants.

[18] However, the Associate Judge also observed "if and when the applicants bring an application for removal of the liquidator based on bad faith or otherwise, … a more broad ranging discovery may be appropriate".[5]

Power to review

[19] The application for review is made under s 26P of the Judicature Act 1908 and High Court Rule 2.3. Under High Court Rule 2.3, the application is to proceed as a full rehearing and I may give the order or the decision of the Associate Judge the weight I think appropriate.

[20] While I may, if I think it in the interests of justice, rehear the whole or any part of the evidence or receive further evidence, the review proceeded on the basis of the affidavit evidence which was before the Associate Judge. Furthermore, given the urgency of conducting the review prior to the substantive hearing scheduled for 26 March 2014, I conducted the hearing by way of telephone conference.

Application for review

[21] The application for review was sought on seven grounds, some of which listed sub reasons. I summarise the grounds as follows:

(a) the Associate Judge erred in finding that the applicants' notice of opposition fell to be considered at the hearing of the originating application and, by implication, was not relevant in the context of the discovery application,

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5 At [30].

(b) the Associate Judge erred in finding that counsel for the applicants conceded that it would be inappropriate to expect the liquidator to meet an informal application for leave at the hearing of the discovery application, or to ask the Court to proceed on such an informal approach,

(c) the Associate Judge erred in finding that leave was required for an application to remove a liquidator, or to otherwise provide the liquidator with directions, because a liquidator is subject to the inherent jurisdiction of the Court and the orders sought by the applicants could have been considered on that basis,

(d) the Associate Judge erred in disregarding the entirety of the informal application for orders, as only the first order relating to removal of the liquidator was a new order introduced in the amended notice of opposition,

(e) the Associate Judge erred, therefore, by not considering the application for removal as a live issue and considering the application for discovery under it,

(f) the Associate Judge erred by ignoring that a ground of opposition for the making of the orders sought by the liquidator was that "the liquidator is acting for improper purposes, ultra vires, in bad faith and for personal gain". As this was a legitimate defence to the orders sought by the liquidator, the further discovery sought was relevant, had an evidential foundation and met the test of proportionality.

[22] The application was opposed on various grounds which I summarise as follows:

(a) the Judge was literally correct in saying that the notice of opposition to the amended application will fall to be considered at the hearing,

(b) regardless of what concessions Mr Moss made, it was clear that the Judge considered that, unless leave was granted, the issues raised in the notice of opposition should not form part of the substantive hearing or require the relevant discovery orders,

(c) in relation to the question of whether the inherent jurisdiction of the Court could have been relied on, there was no basis to override the clear statutory provisions in s 284 and no error was made by the Associate Judge. Indeed the status of the respondents to bring an application for leave was not addressed,

(d) the other orders sought, except for the application for removal of the liquidator, "had been disposed of at the preliminary hearing and/or were matters which were dealt with by way of opposition to the orders sought by the liquidators",

(e) the pleading that the liquidator was acting for improper purposes, ultra vires, in bad faith and for personal gain was without a credible evidential foundation and amounted to a collateral attack,

(f) the Associate Judge had considered the evidence of Mr Hyndman filed by the applicants,

(g) the Judge correctly determined the application, including on the basis that: the application for discovery had no, or extremely limited, relevance to the substantive hearing, it offended the requirement of proportionality, and he had not usurped the functions of the trial Judge.

Approach to application for discovery

[23] This application for discovery is made in the context of an originating application, where the proceeding is normally determined on the basis of affidavit evidence and where there is a reluctance to order discovery, particularly in such close proximity to the substantive hearing.

[24] As Duffy J said in *Katavich v Meltzer:*[6]

> [Originating applications] are automatically placed on the swift track for case management (r 7.1), with the consequence that discovery is discretionary, and the party wanting discovery must make out a case for it at the case management conference (r. 8.17). The authors of *McGechan on Procedure* suggest that discovery may more likely be justified if it is particular discovery or confined to categories of documents.

[25] The reservations expressed by Duffy J in *Meltzer*, being the general reluctance to grant orders for discovery in originating applications, and in allowing it at such a late stage in the proceeding, apply with equal force in the present application. However, the decision must be guided by whether it will "achieve justice in the particular circumstances",[7] and relevant factors to be considered will include whether the applicant will suffer irreparable injury if leave is not granted, whether there is prejudice to the opposing party and whether there is a reasonable explanation for the delay in seeking discovery.[8]

Issues

[26] Mr Moss, for the applicants, focused on two arguments which he said warranted the further discovery sought:

(a) the first is that the application for removal of the liquidator could be addressed under s 284, or, if s 284 was not available, under the Court's inherent jurisdiction, and the discovery sought was relevant to that,

(b) the second is that the allegations that the liquidator was acting for improper purposes, ultra vires, in bad faith or for personal gain could be used to resist the liquidator's application to confirm:

(i) the validity of the sale of shares (or any consequent relief), if the sale of shares had not been validly voided; and

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6 *Katavich v Meltzer* HC Auckland CIV-2006-404-005968, 29 May 2009 at [16].
7 At [3].
8 At [3].

(ii) the validity of the appointment of Denis Marshall as sole director of GWSL.

I deal with each of these in turn.

Is discovery required for application for removal?

[27] Under this heading Mr Moss argued that while leave was required under s 284, he had not conceded in the previous hearing that it would be inappropriate for the Court to proceed on an informal application at this juncture. Alternatively he submitted that the issue of leave could be deferred for determination after hearing substantive argument as was done in the case of *Consolidated Technologies Development (NZ) Limited v McCullagh*.[9]

[28] More importantly though, he said (although he accepted he did not run this argument before the Associate Judge) that the Court has inherent jurisdiction to remove a liquidator, whether or not removal is sought under s 284. Because removal can be sought without a formal application under s 284, the Court was able to consider this informal cross-application in the context of the liquidator's originating application.

[29] Mr Sullivan, in reply, argued that the Companies Act 1993 governs the Court's now limited role in supervising liquidators and the Court will no longer interfere in the everyday course of liquidations. This is particularly so since the Act was strengthened in November 2007 by including restrictions against appointment of liquidators where they have conflicts of interest with the person appointing them or the company.[10] Section 286 governs the very limited grounds in which a liquidator can be removed on application on a limited class of persons and these are "very serious standalone applications" requiring a "clear breach of duty by the liquidator in performing his role".

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9 *Consolidated Technologies Development (NZ) Limited v McCullagh* HC Auckland CIV-2005-404-6454, 15 May 2006 at [23].

10 See Companies Act 1993, ss 280(1)(ca) and (cb).

[30] Section 284 provides a more limited remedy in which a limited class of persons can seek leave of the Court to get directions on any matter in a liquidation. The grant of leave must be based on whether the applicant has an arguable case with a credible factual basis and a reasonable likelihood of success. Even with leave, the Court will not interfere with a liquidator's exercise of discretion unless it is clearly wrong or unreasonable. Mr Sullivan submitted that the respondents have rightly been required by the Associate Judge to seek leave to file their application calling into question the bona fides of the liquidator's conduct, and ruled that these allegations would not be considered in the substantive proceeding.

[31] I am satisfied that the Associate Judge's decision not to accept the informal application under s 284 was correct. This is because it required leave, and because the applicants needed to satisfy the Court that they fell within the classes of persons who were entitled to seek leave. While his understanding that Mr Moss had conceded this point may have supported his decision, it is clear the decision was based on the failure to meet the requirements of s 284.

[32] That then leaves the other issue, now raised, of whether the Court should have entertained the application in the exercise of its inherent discretion. A classic statement on the Court's inherent jurisdiction is found in the article by Master Jacob, *The Inherent Jurisdiction of the Court*:[11]

> The inherent jurisdiction of the Court may be defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[33] The relationship of s 284, and the Court's inherent jurisdiction to supervise liquidations, was considered by Mallon J in *Official Assignee v Norris.*[12]

[34] That case involved the review of an Associate Judge's decision on an application by a liquidator to strike out proceedings brought by the Official Assignee under s 284 and 286 of the Companies Act. The Associate Judge had accepted that

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11 Master I H Jacob "The Inherent Jurisdiction of the Court" [1970] CLP 23 at 51.

12 *Official Assignee v Norris* [2012] NZHC 961.

the Official Assignee was not a person who would have standing to apply under s 284. He therefore ordered that specific references to s 284 in the prayer for relief be struck out. However, he declined to strike out the rest of the claim saying "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".[13]

[35] In *Norris*, at the review hearing the liquidator argued that the Associate Judge was wrong to strike out only the references to s 284 in the prayers for relief and not the allegations on which the relief under s 284 was sought. In particular, he claimed there could be no inherent jurisdiction to seek orders equivalent to orders under s 284, when s 284 specifically dealt with when such orders could be sought.[14]

[36] The Official Assignee, on the other hand, maintained that the 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,[15] citing, *Cassin v Richardson*,[16] and *Re Securitibank Ltd (in liq).*[17]

[37] Mallon J concluded, however, that the present case differed from *Cassin* and *Re Securitibank* because in those cases it was the officer of the Court, that is the liquidator, that was seeking the Court's direction. In the case before her, the Official Assignee was not the liquidator (Court appointed or otherwise), but was seeking that the Court intervene to control the actions of the liquidator. In doing that, the Official Assignee was seeking to rely on the Court's inherent jurisdiction as a way around the limits of s 284.[18]

[38] She then concluded that the Associate Judge was not necessarily wrong to allow the Official Assignee to have the opportunity to re-plead because the question

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13 *Official Assignee v Norris*, HC Nelson CIV-2011-442-000080, 10 February 2012 at [9].
14 *Official Assignee v Norris*, above n 12, at [22].
15 At [22].
16 *Cassin v Richardson* [2006] NZFLR 1068 (CA).
17 *Re Securitibank Ltd (in liq)* [1978] 1 NZLR 97 (SC).
18 *Official Assignee v Norris*, above n 12, at [27]-[28].

of whether there would be inherent jurisdiction was not fully argued before him. However, she cautioned as follows:[19]

> That said, any such amended pleading may not survive if there is a 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.

[39] I, too, hold the same reservations about the ability to call on the Court's inherent jurisdiction in a way that circumvents the statutory restrictions. As was said in the article by Jacob:[20]

> … the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.

[40] Here, if any of the applicants do fall within the classes of persons able to seek leave under s 284, then they are endeavouring to avoid the statutory requirement to seek leave. If they fall outside those categories, it is still not clear that they can avail themselves of the Court's inherent jurisdiction. The exercise of power within the Court's inherent jurisdiction is designed to regulate the practice of the Court and prevent the abuse of its process. While it might afford an opportunity for a party not specified in s 284, to seek the Court's assistance to supervise a liquidation (as was proposed in *Norris*), it does not follow that in the exercise of that power, the Court would entertain an application which would not meet the test for leave under s 284 discussed in *Trinity Foundation (Services No. 1) Ltd v Downey*.[21]

[41] In that case the Court held that a party seeking leave under s 284 would need to show it has an arguable case. This would require it to have a credible factual basis and for there to be a reasonable likelihood that, if the claim was established, the Court would disturb the act or decision in question because it was unreasonable.

[42] Associate Judge Lang expressed the test as follows: [22]

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19 At [30].
20 Jacob, above n 11, at 24.
21 *Trinity Foundation (Services No. 1) Ltd v Downey* 2005 9 NZCLC 263, 917 (HC).
22 At [22].

> Leave will not be granted, however, in circumstances where, even if the claim is established, it is unlikely that the Court would interfere with the act or decision in question. In this way the section strikes a balance between preserving the rights of meritorious claimants, whilst at the same time ensuring that the assets of a company in liquidation are not frittered away as a result of claims that are unlikely to succeed.

[43] That reasoning was endorsed when the matter went on appeal to the Court of Appeal.[23]

[44] For the same reason I cannot see why the Court would invoke its inherent jurisdiction to consider this matter, unless it was satisfied that such a test had been met. That test is not satisfied by the informal application made by the applicants I am therefore satisfied that the Associate Judge's decision, which in effect held that these cross-applications could not proceed until a formal application for leave was made, was correct. Accordingly, the application for discovery relying on the informal cross-application was properly dismissed.

Is discovery required for defence that Mr Walker was acting for improper purpose or in bad faith?

[45] A key aspect of the Associate Judge's reasoning in declining the application for discovery was that, leaving aside the informal applications which he would not entertain, the issues for determination in the forthcoming hearing did not engage questions of whether Mr Walker was acting independently or not. He described them as "constitutional issues … as to the shareholding of Water Services and as to the process of appointing a director of Water Services".[24] In his view these turned on an "objective assessment of the circumstances of that transaction".[25]

[46] Mr Moss urged on me that, in fact, issues of whether the liquidator was acting independently or not, were relevant to determination of the liquidator's applications. He submitted that if the liquidators was acting for improper purposes then, regardless of whether the actions on decisions were objectively reasonable, they would be "void ab initio".

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23 *Trinity Foundation (Services No. 1) Limited v Downey* CA 193/05, 15 November 2006.
24 *Walker v Gibbston Walker Services Ltd*, above n 1, at [54].
25 At [55].

[47] The only authority he could point to to support that submission was a paragraph cited from an article in a Singapore Law Gazette which read:

> … whether the liquidator is pursuing or defending legal proceedings, the failure of the liquidator to act objectively, impartially and independently may be raised in the course of the proceedings either as a "shield"[26] or as a "sword"[27] without (it seems) a need to invoke a specific procedural mechanism for doing so.

[48] In other words, Mr Moss was proposing that evidence that the liquidator had acted partially, for a collateral purpose, or in bad faith, could be a defence to the liquidator's applications for the directions under s 284, and therefore justified ordering discovery which might support that defence. This was regardless of whether the actions sought to be confirmed were "constitutional issues" as described by the Associate Judge, or were reasonable on their face.

[49] There is no debate that liquidators have a duty to be objective, impartial and independent, as was articulated by Sir James Jay in *In re Contract Corporation, Gooch's case*:[28]

> In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever. It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of this investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect.

[50] The real question is whether that principle can be transformed, as Mr Moss asserts, into a legal argument that any action taken by the liquidator, whether objectively reasonable or not, is void ab initio if the liquidator has not met his obligation to be objective, impartial or independent. Certainly the two cases referred to in the Singapore Law Gazette article do not suggest this.

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26 *Amrae Benchuan Trading Pte Ltd (in liq) v Tan Te Teck Gregory* [2006] 4 SLR 969.

27 *Fustar Chemicals Limited (Hong Kong) v Liquidator of Fustar Chemicals Pte Limited* [2009] SGCA 35.

28 *In re Contract Corporation, Gooch's case* [1871] 12 LR Ch App 207 at 211.

[51] In *Amrae*, a liquidator failed in a claim that a payment was an undue preference. The Court was critical of the liquidator for bringing the action when he had also failed against other defendants in respect of payments made in an identical context. The litigation was funded by a single creditor and the implication was that the liquidator had not approached the decision to set the payment aside objectively.

[52] Similarly, in *Fustar*, the liquidator was found to have unreasonably rejected a proof of debt. The Court considered the liquidator's failure to direct her mind to relevant factors which demonstrated the debt had been properly incurred created doubts about her independence of action, because what she set out to do was not reasonable, and was intended to benefit her appointer and no-one else.

[53] In both these cases it was the unreasonableness of the decisions which reflected on the motivation of the liquidator, rather than the other way around. Neither of the cases came close to suggesting an otherwise reasonable decision could be void ab initio (or even voidable) because of the liquidator's motivation.

[54] In any event, even if this legal argument had some precedent, I am not satisfied that the evidence advanced by the applicant provides an evidential foundation for such accusations. The applicants rely on the evidence of Mr Hyndman. He describes himself as "an alternate director of the first respondent, and a director of the second respondent".

[55] The allegations he makes against the liquidator is that he is "acting either for his personal gain (either fees and/or some personal vendetta against Mr David Henderson) and/or for the interests of third parties".

[56] The first allegation is unmeritorious. As the liquidator said in his submissions on the discovery application "to say that a liquidator wishes to get paid so as motivated by improper purpose simply does not follow. A liquidator deserves to be remunerated".

[57] In terms of the other allegations, Mr Hyndman points to GWHL being put into liquidation "to gain control of the potable water rights scheme operated by

GWSL". However, that was not a decision of the liquidator, but of the receivers of RFD Investments Limited.

[58] The balance of the affidavit refers to a number of statements made by third parties, via emails, text messages and the like, which suggest that these parties support the steps taken by the liquidator and are negative to Mr Henderson (the former director of GWHL and GWSL) and Mr Hyndman. It would be inappropriate and unreasonable to attribute the views of those third parties to the liquidator himself, without clear evidence that that is so.

[59] There is nothing in Mr Hyndman's two affidavits which, in my view, would justify authorising a fishing exercise for documents to be used to support a defence which does not have a clearly arguable legal or factual basis.

[60] Because of my conclusions on this, I do not need to go on to consider issues such as the proportionality of the discovery sought.

[61] Overall, I am not satisfied that the applicants' case will suffer irreparable injury if the application for discovery is not granted. There is no adequately pleaded cross-application before the Court to remove the liquidator, nor have the applicants established that motive of the liquidator could render the liquidator's actions void ab initio, which is the defence the documents are claimed to support.

[62] I also do not think, as the applicants claim, that denying this application for discovery will cause irreparable injury to the applicants. If the applicants wish to challenge the liquidator's conduct, that can be raised by way of formal and separate application for leave on notice in the usual way. An application for discovery can be made in that context.

[63] At the same time, the request for discovery at this late stage will cause the liquidator prejudice. It is a reasonably broad ranging request sought only days before the substantive hearing. While I have been unable to get a clear idea of how many documents it might encompass, it is, as the liquidator says, a "wide ranging" request, with the liquidator being asked to "search every file and computer for

communications with a shopping list of individuals, organisations, covenant departments and media organisations".

Result

[64] The application for review of the Associate Judge's decision dated 28 February 2014 to decline the orders sought for discovery is dismissed.

[65] Mr Sullivan, for the liquidator, submitted that this was an appropriate case for increased costs to be granted jointly and separately against all respondents. I have not heard from the applicants on the issue of costs.

[66] Accordingly, I direct:

(a) the liquidator has 14 days from the date of this judgment to file a memorandum on costs;

(b) any memorandum in opposition to an award of costs is to be filed within a further 14 days of receipt of the memorandum seeking costs.

Solicitors:
K Sullivan, DLA Phillips Fox, Wellington
J Moss, Barrister, Christchurch