IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-697
[2020] NZHC 816

IN THE MATTER OF	the liquidation of INVESTACORP HOLDINGS LIMITED
BETWEEN	CLIVE ANTHONY QUINN and PHILIP SAMSON WELLS Applicants
AND	VICTORIA TOON First Respondent
	BRUCE JAMES THOMPSON Second Respondent
	CAROLYN MARY THOMPSON and STEWARTCO TRUSTEE SERVICES LIMTED Third Respondents
	PAMELA ISOBEL QUINN Fourth Respondent

Hearing:	18, 19 and 20 September 2019
Appearances:	S P Bryers for the Applicants G P Blanchard QC and Tiaan Nelson for the Respondents
Judgment:	30 April 2020

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **30 April 2020** at **3:00pm***
pursuant to r 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
McVeagh Fleming, Auckland, for the Applicants
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Copy for:
S P Bryers, Barrister, Auckland, for the Applicants
G P Blanchard QC and Tiaan Nelson, Auckland, for the Respondents

CONTENTS

Introduction

[1] The main question is how much Ms Toon should be paid for her work as liquidator of Investacorp Holdings Ltd. The liquidation is almost complete. She claims $101,729 plus GST and expenses as her remuneration for work until the hearing. In addition to normal expenses, at the end of August 2019 she had run up legal fees of $63,158 plus GST.

[2] This was a solvent liquidation. When the company went into liquidation, it had a portfolio of shares in publicly-listed companies, funds held on term deposit and a half share of the proceeds of sale of a commercial building which had just been sold. There were no creditors to speak of. There had however been disputes between shareholders. Before liquidation they had made a settlement agreement. The liquidation was intended to realise the assets of the company and to allow the shareholders to go their separate ways, but their differences dogged the liquidation. Ms Toon took up the dispute.

[3] There are two applications. The applicant shareholders, trustees of the C A Quinn Trust, apply for orders under s 286 and directions under s 284 of the Companies Act 1993. They say that Ms Toon has breached her duty under s 253 of that act by enquiring into matters that had already been settled by the shareholders. They seek directions for her to complete the liquidation. Ms Toon has applied under ss 276 and 284 of the Companies Act for orders approving her remuneration.

[4] Under s 253 of the Companies Act a liquidator's principal duty is to take possession of, realise and distribute the company's assets first to creditor, then to shareholders in a reasonable and efficient manner. Under s 276(2) a liquidator appointed by court order requires court approval of their remuneration, if it exceeds prescribed rates (under the Companies Act 1993 Liquidation Regulations 1994). Section 284 provides for court supervision of a liquidation. Liquidators can apply for directions as of right, shareholders need leave. In this case, the Quinns have leave.[1]

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1 Minute of 8 October 2018 at [9].

[5] Under s 284(1)(b) the court can confirm, reverse or modify an act or decision of the liquidator. Under s 284(1)(e) the court can review or fix the liquidator's remuneration at a level that is reasonable in the circumstances. Under s 286(2) a shareholder (amongst others) may give a liquidator notice of a failure to comply, which under s 285 includes failure to comply with a duty under the act. If the liquidator continues not to comply for five working days, the shareholder may apply to the court for an order. Under s 286(3) the court may in its discretion order the liquidator to comply. Disobedience may result in removal from office.[2]

[6] I find for the applicants. Ms Toon mismanaged the liquidation by taking up complaints by Mr Thompson, the second respondent and another shareholder, against Mr Quinn. She should not have, because Mr Thompson's dispute with Mr Quinn had settled. That soured the liquidation. A reasonable liquidator would have completed the liquidation more quickly, at lower cost and with less rancour. I fix her remuneration at $28,000 plus GST plus expenses. I give directions to complete the liquidation.

Background to the company going into liquidation

[7] Investacorp was incorporated in 1947 by Mr R J Thompson. He had three children – Bruce Thompson, Elizabeth Bakker and Pamela Quinn, the wife of Clive Quinn. The 30,000 shares in the company are held by the three children or interests associated with them. There are 300 voting shares:

Bruce Thompson	109
Clive Quinn	75
Pamela Quinn	76
Elizabeth Bakker	40

and 29,700 non-voting shares:

Bruce Thompson	3970
trustees of the C A Quinn Trust	7425
trustees of the P L Quinn Trust	7504
trustees of the C M Thompson Trust	6831
Elizabeth Bakker	3970

[2] Companies Act 1993, s 286(4).

The Quinn interests' shareholding is 50.27 per cent, the Thompson interests' 36.37 per cent, and Mrs Bakker 13.37 per cent. At liquidation, the directors were Pamela and Clive Quinn. Bruce Thompson had been a director but was removed in 2015. Both Mr Thompson and Mr Quinn were accountants but are now retired.

[8] The company owned commercial premises in Nelson Street, central Auckland, and in Kolmar Road, Papatoetoe. The company owned a half share of the Kolmar Road premises, with the other half owned by Katoria Investments Ltd, a company associated with Mr Quinn and his family. Katoria Investments Ltd and Investacorp Holdings Ltd owned the building as partners of the Kolmar Road Partnership. Mr Quinn occupied part of the Kolmar Road premises as tenant, where he ran his accountancy practice, Quinn Chartered Accountants Ltd. The Nelson Street property was sold in 2013 for $3,250,000. The proceeds were invested in publicly listed companies in a share portfolio managed by Craigs Investment Partners.

[9] Mr Thompson considered that the Quinns were and had been wrongly using their control of Investacorp to obtain benefits for themselves at the expense of other shareholders. He made complaints and took proceedings. The Quinns have consistently considered that Mr Thompson had no basis for his complaints. For this decision, I do not have to decide the merits of their disputes, but the fact of the disputes is relevant.

[10] In 2011, Mr Thompson began a derivative proceeding against Mr and Mrs Quinn, alleging breaches of fiduciary duty by Mr and Mrs Quinn, breaches of s 131 and 133 of the Companies Act, and breach of s 161 (as to remuneration). He also claimed that Quinn Chartered Accountants Ltd was paying inadequate rent for the Kolmar Road premises. Woodhouse J upheld the claim for rent for Kolmar Road but dismissed the other claims.[3] The Quinn interests were required to pay $291,358.

[11] Mr Quinn's accountancy practice left the Kolmar Road premises in November 2014 and paid rent until 31 March 2015. Mr Quinn retired from practice on 31 March 2015.

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3 *Investacorp Holdings Ltd v Quinn* [2014] NZHC 2389.

[12] Mr Thompson also made a complaint against Mr Quinn under the New Zealand Institute of Chartered Accountants Act 1996. The Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants found that Mr Quinn had breached the Institute's code of ethics by providing professional services to Investacorp while he was a director and shareholder of the company, to the Kolmar Road Partnership while he was a director and shareholder of both companies comprising the partnership, and to the C A Quinn Trust when he was a trustee and had a financial interest in its assets. The Disciplinary Tribunal's decision records an undertaking Mr Quinn gave the Institute:

(a) he would resign his membership of the Institute;

(b) he would not prepare the end of year financial statements for Investacorp Holdings Ltd, the Kolmar Road Partnership or the trust for 31 March 2013 and future years, and he would ensure that his accounting practice would not do so either;

(c) he would continue to do routine accounting and administration work for the three entities without charge for the next 24 months; and

(d) the accountant engaged in the future for the three entities would be appointed by the board, the partners, and the trustees respectively.

[13] The tribunal accepted those undertakings. It expressly did not direct who should act as the accountant for Investacorp Holdings Ltd. Mr Quinn arranged for another accountancy practice, Mayston Partners Ltd of Tauranga, to prepare financial statements for Investacorp Holdings Ltd and for the Kolmar Road Partnership. The accountants in that practice were his daughter and son-in-law.

[14] Mr Thompson believed that there were ongoing problems in Investacorp Holdings Ltd. In 2016 he brought a proceeding under s 174 of the Companies Act. The Thompson interests were the plaintiffs, the defendants were Investacorp Holdings Ltd and the Quinn interests. The Thompsons alleged prejudicial and oppressive conduct by the Quinns in:

(a) not putting in place leases on commercial terms between the Kolmar Road Partnership and Mr Quinn's accounting practice and not paying a market rent for the premises;

(b) charging excessive professional and management fees;

(c) removing Mr Thompson as director;

(d) charging excessive directors' fees; and

(e) arranging unequal distributions from the Kolmar Road partnership to favour Katoria Investments Ltd at the expense of Investacorp Holdings Ltd.

He sought an order under s 174 for Investacorp Holdings Ltd to be put into liquidation or, alternatively, for an order that the Quinn interests pay out the Thompson interests at fair market value without any minority discount. The Quinn interests defended the proceeding, including obtaining expert evidence as to the reasonableness of their conduct. Mr Quinn says that they did not oppose the company being put into liquidation as such but proposed that it be deferred until after March 2018 to allow tax losses to be used up.

[15] The case went to hearing in May 2017 but there was a settlement. The parties to the settlement agreement are the Thompson interests, the Quinn interests, Mrs Bakker and Katoria Investments Ltd. The recitals record that the Thompsons had brought the proceeding against the Quinns under s 174 of the Companies Act and that the parties entered into the agreement to resolve the claims in the proceeding. The agreement sets out proposed consent orders in a schedule. These included that:

(a) a liquidator be appointed by 1 April 2018;

(b) the identity of the proposed liquidator be advised to the court by 31 August 2017; and

(c) on the appointment of the liquidator the proceeding would be at an end.

[16] Clause 2.2 of the settlement agreement provided:

> On the condition that the Orders are made the Parties agree:
>
> (a) To settle all matters at issue in, arising out of, or relating to the Proceeding, including the manner in which Investacorp is to be wound up and its assets distributed;
>
> …
>
> (g) the Quinns will not charge any sums to Investacorp for the work (of any description including without limitation directors work, property maintenance or management, leasing, or sale commissions) on company matters or matters relating to the Kolmar Road Partnership after 31 March 2017, through Quinn Consultancy Ltd (QCL) or otherwise;
>
> (h) Investacorp will not meet any costs of the proceeding. Any costs associated with its participation will be met by the Quinns.
>
> …
>
> (j) The parties agree that the following payments will be made within 7 days of the Orders being made and to take all necessary steps to ensure that they are made;
>
> (i) Mr Thompson will be paid $3,400 by Investacorp for directors' fees for the 2015 financial year;
>
> (ii) The Thompsons will be paid $2,007 by the Quinns, in accordance with the Minute of Courtney J dated 9 May 2017 in the Proceeding;
>
> (iii) The Quinns shall cause QCL to pay Investacorp $2,773.50 plus GST by way of refund in fees charged by QCL in previous years.

[17] The settlement agreement has a further assurances clause that each party would do all things and sign all documents necessary to give effect to the agreement.[4] The parties acknowledged that they entered into the agreement following independent legal advice.[5] Any of the shareholders could elect to take an in specie distribution of shares held in the investment portfolio.[6]

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4 Clause 3.2.
5 Clause 3.4.
6 Clause 6.4.

[18] The agreement authorised Mr Quinn to arrange a sale of Kolmar Road before 1 April 2018 and provided how the Craigs portfolio was to be managed pending liquidation.

[19] The agreement provided that before liquidation any disagreement on the management of the company was to be referred to a named retired judge for an expert determination.[7] After liquidation the liquidator would determine as an expert any matter requiring the agreement of the parties, but on which they did not agree.[8] These provisions were not invoked.

[20] On 24 May 2017 the trial judge issued a minute recording that the parties had settled and made consent orders in terms of the settlement.

[21] In June 2017, Mr Quinn approached Ms Toon with a view to her being appointed liquidator. He sent a letter giving background. She sent Investacorp an engagement letter of 12 June 2017. Under the hearing "*Costs of Liquidation"*, she said:

> This is not a straight-forward solvent liquidation when estimating costs. I am usually provided with the Balance Sheet as a guide but understand your desire for privacy.
>
> I also do not know what the returns of the settlement agreement are but the distribution to nine shareholders could be complicated, or not. I will also need to confirm whether I will correspond solely with only the directors or all shareholder groups which, from experience, can add significantly to the time involved if there is any acrimony (double checking etc).
>
> On the information provided, I estimate our fees will be approximately $5,000-$7,500 plus disbursements of $1,000 (mostly advertising costs) + GST provided the property has been sold prior to liquidation. …
>
> If there are additional matters that we will be required to attend to which have not previously been brought to our attention, then this estimate is likely to be subject to change.

The letter also noted that protracted negotiations with the Inland Revenue to obtain tax clearance could add to costs, but they would make every effort to complete the liquidation in a timely manner.

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7 Clause 2.2(e).
8 Clause 2.2(f).

[22] Mr Quinn says that he briefed Ms Toon on the issues involved in the liquidation, including details of the company's assets, the settlement agreement and that shares in the investment portfolio could be distributed in specie. She had a copy of the constitution and was aware of the identity of the shareholders. She gave her normal chargeable rate at $350 per hour. Mr Quinn believed that the liquidation would be straightforward. Once the company's interest in the Kolmar Road property was realised, the company's accounts would be finalised and cash and shares would be distributed to the shareholders. He sent her the company's financial statements for the year ending 31 March 2017 and tax returns.

[23] Mr and Mrs Quinn, as directors of Investacorp Holdings Ltd, signed the letter of engagement on 1 March 2018. All the shareholders had agreed on her appointment.

The start of the liquidation

[24] On 27 March 2018, Associate Judge Smith made an order by consent that Investacorp Holdings Ltd be put into liquidation and appointed Ms Toon as liquidator. Leave was reserved to Ms Toon to apply for approval of her rates of remuneration. In the event Ms Toon did not seek prospective approval.

[25] Mr Quinn says that the reason for not putting the company into liquidation immediately in May-June 2017 was to allow the company to use up its tax losses before liquidation. The liquidation was by court order instead of shareholders' resolution to avoid any difficulties under s 241AA of the Companies Act. The s 274 proceeding was a pending liquidation application and any shareholders' resolution to put the company into liquidation would be made more than 10 working days after service of the application on the company.

[26] In March 2018, Mr Quinn negotiated the sale of the Kolmar Road property for $1,550,000. The sale was completed on 5 April 2018. After the sale of Kolmar Road, the company's assets were cash of about $2,550,000 and shares of about $1,000,000. Mr Quinn transferred $737,000 from the Kolmar Road Partnership to Ms Toon as the Investacorp share of the proceeds of sale (subject to a small residual sum). Investacorp Holdings had no creditors.

[27] On 6 April 2018, Mr Quinn sent Ms Toon a copy of the May 2017 settlement agreement, details of the shareholdings and information as to term deposits held by Investacorp.

Events during the liquidation

[28] Mr Quinn believed that the liquidation should be relatively quick and easy. The time from the liquidator being appointed to the funds being distributed to the shareholders should be a matter of a few months at most. Leaving aside matters initiated by Mr Thompson, there were however two aspects which took up more time than Mr Quinn had allowed for.

[29] First, the distribution of assets in specie. Ms Toon says that when a distribution in specie is planned, it is better practice to distribute assets in specie first so that any adjustments on account of unequal distributions can be addressed when funds are paid out to shareholders. The Craigs portfolio comprised shares held in publicly listed companies. All the shareholders would need to be consulted whether any of them wished to take the shares in specie and, if so, which ones. In the event, only Mr and Mrs Quinn wanted to take shares, but not all. Mr Thompson and Ms Bakker did not want any shares. Ms Toon had to await responses from the other shareholders. Ms Toon says that it took time for Craigs to provide the values of the shares as at the date when they were transferred to the Quinns. The remaining shares were sold and the proceeds paid to Ms Toon. Dividends from some of the shares continued to be paid to Investacorp, even after the shares had been transferred or sold.

[30] The other aspect was the Kolmar Road Partnership. With the sale of the commercial property in Kolmar Road, the partnership between Investacorp Holdings Ltd and Katoria Investments Ltd had to be dissolved. Accounts had to be taken. The dissolution would be complete upon the partnership having a nil balance sheet. That would require further accounting work. Mayston Partners Ltd was used for that. The dissolution of the partnership and distribution of its assets to the partners also required time.

[31] Given those matters, the liquidation might have been completed in five to six months. Financial statements for Investacorp Holdings Ltd for the year ended

31 March 2018 had to be prepared. Accounts and returns had to be submitted to the Inland Revenue for final tax clearance. Ms Toon would also have to apply to the court for approval of her remuneration before she filed her final report and asked for the company to be removed from the register.

[32] But other matters added to the time taken on the liquidation. Ms Toon took up Mr Thompson's complaints about the Quinns' conduct as directors, the matters which he had alleged were prejudicial and oppressive conduct in his proceeding under s 174 of the Companies Act. While Mr Quinn did not find out until this proceeding, Mr Thompson had been in touch with Ms Toon before her appointment as liquidator. After her appointment, on 12 April 2018, Mr Thompson and his wife saw Ms Toon at her office. He told her about his complaints about the Quinns and asked her to investigate them. At that time, Ms Toon had a copy of the settlement agreement of May 2017. Mr Thompson followed up with telephone calls and emails. Ms Borrie, one of Ms Toon's accountants, began investigating the matters raised by Mr Thompson.

[33] On 26 April 2018, Ms Toon met with Mr and Mrs Quinn at her request. There are different accounts of the meeting. Mr and Mrs Quinn say that Ms Toon was rude and aggressive, but Ms Toon and Ms Borrie deny that. They say that the meeting was businesslike. They deny Mrs Quinn's evidence that she was distressed. It is not necessary to resolve those differences. They may be differences of perception and may be coloured by later events. Ms Borrie made a file note of the meeting, but the discussion was more extensive than what she recorded. Ms Toon told the Quinns that Mr Thompson had told her of his complaints and that it was taking a lot of time to look into these matters. Mr Quinn responded that that work should be billed directly to Mr Thompson. Ms Toon commented that the company could have sold the Nelson Street building years ago. At the meeting, Mr and Mrs Quinn signed letters acknowledging that now that the company was in liquidation, they no longer had power to deal with the assets of the company. Ms Toon asked for certain documents to be provided. Mr Quinn sent them on the same day.

[34] In early May, the Quinns advised Ms Toon of the shares the Quinn trustees wished to take as an in specie distribution. In doing so, Mr Quinn indicated that he

had been in touch with a Craigs broker as to the process to be followed. In an email the same day, Ms Toon ticked him off, saying that, as she was the liquidator, it was for her to make the decisions, not Mr Quinn as director. That led to an exchange of emails. In the last, Ms Toon said to Mr Quinn:

> Whilst you may think this is a relatively simple liquidation, with conflicting views with acrimonious shareholders.
>
> Yes, I did say that Bruce had advised me that he would leave it up to me but I do not have a definitive statement from him in writing and given the litigious nature of this assignment I am insisting on everyone being clear on what steps I am taking. …

[35] On 15 May 2018 Mr Quinn emailed Ms Toon asking what was causing the delay in making a distribution to shareholders.

[36] On 16 May Ms Borrie emailed Mr Wells, a co-trustee of the C A Quinn Trust (and also a lawyer who had acted for the Quinns) requesting settlement statements for their sale of the Nelson Street property in September 2013. While Mr Wells provided them, he queried the need, given that the litigation had settled.

[37] Mr Quinn emailed again on 18 May, querying the time to make a distribution. By then, Mr Thompson and Mrs Bakker had confirmed that they did not want to take an in specie distribution of shares. In an email of 21 May 2018, Ms Toon advised that as liquidator she had not satisfied herself that all assets had been accounted for correctly. She still had queries regarding the accounts and was waiting for information from Mayston Partners Ltd. She added that she believed that some fees had been charged in excess of the court ruling but was awaiting confirmation. She reminded Mr Quinn that he was not the liquidator and he had no authority to dictate to her how she ran the liquidation or made distributions. She would not be bullied.

[38] In an email of 28 May 2018, Mr Quinn followed up, noting that he had not heard from Ms Toon. As the shareholders had settled the case with the court's approval it was believed that the liquidation of the company would be straightforward and take little time. The identity of the assets was readily apparent to the shareholders. He saw no need for a detailed investigation. All the issues that had previously been in dispute (such as fees charged) had been settled by the settlement agreement. While not trying

to dictate to her, he recorded his concern at the delays, with shareholders losing income because they were not able to invest the funds they should have received on distribution.

[39] In the meantime, Ms Borrie had been investigating the matters that Mr Thompson had raised. Her findings are summarised in a spreadsheet in which it is proposed that directors and other fees charged by Mr and Mrs Quinn be credited to the company. These were directors and management fees for the years ending March 2014, 2015, 2016 and 2017. The directors' fees to be repaid were $98,039 odd and management fees $8,506 - a total of $106,545.

[40] On 29 May 2018, Ms Toon sent Mr Quinn copies of emails that she had received from Mr Thompson raising queries about directors and management fees. She explained that she had not formed a concluded opinion and wanted to put the queries to Mr Quinn and hear his response first. She also explained that they had carried out some analysis of the fees and expenses charged to Investacorp since Woodhouse J's judgment of October 2014. On the workings, they had assessed what she considered to be a reasonable percentage of fees according to the judgment and noted that the actual fees were considerably more than what they had calculated. She invited Mr Quinn's comments. She noted that Mayston Partners Ltd had not been reporting to Mr Thompson.

[41] In a reply of 31 May 2018, Mr Quinn declined to answer the issues raised in the email, even though he considered that he could answer all the matters satisfactorily. He gave as his reasons that the issues in Ms Toon's email had been raised by Mr Thompson in the s 174 proceeding and were the subject of extensive evidence. The Quinns' evidence made it clear that Mr Thompson's allegations had no basis. The s 174 proceeding had been settled by the agreement signed by all shareholders and approved by the court. As all the issues had been settled, it was a waste of the company's funds for these issues to be re-visited. The shareholders had agreed on the liquidation as an efficient means of winding up the company's affairs and distributing the assets to the shareholders. The reason for the liquidation was to bring disputes between the shareholders to an end after they had been running for many years. He

had instructed a solicitor to take necessary steps to enforce the settlement agreement and bring the liquidation to an early end.

[42] On 1 June 2018, lawyers instructed by the Quinns (not Mr Wells' firm) wrote to Ms Toon with a notice under s 286 of the Companies Act. The letter explained that the Quinns had consulted their lawyers over the delays occurring in the liquidation, in particular, enquiries by Ms Toon concerning complaints made by Mr Thompson. These had been settled in the settlement agreement and were not to be regurgitated. Reinvestigating these matters was creating unnecessary delays.

[43] The notice under s 286 of the Companies Act alleged that Ms Toon had failed to comply with her duties as a liquidator in failing to complete the liquidation and distribution of the assets of the company to the shareholders in a reasonable and efficient manner under s 253 of the Companies Act. The notice also stated that if the failure continued for five working days from the date of the notice, Mr Quinn and Mr Wells would apply to the court for relief under s 286.

[44] At the same time, the Quinns' lawyers wrote to the lawyers who had acted for Mr Thompson in the s 174 proceeding. The letter advised of the problems that had arisen in the liquidation because of the complaints that Mr Thompson had made to the liquidator and pointed out that all matters had been settled by agreement. It alleged that Mr Thompson had breached the settlement agreement by raising the matters with the liquidator. It suggested that Mr Thompson and his related shareholders should advise the liquidator that their complaints about the Quinns were withdrawn.

[45] Around 11 June 2018, Ms Toon made the first interim distribution to the shareholders. Shares were transferred to the Quinn interests and cash was paid to the other shareholders. The value of the distributions was $1,829,213.67. Ms Toon held back substantial funds.

[46] Mr Mayston sent Ms Toon draft financial statements for the Kolmar Road Partnership for 31 March 2018. He invited Ms Toon to approve the accounts.

[47] On 28 June 2018, Mr Quinn emailed Ms Toon advising that he and his wife had returned from overseas. He was concerned that there had not been a further cash distribution to the shareholders. In response, Ms Toon advised that she was overseas but she respond when she returned.

[48] On 6 July 2018, in response to an email from Mrs Bakker, Ms Toon said that Mr Thompson had raised queries regarding the fees charged by Mr Quinn in 2015, 2016 and 2017. These queries had been forwarded to Mr Quinn but he had refused to answer the queries. She hoped that these matters could be resolved amicably. The 2018 accounts had been drafted but could not be filed until this matter had been resolved. The liquidation could not be completed until the 2018 and 2029 tax returns had been filed and a tax clearance received. Mrs Bakker confirmed that she did not have any queries.

[49] On 16 July 2018, Mr Quinn emailed Ms Toon expressing disappointment at the delays and lack of response to his queries. He called for a meeting of shareholders under s 258(2)(c) of the Companies Act.

[50] On 18 July 2019, Ms Toon sent the Quinns a letter requiring company records going back five years. This was a request under s 261 of the Companies Act. She referred to the penalties for not complying. Mr Quinn queried the need for these records in the circumstances when he had already provided records going back three years. He reminded her of the settlement. Ms Toon made it clear that she still required the records.

[51] On 19 July 2018, in an email, Mr Quinn asked Ms Toon about the funds held in her trust account and whether they were earning interest.

[52] Ms Toon sent a letter to shareholders headed "Without prejudice", setting out the matters that she and Ms Borrie had enquired into and provided a copy of the spreadsheet showing the calculation of fees of $106,545 to be credited. She believed this to be fair and reasonable to all the shareholders. She said that once this credit had been processed, she could proceed to finalise the financial statements and that a further distribution could be made to shareholders in the next few weeks. She also noted that

Mr Thompson had asked her to investigate the accounting fees charged by Mr Quinn's accounting practice and by Mayston Partners Ltd, but she had declined to do so, as she considered that only relatively small amounts were involved. The shareholders' meeting would be convened.

[53] On 23 July, Mr Quinn emailed requesting that certain items be included on the agenda:

(a) Ms Toon's letter of 18 July 2018 to the shareholders;

(b) his reply; and

(c) general business.

He also requested a copy of the letter showing the funds held on trust for the shareholders.

[54] In a follow-up email, he requested further matters to go onto the agenda:

(a) Confirmation of minutes of shareholders' meeting of 25 July 2017;

(b) the shareholders' settlement agreement made in 2017;

(c) the notice to the liquidator under s 286 of the Companies Act; and

(d) liquidation costs.

[55] In an email of 26 July 2018, Ms Toon gave information as to the funds held ($1,785,597.41) and that they were in an interest-bearing deposit account. She said that she hoped to distribute the funds as soon as possible if they could reach agreement at the meeting.

[56] On 27 July 2018 Mr Quinn wrote at length addressing the substantive issues on the crediting back of $106,554 proposed by Ms Toon, reserving the point that there was in any event a final settlement. He mentioned that at the meeting he would

propose resolutions requiring Ms Toon to cease investigating matters that had been settled between the shareholders and to complete the winding-up without delay. He trusted that she would abide by those resolutions.

[57] In a reply of 30 July 2018, Ms Toon said that while shareholders can propose and pass resolutions, a liquidator is not bound by them, but she would take shareholder views into consideration. The purpose of the meeting was not for passing resolutions. She suggested that Mr Quinn arrange another time either before or after the meeting when the shareholders could discuss matters.

[58] In an email of 1 August 2018, Mr Quinn addressed further points in rebuttal of the crediting back proposed by Ms Toon. He replied to her request for further documents. In a reply on the same day, Ms Toon remonstrated with Mr Quinn.

[59] There was a meeting of the liquidator with the shareholders on 3 August 2018. There is no evidence that Ms Toon circulated an agenda before the meeting. While in correspondence she had indicated that she hoped that an agreement could be made at the meeting, she had not stated what such an agreement would be. She had, however, made plans for a distribution which would include her proposed adjustment of $106,545. That would be charged against Mr Quinn's account and would put him in debt to the company. That debit would be adjusted by the C A Quinn Trust assigning part of its distribution to him personally. The Quinns, however, had no inkling of this before the meeting.

[60] All the shareholders attended. Ms Toon had her lawyer and Ms Borrie, described as "minute secretary". Mr Quinn objected to the lawyer attending. Ms Toon's explanation was that she had the lawyer along because Mr Quinn twisted what she said. As to that, no one has said how Mr Quinn twisted Ms Toon's words, and I am not aware of any evidence to that effect. After objecting to the lawyer being present, Mr and Mrs Quinn left.

[61] According to minutes of the meeting, sent to shareholders in December 2019, Ms Toon reported on the conduct of the proceeding to date. The Thompsons had requested her to review the terms of the settlement agreement and whether it had been

adhered to. This was not a simple straightforward liquidation. She also queried the decision of the shareholders not to put the company into liquidation when the Nelson Street property had been sold. She did not accept that the company should have been kept going to take advantage of tax losses. She cited Inland Revenue rulings to support her position. She provided a draft distribution schedule which would allow a distribution before matters were resolved at the meeting. Her draft distribution schedule provided for a write back of funds, as she had earlier proposed. She found it difficult to substantiate the directors' fees taken over recent years. It is clear from the minutes that Mr Thompson supported what Ms Toon had done and was not content to overlook charges which he believed were excessive.

[62] On 7 August 2018 the Quinns began their application under s 286 of the Companies Act. They sought:

(a) a declaration that Ms Toon as liquidator was in breach of her duty to collect and distribute Investacorp's assets reasonably and efficiently under s 253 of the Companies Act,

(b) a direction that she refrain from investigating the issue settled by the shareholder under the settlement agreement of May 2017, including any issues relating to fees and expenses charged to Investacorp by the Quinns and by Mayston Partners Ltd since October 2014, and

(c) ancillary directions for the prompt completion of the liquidation.

[63] Ms Toon filed a notice of opposition. While the Thompson interests were named as respondents, they did not file an appearance or a notice of opposition. When Mr Quinn received Ms Toon's evidence in opposition to the application under s 286, he considered that she had raised new issues. He wrote to advise her of his position on those new issues. He arranged for his counsel to send her copies of all the documents and evidence in the s 174 proceeding to inform her of the merits of the matters in issue in that proceeding and to show what had been settled. It emerged at the hearing, however, that Ms Toon did not read them.

[64] On 17 August 2018, Ms Toon made a further interim distribution of $1m cash to shareholders. That left her holding about $780,000.

[65] During September 2018, Mr Quinn sent Ms Toon further documents she had requested. On 19 September, Ms Toon's lawyer wrote to the Quinns' lawyer, saying that the Quinns had not complied with the notice under s 261 of the Companies Act sent on 24 July 2018. Mr Quinn had sent copies of documents, not originals, and provided copies of tax returns but not physical files containing tax-related documents and correspondence. Compliance by 21 September 2018 was requested. The Quinns' lawyer replied, pointing out that some documents had been supplied but saying Mr Quinn would look into the matter further. Mr Quinn wrote directly to Ms Toon on 24 September 2018, pointing out that he had provided the required documents.

[66] In October, Ms Toon wrote to Mr Quinn asking him to account for the outstanding monies held back on the sale of the Kolmar Road property. Mr Quinn replied the same day, giving her details. He said $30,000 was held in a partnership account and a GST refund was to be received. He would make a payment to the partners. A small amount would be held back to cover any creditors while final accounts were prepared.

[67] Ms Toon asked Mayston Partners Ltd to complete the Kolmar Road Partnership financial accounts for the year ending 31 March 2019. She objected to Mr Quinn having filed the 2018 tax return for the Kolmar Road Partnership without her approval.

[68] Mr Quinn wrote to Ms Toon on 1 November 2018 pointing out that Katoria Investments Ltd had been ready to complete the dissolution of the partnership but that Ms Toon had not replied when the 2018 partnership financial statements had been sent to her for comment and approval in May 2018.

[69] At the end of 2018, as a chartered accountant Ms Toon had a practice review. Mr Dennis Parsons, an experienced insolvency practitioner, carried out the review. While he found matters generally in order, he pointed out that she should not be holding on to the $780,000, but that it should be distributed to shareholders.

[70] On 20 December 2018, Ms Toon made a further distribution to shareholders of $639,578.00. She held back $125,082.37. At the same time, she sent the shareholders her second liquidator's report and minutes of the meeting of 3 August 2018.

[71] Her second report covers the period 27 March 2018 to 26 September 2018. The statement of realisations and distributions shows that she held $780,184 after distributions. At the end of the period her fees came to $45,255.68 excluding GST and expenses. This was for 166.5 hours (giving an average hourly charge-out rate of $271.80). Ms Toon says that in most solvent liquidations the report is of interest only to the shareholders but as it is lodged in the Companies Office, she keeps the reports fairly anodyne. She says that the information in this report was more extensive and she required more time to write it.

[72] On 20 December her lawyer also wrote to the Quinns' lawyer, rehearsing Ms Toon's arguments why the Quinns should agree to the write-back of $106,545.00 but adding:

> However, the liquidator has decided that it would not be cost-effective to pursue court proceedings to cover those fees even though she feels a moral obligation to do so.

The letter outlined the outstanding matters requiring attention before the liquidation could be completed. One of those matters was an enquiry into a payment made in August 2015 (which was subsequently adequately explained).

[73] In evidence, Ms Toon expressed her regret at having to make the distribution in December 2018. I find that she never intended to take any legal proceedings that would require the Quinns to account for the $106,545. Instead, knowing that the Quinns were impatient for the liquidation to be completed promptly, she held the funds back to put some pressure on them to fall in with her views. That tactic did not work, when Mr Parsons pointed out that she should make a further distribution to shareholders.

[74] Mayston Partners Ltd got caught up in the differences between Ms Toon and the Quinns. Ms Toon regarded the involvement of Mayston Partners Ltd with suspicion, given the relationship between the Quinns and Mr and Mrs Mayston.

Mr Quinn, on the other hand, pointed out that there was no breach of the undertaking he had given to the Institute of Chartered Accountants, because the Maystons were independent of the Kolmar Road partnership, Katoria Investments Ltd and Investacorp Holdings Ltd. They were not shareholders or officers in any of those entities. The upshot of the differences was that Mayston Partners did not complete the 2019 financial accounts for Investacorp Holdings Ltd. Ms Toon did so instead.

[75] In March 2019, Ms Toon applied on notice for approval of her liquidators' fees of $106,940.00 and disbursements of $9,036.36. The Quinns sought discovery of certain documents. A hearing was required to obtain an order for Ms Toon to disclose her time-sheets and invoices for legal expenses (with redactions for privileged content). She filed an amended application in August 2019, seeking approval for fees of $83,369 plus GST. She estimated further fees to complete the liquidation of $18,360.00 plus GST. She would be charging a total of $107,296.00.

[76] Since then, much of the liquidation has been taken up with this proceeding.

In light of the settlement agreement made in 2017, should Ms Toon have investigated Mr Thompson's complaints?

[77] The Quinns say that Ms Toon should not have investigated Mr Thompson's complaints about the fees they had taken from the company, because these matters had already been resolved in the settlement agreement of May 2017.

[78] In liquidations of solvent companies, where there have been disputes between shareholders, it is not unusual for the disputes to continue into the liquidation. Liquidators may have to deal with ongoing differences between shareholders and that can add to the costs of liquidation. The full Court's decision in *Re Roslea Path Ltd* is an example.[9] A liquidator faced with differences between shareholders needs to know whether they have been resolved. If they have been, the liquidator does not have to deal with them.

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9 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207.

[79] The law has always recognised the benefits of resolving disputes by agreement. It has required parties to adhere to settlement agreements because it is in the public interest that there be an end to conflict and because the parties should be held to their agreements. Where there is a binding settlement agreement, the dispute is brought to an end. In *Plumley v Horrell* Lord Romilly MR said:[10]

> Prima facie everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of compromise. When I compromise a law suit with my adversary, I mean that the question is not to be tried over again.

In *Knowles v Roberts*, Bowen LJ said:[11]

> As soon as you have ended a dispute by a compromise you have disposed of it.

In a liquidation that is reinforced by the liquidator's principal duty under s 253 of the Companies Act to get in the assets of the company and to distribute them to creditors, then to shareholders "in a reasonable and efficient manner". It is not reasonable or efficient to investigate disputes that have already been resolved.

[80] Two experienced insolvency practitioners gave evidence, Mr Bethell for the Quinns and Mr Parsons for Ms Toon. While neither of them put the matter in quite the way I have set out above, the general tenor of their evidence agrees with it. They differed on whether the settlement agreement meant that Ms Toon did not have to investigate Mr Thompson's complaints. Mr Parsons assumed that the settlement agreement did not apply but did not give reasons, perhaps recognising that that involved questions of law and was not a matter on which he could give expert opinion evidence. On the other hand, Mr Bethell accepted that the settlement agreement applied, although he gave his opinion after having taken advice from in-house counsel. Neither suggested that the liquidator should completely ignore the shareholder making the complaint. Some preliminary inquiries would be required to see what the complaint was and whether it was covered by an earlier agreement. Nor did Mr Parsons suggest that a liquidator was entitled to press on with an investigation of a complaint, even if it had already been resolved in a settlement agreement.

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10 *Plumley v Horrell* (1869) 20 LT 473.
11 *Knowles v Roberts* (1888) 38 Ch D 263 at 272.

[81] While the interpretation of the settlement agreement involves questions of law and a liquidator may seek legal advice, it is useful to consider what an insolvency practitioner would understand on reading the agreement. In my experience, insolvency practitioners have a good working knowledge of the law in the areas in which they work. That includes dealing with agreements and other transactions by companies that have since gone into liquidation. An insolvency practitioner would note these matters:

(a) This was a formal agreement drawn by lawyers and made after all parties had taken legal advice.

(b) It was a settlement agreement. The document says so. There is nothing to suggest that this was a false label.

(c) Investacorp Holdings Ltd's name appeared on the front page of the agreement and the agreement concerned the company, but it was not named as a party to the agreement.

(d) The agreement was to resolve claims the Thompsons had made in their proceeding under s 174 of the Companies Act about Investacorp Holdings Ltd. It was "to settle all matters at issue in, arising out of, or relating to the Proceeding…". The proceeding would be concluded on the appointment of the liquidator.

(e) The agreement provided that certain payments were to be made: Investacorp was to pay Mr Thompson director's fees for 2015, the Quinns were to pay the Thompsons $2,007 and the Quinns were to arrange for Quinns Consulting Ltd to pay Investacorp $2,773.50 as a refund of fees, but there were to be no other monetary adjustments for directors and accounting fees. The Quinns would not charge the company for any kind of work after 31 March 2017.

(f) Orders were to be made for the company to be put into liquidation by 1 April 2018.

(g) The agreement provided for the management of the company and the conduct of its affairs pending liquidation, including consent orders, the sale of the Kolmar Road property and the management of the Craigs investment portfolio.

(h) The agreement allowed the liquidator to make in specie distributions of company assets to shareholders. A court order would amend a provision in the constitution about in specie distributions.

[82] A liquidator reading the agreement would understand that the matters that the parties had been litigating had now been resolved. Because this was a settlement agreement, earlier differences were not to be pursued anymore. The parties had chosen liquidation to bring about an orderly winding up of the company and distribution of assets to shareholders, so as to separate the interests of parties who had been in dispute. The liquidation was to be carried out by an independent professional the parties had agreed on. Nothing in the agreement would suggest to a liquidator that the matters resolved by the settlement were to be opened up again in the liquidation.

[83] If the liquidator were provided with a copy of the pleadings in the s 174 proceeding, they would see that the matters the Thompsons had put in issue in that proceeding were now resolved. Both sides accepted that. The liquidator would understand that they were not to be live issues in the liquidation, because under the settlement agreement, the Thompsons had agreed not to pursue them. In light of the history of litigation between the Thompsons and the Quinns, the purpose of the settlement agreement was not to allow for further litigation about Investacorp Holdings Ltd.

[84] Having worked that out, the liquidator would understand that in carrying out the liquidation they would not need to inquire into Mr Thompsons' grievances because he had agreed not to pursue them anymore. Instead the liquidator could get on with getting the assets in and distributing them to shareholders. In response to Mr Thompson's complaints, the liquidator could explain that those issues were now dead.

[85] Now for Ms Toon's position. She does not dispute that the shareholders had resolved their differences, but she says that that does not matter, because she as liquidator could inquire into Mr Thompson's complaints, even if he could not pursue them anymore. The settlement agreement did not stop her. Her reason is that the company is not bound by the agreement and as liquidator she has control of the company and can exercise all its powers, including investigating whether the Quinns have breached any duties to the company. There are however problems with that.

[86] The Quinns are entitled to raise the settlement agreement as a defence to any claim that the company might bring against them for breach of duty. Where all the shareholders of a solvent company consent to transactions between the company and its directors, the shareholders' consent bars the company from suing the directors on those transactions.

[87] To explain this, I start with examples from outside a company context. Take a relationship such as principal and agent or trustee and beneficiary. The agent or trustee may enter into a transaction which might have an adverse effect on the interests of the principal or beneficiary. Taking remuneration is only one potential transaction that might affect the interests of the principal or beneficiary. The principal or beneficiary may however consent to the transaction, and if they do, they will not be able to sue the agent or trustee to put right any adverse effect of the challenged transaction. The principal or beneficiary may authorise the transaction in advance or ratify or affirm it afterwards. If the principal or beneficiary sues the agent or trustee on the transaction for breach of duty, the parties may resolve their differences and a settlement agreement may bar any further claim against the agent or trustee. That also counts as consent. In short, consent is a defence to a claim that the agent or trustee has entered into a transaction that is otherwise adverse to the interests of the principal or beneficiary.

[88] In the case of a company, there are the shareholders, directors and the company. In a solvent company, transactions by directors that might be challenged as in breach of their duty to the company may have an adverse effect on the interests of shareholders. As the affected parties, the shareholders may consent to the transactions, again before or after the event. If the shareholders, as the only ones affected, have all consented, the directors have a defence to a claim by the company for breach of duty.

Re Duomatic Ltd illustrates this.[12] A liquidator's claims against directors included recovery of salaries they had paid themselves when the payments had not been authorised by resolutions in general meetings of shareholders. The directors successfully argued and proved that the shareholders had consented to these payments. Buckley J said:

> I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

It did not matter whether the shareholders gave their consent at the same or different times.[13] Buckley J held that another challenged transaction was ultra vires. The shareholders' assent was not a defence to that part of the liquidator's claim.

[89] The *Duomatic* case has been treated as authority for a wider proposition than what I have stated here. In *Meridian Global Funds Management Asia Ltd v Securities Commission*, the Privy Council said:[14]

> The unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company.

[90] It has been questioned whether the Privy Council's dictum in *Meridian Global Funds Management Asia Ltd v Securities Commission*[15] applies under the Companies Act 1993, under which the board has management of the company.[16] However, at common law shareholders have the power to ratify director's decisions, for example in matters of their drawings and remuneration, and that power has been saved under s 177(4) of the Companies Act. The general objection to the *Duomatic* principle accordingly does not apply here. If the shareholders could ratify the Quinns' actions in a general meeting, they could also do so in the settlement agreement.

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12 *Re Duomatic Ltd* [1969] 2 Ch 365 at 373.

13 *Parker and Cooper Ltd v Reading* [1926] Ch 975 at 984.

14 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12.

15 See n 14.

16 Companies Act, s 128. For recognition of the issue, see *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [167].

[91] In *Attorney-General v Ririnui* the Court of Appeal described the *Duomatic* principle as a matter of ratification:[17]

> In its orthodox application …, the *Duomatic* principle is a rule of ratification, preventing a company from relying on its failure to comply with constitutional formalities to justify it in resiling from its binding obligation lawfully assumed by its agent. The principle permits corrections of technical non-compliance, to formalise an extant substantive decision which has the shareholders' unanimous if informal consent. Its purpose is to bar a company from relying upon failures of formality as a means of avoiding its legal obligations. Its sensible rationale is that in these circumstances it "would be idle to insist upon formality".

What justifies the relaxation of compliance with formalities is that the shareholders, who would otherwise stand to be adversely affected, have consented to the directors' transactions.

[92] *Duomatic* is authority that consent of affected shareholders is a defence to a claim by a liquidator suing directors for breach of duty where the alleged breach affects only those shareholders. I do not rely on it for any wider proposition. That will not apply in insolvent liquidations, where creditors' interests are adversely affected by directors' breaches of duty.[18] I add that I apply this consent principle similarly in a different context – approving liquidators' remuneration. In many insolvent liquidations, only a preferential creditor may stand to benefit from a reduction in the liquidators' remuneration. If that preferential creditor consents, there is no reason not to approve the remuneration sought.

[93] Under the settlement agreement, the shareholders all agreed on monetary adjustments between the company, the Thompsons and the Quinns. They were the only ones who stood to be adversely affected by the company's payments to the Quinns. The settlement meant that there would be no claims against the Quinns for alleged breaches of duties or for other transactions with the company. The shareholders' consent given in that agreement is a defence to those claims made by the liquidator in the name of the company against the Quinns.

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17 *Attorney-General v Ririnui* [2015] NZCA 160 at [53].
18 *Nicholson v Permakraft NZ Ltd* [1985] 1 NZLR 242 (CA).

[94] I have treated the settlement agreement as the shareholders' consent to the release of the Quinns from any claims by the company for breach of duty. But there is another way of considering the agreement – as a decision of the company itself. In a meeting the shareholders could pass resolutions in terms of the agreement. Such resolutions settling the proceeding, in which the company was a party and in which the Quinns were alleged to have acted oppressively and in breach of duty to the company, would ratify what they had done or, at least, release them from claims by the company against them as directors. Such a release would be a defence to any claim against them by the company and by any liquidator of the company. The shareholders had an alternative to voting on resolutions in a meeting. Under s 122 of the Companies Act, they could sign written resolutions, which would have the same effect as resolutions made in a shareholders meeting. Here the quorum requirement of 75% of the shareholders was satisfied, as all the shareholders signed the agreement. There are no particular requirements as to form, except that the resolutions must be written and signed by the shareholders. Under s 122(3A) they may be recorded in letters, telegrams, faxes, telex, electronic mail and similar means of communication. In *Sharrock v Wedd*, a deed in which the sole shareholder of a company agreed to appoint a director was held to be an effective resolution under s 122 appointing the director.[19] The agreement in this case also meets the formal requirements of s 122 and was signed by all the shareholders. The agreement was carefully prepared by lawyers and was signed after legal advice.

[95] It was objected that the settlement was no more than a shareholders agreement. But the agreement makes decisions for the company: the Kolmar Road property is to be sold, the investment portfolio is to be managed without new investments being made and the mechanism for making in specie distributions in a liquidation was changed. Admittedly some of these decisions were matters of management, but under the agreement the directors, whose conduct had been under attack, had the approval of all the shareholders to take those steps for the company. Ratification of directors' conduct is solely the business of shareholders but binds the company.[20] The settlement provisions of the agreement, which release the Quinns from liability, bind the company and bar it from suing the Quinns.

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19 *Sharrock v Wedd* [2016] NZHC 1477.
20 Companies Act, s 177.

[96] There is also a procedural reason why Ms Toon and the company could not sue the Quinns: any proceeding would be an abuse of process. In *Johnson v Gore Wood*, it was recognised that it would be an abuse of process for a party to begin a proceeding if they had compromised a claim by making a settlement agreement with the person they had sued.[21] Lord Bingham said about the rule in *Henderson v Henderson*:[22]

> An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.

And Lord Millett said:[23]

> In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.

Nandro Homes Ltd v Datt and *Nixon v Richardson* are New Zealand examples applying the principle.[24]

[97] The question is whether it is abusive for Ms Toon or the company, instead of Mr Thompson, to sue the Quinns. In *Johnson v Gore Wood* Lord Bingham said that the test for abuse of process in this context:

> … should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

Lord Millett warned:

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21 *Johnson v Gore Wood* [2002] 2 AC 1 (HL).

22 At 32-33 referring to *Henderson v Henderson* (1843) 3 Hare 100, 114–115.

23 At 59.

24 *Nandro Homes Ltd v Datt* HC Auckland CIV-2008-404-6676, 16 March 2009 at [66]-[69] and *Nixon v Richardson* HC Auckland CIV 2010-404-1412, 1 September 2010 at [71]-[76].

> Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so.

[98] In his s 174 proceeding Mr Thompson alleged oppressive conduct by the Quinns but asserted matters going to alleged breaches of duty by the Quinns to the company which adversely affected him. This was one of those occasions where a shareholder can sue a director for alleged breaches of duty to the company.[25] The matters that Ms Toon intended to claim against the Quinns were not as extensive as Mr Thompson's,[26] but she did not raise any new matters. Mr Thompson was the only shareholder who wanted her to go into these matters. He asked her to and she took it up. He got what he wanted – someone to continue hounding the Quinns when he could not do so himself. In that sense Ms Toon became Mr Thompson's proxy.

[99] *Shiels v Blakeley*, a decision on res judicata, gives guidance.[27] There were successive proceedings by members of a trade union challenging an amendment to a superannuation scheme. When the first failed, another union member, not a plaintiff in the first proceeding, sued on exactly same the matter. He was held to be a privy. The Court said of the test for a privy:[28]

> We conclude that there must be shown such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[100] Here Mr Thompson is shareholder and Ms Toon is liquidator, a different relationship from that in *Shiels v Blakeley*. A liquidator is ordinarily independent of the shareholders of the company in liquidation. Ms Toon did show some independence, as she did not take up everything that Mr Thompson wanted her to and she ran matters her way. Nevertheless, she stepped into Mr Thompson's shoes in

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25 Other occasions are derivative proceedings under s 165 of the Companies Act and, when the company goes into liquidation, s 301.

26 He wanted to pursue accounting fees as well.

27 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA).

28 At 268.

continuing claims that only he wanted to make, when he could not. In *Johnson v Gore Wood* Lord Bingham compared res judicata and abuse of process:[29]

> The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

The parties committed considerable resources for the Thompsons' s 174 proceeding. Having settled that proceeding, they should not have to commit yet more resources to run the same dispute again. That would offend the public interest identified by Lord Bingham. The fact that Ms Toon has taken up the matter as liquidator makes no difference. Any proceeding by Ms Toon against the Quinns rerunning Mr Thompson's complaints would be an abuse of process.

[101] After the hearing Mr Blanchard QC filed a memorandum with a copy of Venning J's decision in *Westpac New Zealand Ltd v Anderson*.[30] In that case an abuse of process argument was rejected. The case also raised res judicata questions, but they are not relevant here. The defendant contended that the outcome of earlier criminal proceedings meant that Westpac could not sue, but that does not apply here. The interest for this case is that the defendant had been sued in an earlier proceeding which had settled. The defendant had been director and shareholder of a company which Westpac put into receivership. The receivers sued the director in the name of the company for money had and received and for knowing receipt. The causes of action were directed at recovering money paid into the director's personal bank accounts from the company's account.[31] The case settled at mediation. In the new proceeding Westpac sued the director in deceit and conspiracy to defraud in respect of a letter of credit facility which had been used to obtain payments from Westpac for fictitious transactions. Venning J held that the scope of the receivers' proceeding was quite different from Westpac's.[32] He did not find any abuse of process. Unlike the Quinns, the defendant was not in peril of being sued twice for the same matter. Because of the absence of overlap in that case, it does not help Ms Toon.

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29 *Johnson v Gore Wood* [2002] 2 AC 1 at 31.
30 *Westpac New Zealand Ltd v Anderson* [2019] NZHC 979.
31 At [63].
32 At [63].

[102] The shareholders' consent to the release of claims against the Quinns, the company's release by the shareholders' resolution and the abuse of process by Ms Toon in claiming against the Quinns over the matters settled in the agreement all give legal reasons why she cannot say that she was free to investigate possible breaches of duty by the Quinns and get them to accept adjustments to their distributions on account of Mr Thompson's complaints. Ms Toon is not a lawyer and cannot be expected to know the legal rules on which these reasons are based. But a competent insolvency practitioner would have recognised that the shareholders had settled their differences and therefore she did not have to deal with those differences in the liquidation. If she had obtained legal advice, I expect a competent lawyer would advise her that the matters settled by the shareholders did not need to be reopened. She says that she did consult a lawyer, but she did not give evidence what that advice was. For all I know, she may have required the lawyer to support her in a decision she had already made. If she received inadequate advice from her lawyer, she can take it up with him.

[103] For Ms Toon it was submitted that the decision was a matter of commercial judgment and in such matters, the court will only intervene where there has been fraud, the liquidator did not exercise their discretion bona fide or no reasonable liquidator would act as Ms Toon did.[33] I accept that there was no fraud or lack of good faith, but it must have been clear to Ms Toon at the outset that nothing good could come of reopening Mr Thompson's complaints when all the shareholders had made a formal agreement to bury the hatchet. She cannot say that she did not know. Mr Quinn made it clear that he relied on the settlement and that she did not have to investigate Mr Thompson's complaints. Her explanation for disregarding him, that the company was not bound by the agreement, is unsound. Her disregard of the agreement is inconsistent. She accepted and went along with the in specie distribution of assets, as the agreement provided, but would not accept those parts of the agreement barring claims against the Quinns. As she could not hope to recover anything by investigating what had already been settled, it was unreasonable and inefficient for her to take the matter any further once she knew of the settlement. No competent liquidator would have taken the matter up. It was against common sense.

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[33] Citing *Leon v York-o-Matic Ltd* [1966] 1 WLR 1450 and *Cardis v Pardington* (1996) 7 NZCLC 261,211 (CA).

[104] Ms Toon's lawyer's letter of 20 December 2018 explains that she would no longer pursue the Quinns for the proposed adjustment as it would not be economic to do so. While that is correct, it does not excuse her earlier decision to open the investigation into Mr Thompson's complaints. By December 2018 her investigation had already run up considerable costs and tainted the liquidation.

What were the effects of Ms Toon enquiring into Mr Thompson's complaints?

[105] This question is required before the remuneration issue can be considered. It might be thought that Ms Toon's investigation of Mr Thompson's complaints and the steps she took as a result might be cut off from the rest of the liquidation, leaving her to claim remuneration for everything else she did. But the effects extended beyond that.

[106] Ms Toon bought into Mr Thompson's complaints. While she went through the motions of giving the Quinns the opportunity to reply to her findings, she did not show any interest in his responses, including his reliance on the settlement agreement and his answers on the substance of Mr Thompson's complaints. She did not read the materials about the s 174 proceeding sent to her by the Quinns' counsel. She had decided that the Quinns should accept the adjustment she had proposed and dragged the chain in making distributions to put some pressure on the Quinns to do what she wanted. Those delays in turn generated more activity with Mr Quinn pressing for explanations why distributions had not been made.

[107] She viewed Mr Quinn with suspicion and as someone not to be trusted. That soured the liquidation. Ordinarily in a solvent liquidation it would be expected that a director would work with the liquidator to provide records and get assets in, but that did not happen here. That can be seen with Mr Quinn's contacting Craigs about the investment portfolio and Ms Toon telling him off for usurping her authority as liquidator.

[108] She took a fault-finding approach, when the circumstances did not call for it. She criticised the Quinns for not having the company put into liquidation after the Nelson St property was sold. Not only did she not accept his explanation about using

up tax losses, but she did research on the tax law to disprove him. That had nothing to do with the liquidation.

[109] While Mr Quinn gave her company records to carry on the liquidation, she demanded more, going back five years before liquidation, in strong terms threatening use of s 261 of the Companies Act. This was unnecessary. She did not need them to carry out the liquidation provided in the settlement agreement.

[110] In the hearing Mr Quinn was criticised for being too aggressive and too quick to take legal steps. Early on he found that the liquidation was going in a direction not intended in the settlement agreement. He pointed that out to Ms Toon in correspondence, but without success. In a liquidation a shareholder, concerned that a liquidator has taken a wrong turn, has few formal remedies. One is under s 286 of the Companies Act – to give notice to the liquidator to comply with their duties and if the non-compliance continues, then to apply to the court for orders. Another is to call for a shareholders' meeting under s 258. Mr Quinn instructed his lawyers to give the notice under s 286. That had no effect. He did not apply to court immediately. He required Ms Toon to call a shareholders meeting. His plan was to put resolutions that would require Ms Toon to carry on with the liquidation without pursuing the Quinns on the matters that had been settled, but Ms Toon would not have it. While the meeting went ahead, the Quinns left after objecting to Ms Toon having a lawyer there. In hindsight they cannot be criticised. Ms Toon was planning on having an agreement made which would require the Quinns to take the adjustment she was seeking. While she had a legal adviser, they did not. They would have been at a disadvantage. The Quinns brought their s 286 application only after other efforts had failed. They cannot be criticised for acting too early. Delay may have counted against them.

[111] Mr Parsons, who had carried out the practice review, commented that this liquidation file had much more correspondence than would normally be expected in a liquidation of this sort. That was a sign of the difficulties in the liquidation.

[112] Ms Toon did not approve of Mayston Partners Ltd doing the accounting work, given the directors' relationship with Mr Quinn. The falling out between Ms Toon and Mayston Partners Ltd is another consequence of her suspicious view of Mr Quinn.

She says that Mr Mayston abruptly refused to do any more work on Investacorp accounts. But Mr Quinn has attached copies of emails showing that Mr Mayston advised Ms Toon that he had completed the work. She considered that more work was required. He sent her terms of engagement, but she refused to sign them and said that she remained concerned about a possible conflict of interest. They then agreed that she would make other arrangements.

[113] The litigation with its associated effort, time and expense is also a consequence of Ms Toon's wrong turning at the outset.

[114] In summary, the effects of Ms Toon taking up Mr Thompson's complaint and wrongly pressing the Quinns to accept her proposed adjustment were extensive, led to a lack of co-operation, strained relationships between Ms Toon and the Quinns, extra work that could have been avoided and added enormously to the costs of the liquidation.

How much should Ms Toon receive for her remuneration?

[115] The expenses and remuneration of Ms Toon as liquidator are payable out of the assets of the company.[34] She cannot require the shareholders or any of them personally to pay her remuneration. As the company was put into liquidation by court order and as she claims at more than the rates allowed under s 276 and 277 of the Companies Act, she needs a court order approving her remuneration.[35] Even if the liquidation had gone smoothly, she would still have had to apply. She is entitled to reasonable remuneration. She has the burden of showing that her remuneration is reasonable.

[116] The leading New Zealand case is *Re Roslea Path Ltd (in liq)*.[36] The decision deals extensively with the principles and practice on applications to fix liquidators' remuneration. For this case it is not necessary to address every point in the decision. It held that in fixing a liquidator's remuneration the court is determining the fairness and reasonableness of what has been charged when measured against the work undertaken and the result achieved. Fair and reasonable remuneration is the value of

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34 Companies Act 1993, s 278.
35 Companies Act 1993, s 276(2).
36 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207.

the services to the creditors and shareholders. Value is an elusive concept which goes beyond mathematical application of hourly rates to hours spent in administering the company's affairs. The principles applied on reviewing lawyers' costs were analogous.[37]

[117] It referred[38] with approval to an Australian decision, *Conlan v Adams* that suggested non-exhaustively categories where time had not been used reasonably:[39]

(a) work beyond the power of the liquidator;

(b) work done negligently;

(c) unnecessary work (covering decisions to carry out work and overservicing);

(d) work by people with inappropriate seniority; and

(e) work at inappropriate rates.

[118] The judgment encouraged liquidators to disclose relevant information as to remuneration to creditors and shareholders during the liquidation. The court also noted that the liquidators' costs associated with applications to fix remuneration are to be treated as costs of the liquidation, unless the court orders otherwise. The statements in the judgment as to a proportionate approach have statutory support. Section 253 of the Companies Act, which sets out the principal duty of a liquidator, is subject to the requirement "in a reasonable and efficient manner".

[119] It quoted a dictum in *Re Medforce Healthcare Services Ltd (No 1)* that the court reviews only remuneration, not expenses of the liquidator.[40] There is however a qualification to that. If liquidators take a course of action which is not required for the liquidation, the court may disallow both their expenses and their remuneration for that course of action. It would be absurd to refuse their remuneration while still allowing their expenses for the same matter. The legal basis is that regardless of the court's power of review of remuneration under ss 276 and 284, liquidators have no right to

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37 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 at [102] and [103].
38 At [82].
39 *Conlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521.
40 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 at [45]; *Re Medforce Healthcare Services Ltd (No 1)* [2001] 3 NZLR 145 (HC) at [18].

claim for expenses not required for a liquidation. Under Schedule 7(1) of the Companies Act 1993 liquidators may be paid only "the fees and expenses *properly incurred*".[41]

[120] Ms Toon's hourly rates (excluding GST) were:

(a)	Liquidator	$350
(b)	Chartered accountant	$220
(c)	Senior insolvency manager	$200
(d)	Insolvency manager	$180
(e)	Office assistant	$120

These were accepted as reasonable. In my experience they are consistent with rates charged by Auckland insolvency practices of a comparable size.

[121] In an affidavit sworn in July 2019, Ms Toon said that applying those rates her fees came to $86,956 (excluding GST) as at 5 July 2019. She estimated fees to complete the liquidation would be $20,340, giving a total of $107,296. Mr Parsons has reviewed that and considers that some of her charges are excessive:

(a) Too much time was spent on completing financial statements after Mayston Partners was no longer engaged. He would deduct $2,259.

(b) Too much time was spent on the second report to shareholders (9.4 hours). He would deduct $1,140.

(c) He would allow $15,732 for administration, less than the amount claimed.

[122] When those are taken into account, her remuneration would reduce to $101,729. Ms Toon accepts his criticism and claims that amount for her remuneration.

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41 *Re Shaftspry Ltd (in liq), Horton v Cowley (No 2)* [2014] NZHC 20 at [19], *Re Rayland Investment Ltd, Fann v Norrie* [2017] NZHC 2019 at [15].

In addition to GST, she also claims expenses and legal fees incurred in the liquidation, including this proceeding. Mr Parsons' assessment of her remuneration assumes that Ms Toon was entitled to investigate Mr Thompson's complaint and take all the steps that followed from that.

[123] In reply to an earlier affidavit of Ms Toon giving her fees at 28 February 2019 at $68,940 (excluding GST), Mr Bethell has assessed that about 65% of the charges were related to the investigation of the Thompson complaint and steps taken in consequence. When he made that affidavit, he did not have all Ms Toon's time records. His assessment is broad brush.

[124] Ms Toon's remuneration claim is too high because she spent time on unnecessary work, investigating Mr Thompson's complaints, and that had other effects on the liquidation which added to its length and the time spent on it. It led to differences with the Quinns, pursuit of a fruitless claim against them, increased correspondence, the notice under s 286 of the Companies Act, the shareholders meeting, the application under s 286, requests for unnecessary documents, digging into past transactions that had nothing to do with the liquidation (the sale of Nelson St), delays in completing accounts and delays in distributions. None of this was reasonable or efficient. Nor did it give value to the shareholders. She should not be paid for it.

[125] In some cases fixing liquidators' remuneration, it is possible to separate the good from the bad and to make deductions for those parts where the claim is excessive.[42] But that is not possible here. Ms Toon took a wrong turn early in the liquidation and that affected much of what followed. Instead, I assess the matter afresh based on what a competent liquidator would likely charge.

[126] I apply an average hourly rate of $263 plus GST. I have derived that from Ms Toon's breakdown of fees as at 28 February 2019. She charged $30,990 for 88.6 hours of her own work and $34,708 for 161 hours of Ms Borrie's work. They worked most on the liquidation. Attendances by other staff are few, relatively insignificant, and can be disregarded. The average is obtained by dividing the total of Ms Toon's and Ms Borrie's charges by the total hours they worked. In a liquidation that ran more

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[42] *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 is an example. See [230], [231], and [239].

smoothly than this, Ms Toon is unlikely to have given the matter so much attention and would leave Ms Borrie to do more. Accordingly, this average slightly favours her. The rate is consistent with many average rates claimed in approvals for insolvent liquidations I have considered – usually in a range $250-$300 per hour.

[127] I assess hours required for categories of tasks. The witnesses who have considered the remuneration issue have put Ms Toon's work into different categories. Mr Bethell has seven categories. Mr Parsons has 29. I prefer Ms Toon's 10 categories in her fee breakdown as at 28 February 2019 as giving a starting point for assessing her reasonable remuneration:

(a) Commencement: Initial discussions regarding liquidation process including meetings, reviewing appointment documentation and legal documents

(b) Statutory: Preparing and filing liquidator's reports with the Companies Office, obtaining company records, advising IRD and ACC

(c) Asset realisation: Correspondence with accountant and shareholder regarding bank accounts, Craigs Investments portfolio, liaising with three banks regarding term deposits, Kolmar Road Partnership dealings

(d) Creditors including shareholders: correspondence with all shareholders including initial meetings

(e) Administration: Correspondence and subsequent administrative matters, filing, cashbooks, scanning, etc

(f) Meeting of shareholders: Preparation and attendance at liquidators meeting at request of Clive Quinn

(g) Investigations: Investigations

(h) Legal: Replying to legal action taken by the Quinn interests including meetings with lawyers, preparation of affidavits

(i) Taxation/accounts: Preparing & filing GST returns, correspondence with accountant regarding financial accounts & tax returns, review, queries & approval of 2018 and 2019 accounts 7 tax returns for both IHL and KRP

(j) Distributions to shareholders: Preparing distributions including calculations and statements to shareholders, verifying shareholdings as per companies office, review of constitution/

[128] I delete some of these categories and add others. I assess the time required for the tasks as follows:

(a)	commencement:	8.4 hours
(b)	statutory:	8 hours
(c)	asset realisations:	10 hours
(d)	dealing with Mr Thompson's complaints:	18 hours
(e)	other dealings with shareholders:	8 hours
(f)	administration:	12 hours
(g)	taxation/accounts:	15 hours
(h)	distributions:	10 hours
(i)	application for approval of remuneration:	6 hours
(j)	complete liquidation:	10 hours

Total: 105.4 hours @ $263 = $27,720.20, rounded up to $28,000 (exclusive of GST).

Commencement

[129] The time for commencement is what Ms Toon has recorded. No-one criticised it. At that stage, no decisions on dealing with Mr Thompson were required.

Statutory

[130] Ms Toon said that she had spent 16.4 hours on statutory as at the end of February 2019. Mr Parsons considered that she had spent too much time on her second report. With better management of Mr Thompson's complaint, the second report would have been more routine and not required any special effort. Most liquidators' reports follow a standard format.

Asset realisations

[131] For asset realisations, Ms Toon claimed 12.6 hours. That did not run smoothly because she and Mr Quinn worked at cross-purposes, something that would not have arisen if Ms Toon had recognised Mr Quinn's intention to co-operate with her, not undermine her. I recognise that she still had to deal with the sale of the shares which were not distributed to the Quinns and dividends continued to come in.

Dealing with Mr Thompson's complaints

[132] A liquidator was required to consider Mr Thompson's complaints and the settlement agreement, and to check whether his complaints were covered by the agreement. That would include obtaining information about the claims in the s 174 proceeding, obtaining legal advice, telling Mr Thompson that the liquidator would take no further steps on his complaint and deal with any response from Mr Thompson. If Mr Thompson had been told clearly that he could not revive complaints that he had settled, he would not have taken the matter any further.

Other dealings with shareholders

[133] The liquidator would have other dealings with shareholders. There would not only be the initial meeting with the Quinns. Mr Quinn is still likely to have been impatient with the pace of the liquidation and have pressed for prompt distributions.

Administration

[134] Ms Toon claimed 43.4 hours for administration up to the end of February 2019. The bulk of that can be attributed to the differences that arose during the liquidation. There was an unusual amount of correspondence. If Mr Thompson's complaints had been dealt with firmly early in the liquidation, the time spent on administration would have been reduced.

Taxation/accounts

[135] Ms Toon claimed 33.5 hours on taxation and accounts. The accounts for the year ending 31 March 2017 had been approved and did not require review. Mayston Partners Ltd prepared the company's financial statements for the year ending 31 March 2018 for approval. They also prepared accounts for the Kolmar Road Partnership. They did not complete the work, with Ms Toon doing it but inefficiently, as Mr Parsons found. With a smoother working relationship, Ms Toon would have left Mayston Partners Ltd to complete the job.

Distributions

[136] There have been three distributions so far and there will be another when the liquidation is completed. More efficiently only two were required. Once the in specie distribution had been sorted, the first would be both shares and the bulk of the funds, holding back a small reserve for contingencies, fees and expenses, and tax provision. The second would be made at the end of the liquidation.

Application for approval of remuneration

[137] At the start Ms Toon did not allow for applying for court approval of her remuneration, even though she had been told that the liquidation was to be by court

order. Liquidators apply for approval of their remuneration by filing a memorandum with supporting information. They do not need a lawyer to apply on their behalf. Most have standard formats. In this case the liquidator is likely to advise the shareholders about the remuneration to be claimed.

Complete liquidation

[138] I have considered Ms Toon's fees as at 28 February 2019. By that date the liquidation ought to have been completed, if matters had gone smoothly. Further steps are required to complete the liquidation: file any outstanding tax returns with the Inland Revenue (if not already filed), obtain tax clearance from Inland Revenue, distribute remaining funds after tax clearance and remuneration has been approved, and request removal of the company from the register. On applications to approve remuneration some liquidators ask for an allowance for final steps to be taken. $1,500 is a typical figure. I have allowed somewhat more, as more steps are required.

[139] There is no need to allow for work in Ms Toon's categories, "meeting of shareholders" and "investigations". They would not be required, if Ms Toon had not decided to take up Mr Thompson's complaint. Similarly, Ms Toon cannot claim for her time dealing for with this proceeding, as it would not have started if she had done her job properly.

[140] Further adjustments are required. Ms Toon completed accounting work that would otherwise have been carried out by Mayston Partners Ltd. She should have credit for that saved expense. I assess that at $4,000 (excluding GST).

[141] A careful liquidator would likely obtain legal advice to check that Mr Thompson's complaints had been resolved by the settlement agreement. The lawyer may also have been required to deal with any responses from Mr Thompson or his lawyer. I allow $4,000 (excluding GST) for that.

[142] I do not allow anything else for her other legal expenses. These were not expenses properly incurred for the liquidation. If she had dealt with Mr Thompson's complaint as a competent insolvency practitioner would have, she would not have needed to use a lawyer for anything else. Mr Quinn would not have given his notice

under s 286, there would have been no shareholders meeting and this proceeding would not have started.

[143] When a fundholder is personally in breach of a duty to those claiming on the fund, the fundholder cannot generally draw on the fund to defend the claim against them. This principle comes from trust law.[43] In *Re Roslea Path Ltd* the common fund held by liquidators for creditors and shareholders was likened to a trust fund and liquidators were held to be fiduciaries.[44] When they are in breach of duty, such fiduciaries can hardly use for their defence funds they are holding for shareholders. They should meet their legal expenses from their own resources.

[144] The same applies to the remuneration application. In *Re Roslea Path Ltd*, the court said that liquidators' costs associated with remuneration applications are to be treated as costs of the application, unless the court orders otherwise.[45] In the normal case for a court-appointed liquidator, an application is not controversial and is a standard incident of the liquidation. The liquidator should recover the costs of the application from the company assets. I have allowed for that above. But when the application is contested and, as here, the liquidator is mainly unsuccessful in trying to uphold their personal interest, it would be wrong for the liquidator to use company funds to meet the costs of the application.

[145] The Quinns also attacked Ms Toon's remuneration for far exceeding her estimate in her letter of 12 June 2017. *J & J C Abrams Ltd v Ancliffe* was cited, a case in tort for negligent misstatement in giving an estimate.[46] I have not relied on those submissions. Ms Toon did not give a quote. Her letter made it clear that there were contingencies and that her fees could be higher than the estimate. The shareholders would not have known before her appointment that her remuneration claims would skyrocket. Once she was appointed liquidator, there was little they could do to have her removed. Their only effective remedy was to have the court fix her reasonable

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43 See the "hostile" class of cases, where beneficiaries sue trustees for breach of duty, in *Re Buckton* [1907] 2 Ch 406 at 413-417 and *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525 at [23]. In those cases, costs follow the event. If the trustees are found liable, they cannot indemnify themselves from the trust fund for their costs incurred in the litigation.

44 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 at [46] and [47].

45 *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 at [240].

46 *J & J C Abrams Ltd v Ancliffe* [1978] 2 NZLR 420.

remuneration. I have done that. I express no view whether Ms Toon was negligent in giving her estimate.

[146] Accordingly, I fix Ms Toon's remuneration at $28,000 plus GST. In addition to her normal expenses, she is to have a notional expense of $4,000 plus GST for accounting fees saved and $4,000 plus GST for legal fees. She will not pay her other legal expenses out of company funds.

Steps to complete the liquidation

[147] The Quinns' application seeks declarations that Ms Toon breached her duty under s 253 of the Companies Act as liquidator to collect and distribute the assets reasonably and efficiently. The alleged breaches include not giving any weight to the settlement agreement, spending excessive time and costs in investigating issues that had been settled between the shareholders, spending excessive time and costs in defending her decision to carry out the investigation. It seeks directions for Ms Toon to complete the liquidation. The Quinns have proved those breaches, which are failures to comply under s 286. When they began their application on 7 August 2018, those breaches were ongoing. They are entitled to directions for Ms Toon to complete the liquidation.

[148] I give these directions:

(a) With this decision Ms Toon will be able to complete financial statements for the years ending March 2018 and 2019, if she has not done so already. She is to do so promptly.

(b) Again, if she has not done so already, she is to file tax returns for those years within two weeks of this judgment being delivered.

(c) She will need to prepare financial statements for the year ending March 2020 and for part of the current financial year. She is to complete them and file tax returns within 6 weeks of this judgment being delivered and to request a tax clearance.

(d) Within two weeks of the Inland Revenue giving its tax clearance, she is to make a final distribution to shareholders after deducting the remuneration and expenses allowed in this decision. She is also to send the shareholders her final report.

(e) Within a further two weeks, she is to send her final report and request to remove the company to the Companies Office.

(f) Ms Toon is not required to make any further application to approve her remuneration in this liquidation.

Result

[149] On the Quinns' application, I give the directions in [148] above.

[150] I fix Ms Toon's remuneration at $28,000 plus GST. In addition to her normal expenses, she is to have an allowance of $4,000 plus GST for accounting fees saved and $4,000 plus GST for legal fees.

[151] Leave is reserved to apply for further directions.

[152] The Quinns are entitled to costs. If counsel cannot agree costs, memoranda may be filed. Ms Toon should file hers within **10 working days** of the Quinns'.

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Associate Judge R M Bell