IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 157
ARC 31/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LABOUR INSPECTOR (MELISSA ANN MACRURY) Plaintiff
AND	CYPRESS VILLAS LIMITED Defendant
AND	BARRY EDWARD BRILL Proposed Second Defendant

Hearing:	10 June 2015 (Heard at Auckland)
Court:	Chief Judge GL Colgan Judge Christina Inglis Judge ME Perkins
Appearances:	S Carr and S Blick, counsel for plaintiff No appearance for defendant PA Caisley and S van der Wel, counsel for proposed second defendant
Judgment:	16 September 2015

JUDGMENTS OF THE FULL COURT

Judgment of Chief Judge GL Colgan and Judge ME Perkins [1]-[116]

Judgment of Judge Christina Inglis [117]-[152]

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[1] There are a number of questions raised in this case. We are unanimous on the answers to some of them. On other issues the Chief Judge and Judge Perkins are in a

majority and Judge Inglis dissents. Her judgment follows that of the majority judgment.

Background

[2] This is a challenge to a determination of the Employment Relations Authority issued on 3 April 2014.[1] The delays in getting the case to hearing arose because of difficulties in serving the defendant and the proposed second defendant. That was eventually achieved and the proposed second defendant has filed a statement of defence. The defendant has taken no step to defend the challenge and there is no cross-challenge by the defendant.

[3] The Labour Inspector commenced proceedings in the Authority seeking to recover underpaid wages and holiday pay in respect of the employment of Nina Northcroft at the Cypress Villas Motel in Taupo. The motel was operated by the defendant, a limited company to which we will refer as CVL. The sole shareholder in CVL is another limited company, BE Brill Ltd. The sole director of CVL was the proposed second defendant, Barry Brill. Mr Brill is also the majority shareholder in, and the sole director of, BE Brill Ltd.

[4] The case centres on s 234 of the Employment Relations Act 2000 (the Act) which, to our knowledge, has not previously been examined authoritatively. Section 234 is as follows:

> **234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay**
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> (1) This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.
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> (2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—
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> (a) the company is in receivership or liquidation; or
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> (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—
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> the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent

[1] *Labour Inspector (MacRury) v Cypress Villas Ltd* [2014] NZERA Auckland 124.

of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.

(3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.

(4) In this section,—

company has the meaning given to it by section 2(1) of the Receiverships Act 1993

holiday pay means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday

minimum wages means minimum wages payable under the Minimum Wage Act 1983.

(5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[5] The Labour Inspector's proceedings in the Authority included an application under s 234 to authorise her to bring an action against Mr Brill personally, as sole director of CVL, for the recovery of any monies due in those proceedings by CVL to the Labour Inspector for the use of Ms Northcroft. CVL is recorded as not having been represented at the Authority's investigation meeting on 20 November 2013. However, the determination, issued on 3 April 2014, makes frequent references to both the evidence of Mr Brill having been considered by the Authority, and to submissions made by him (we assume in his personal capacity).

The Employment Relations Authority's determination

[6] The Authority's determination upheld the Labour Inspector's claims against CVL for arrears of wages and holiday pay, but not for penalties. These arrears and other entitlements totalled $38,146.89, excluding interest that the Authority ordered at the rate of 5 per cent per annum from 2 April 2013 to the date of payment of the arrears.

[7] In the same determination the Authority refused the Labour Inspector's application to authorise her to commence an action against Mr Brill personally under s 234 of the Act. The Authority's reasoning in respect of the s 234 application is pertinent to the matter now before the Court and was as follows.

[8] First, the Authority said that the Labour Inspector's submissions at the investigation meeting contradicted the statutory grounds for making an order under s 234. Counsel had submitted to the Authority that CVL's financial records disclosed the existence of potential assets,[2] if a loan from an associated company (Tuscany Properties Limited) was forgiven. The Authority recorded:[3]

> Somewhat contrary to the intent behind the application under s.234, the submission for the Labour Inspector, at first instance, posits that CVL could meet the awards made by the Authority if appropriate steps were taken in regard to its financial arrangements with another company (Tuscany Properties Limited), of which Mr Brill is the sole director.

[9] The Authority found against this submission in the following paragraph:

> However, after having assessed the financial information provided by Mr Brill and the weight of his submissions, I conclude that on the balance of probabilities, CVL does not have sufficient assets to pay any of the amounts awarded in full.

[10] The Authority then turned to exercise what it considered was the discretion allowed to it by the use of the word "may" in s 234(2). It held that it had to be persuaded that Mr Brill "directed or authorised" the default in payment of the amounts due to the employee. It dealt with a submission from the Labour Inspector that Mr Brill, as the sole director of and majority shareholder in CVL, must have been aware of the company's obligations to pay minimum wages and holiday pay entitlements to Ms Northcroft. The Authority decided at [55]: "Undoubtedly this is correct …". It concluded, however, that:

> Mr Brill says that it was always his understanding that CVL had met its obligations to Ms Northcroft and it was not until she left the employment of CVL, and subsequently lodged a complaint with the Labour Inspector, that he became aware that there was any dispute regarding her employment entitlements.

[11] Dealing with the submission made by Mr Brill, the Authority accepted that to make an order under s 234, it had to be satisfied that there had been "a wilful default by the company, not merely an error or genuine dispute."[4] In this case the Authority found that: "… the payment of annual holiday pay, in particular, was arguable; as

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[2] *Cypress Villas*, above n 1, at [50].
[3] At [52].
[4] *Cypress Villas*, above n 1, at [59].

was the minimum pay entitlement".[5] The Authority then recorded[6] that it had undertaken research into, and relied on, the report of the Parliamentary Select Committee reporting back to the House of Representatives before the enactment of s 234. It said, as a result of that report, that:[7]

> … the underlying policy behind the introduction of s.234, … concludes that the intention of s.234 is that this provision should only apply as a last resort, where the company is unable to pay, and an officer, director, or agent of the company has personally and deliberately directed or authorised the failure to pay, …

[12] Finally and conclusively, the Authority wrote:

> [66] I conclude that in regard to the Holidays Act matters, Mr Brill sought and obtained professional advice from the company's accountant and applied that advice in apparent good faith. While with hindsight it is now obvious that the advice given was deficient, nonetheless there is nothing to suggest that Mr Brill was aware of this at the time that CVL entered into the employment agreement with Ms Northcroft. Furthermore, there is no tangible evidence that Mr Brill deliberately embarked on a course of action that was designed to deprive Ms Northcroft of her legal entitlements under the Holidays Act or the Minimum Wage Act.
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> [67] I find that it is not proven that Mr Brill deliberately, or even by implication, directed or authorised any action that resulted in a default in any payments due to Ms Northcroft. Hence it is not appropriate to authorise the Labour Inspector to bring an action against Mr Brill for the recovery of the proven default in the payment of Holiday Act and Minimum Wage Act entitlements due to Ms Northcroft.

The sequence of the Authority's process

[13] This case raises issues about the sequence and content of events contemplated by s 234. Because the Labour Inspector says that the Authority erred in law by adopting the process it did in reliance on its interpretation of s 234, it is necessary to record our understanding of how the Authority proceeded.

[14] The Labour Inspector filed a statement of problem with the Authority which included not only the claim for underpaid remuneration and unpaid holiday pay against CVL, but also an application under s 234 that the Authority authorise the Labour Inspector to bring an action for the recovery of that amount against Mr Brill

[5] At [63].
[6] At [64].
[7] At [65].

as the director of CVL who had directed or authorised the default in payment of minimum wages or holiday pay or both. The Labour Inspector's claims were served at CVL's registered office. Mr Brill resides, and has his place or places of business, elsewhere than at CVL's registered office. Service was not, therefore, effected on Mr Brill personally.

[15] Nevertheless, Mr Brill attended at the Authority's investigation meeting, not as a representative of CVL but to resist the Labour Inspector's intended claim against him personally. It appears that he provided assistance to the Authority at its investigation of CVL and, at least in respect of the application for authorisation of a claim against him personally, Mr Brill provided evidence to the Authority and made submissions to it.

[16] In the absence of any participation by the company in the Authority's investigation of the Labour Inspector's claims against it, the Authority accepted that CVL had paid Ms Northcroft neither remuneration at the relevant minimum wage rate nor her minimum holiday pay requirements. It required CVL to pay these sums to the Labour Inspector for the use of Ms Northcroft, together with ongoing interest, but the Authority declined to award a penalty against CVL as the Labour Inspector had requested.

[17] At the same investigation meeting, the Authority then turned its attention to the Labour Inspector's application for authorisation to bring a s 234 proceeding against Mr Brill. The Authority was satisfied that, pursuant to s 234(2)(b), there were reasonable grounds for believing that CVL did not have sufficient assets to pay the amounts which the Labour Inspector had claimed against it and which the Authority had awarded. Having heard from Mr Brill about his actions in relation to the payments of wages and holiday pay to Ms Northcroft, the Authority exercised what it considered was its discretion under subs (2) to refuse to authorise the Labour Inspector to bring her action against Mr Brill.

[18] In these circumstances, therefore, the Authority did not get to subs (3). It nevertheless purported to apply subs (3) considerations to its decision refusing an application for authorisation made under subs (2). Although concluding both that Mr

Brill was the sole director of CVL and that he must thereby have been aware of the company's obligations to pay minimum wages and holiday pay, the Authority accepted Mr Brill's statement that he had always considered that his company had met its remuneration obligations to Ms Northcroft and only became aware that there was even any dispute about these entitlements after Ms Northcroft left CVL's employment and lodged a complaint with the Labour Inspector.

[19] In reaching its conclusion, the Authority applied a subs (3) test. In doing so, it interpreted that subsection to say that to be culpable, Mr Brill's actions had to amount not simply to an error in the performance of a genuinely disputed obligation; it said that there had to be a "wilful default". The Authority said that this was by the company, but we think this must have been a mistaken reference to a default by Mr Brill himself.

[20] The Authority considered that two factual findings from Mr Brill's evidence to it saved him from having an action against him authorised. The first was the Authority's acceptance that Mr Brill had sought and obtained advice about the company's employee remuneration obligations from its accountant and had done so in good faith. The Authority found that although the advice received and acted on by Mr Bill was erroneous, there was no tangible evidence that he had deliberately embarked upon a course of action that was designed to deprive Ms Northcroft of her legal minimum entitlements. Second, the Authority found that it had not been proven by the Labour Inspector that Mr Brill deliberately or, it said, "even by implication", directed or authorised any action that resulted in a default in any payments due to Ms Northcroft.[8]

The pleadings in this Court

[21] As already noted, CVL has not challenged or cross-challenged those findings against it, despite having been served with the proceeding and in spite of its connections to Mr Brill who is now represented and who opposes the challenge affecting him personally. In the Labour Inspector's statement of claim, those paragraphs which deal with the Authority's findings against the company have not

[8] At [67].

been pleaded to by Mr Brill and no relief is sought in this Court by the Labour Inspector against CVL as defendant. Paragraph 3 of the plaintiff's statement of claim asserts:

> 3 This election relates to the whole of that determination in which, in particular, the Authority;
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> a) Without further investigation at a subsequent hearing, disposed of the claims commenced by the plaintiff to recover from the first defendant entitlements to payment under the Holidays Act 2003 and under the Minimum Wage Act 1983, and a claim for the payment of interest.
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> b) Found that although the first defendant had not complied with provisions of the Holidays Act 2003 and Minimum Wage Act 1983, it was not appropriate for penalties to be awarded for the breaches of those Acts because the first defendant was unable to pay any amounts ordered; at para [47] of the Authority's determination, and
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> c) Declined to authorise, under section 234 of the Employment Relations Act 2000, the plaintiff to bring an action against the proposed second defendant to recover the payments due under the Holidays Act 2003 and Minimum Wage Act 1983; at para [67] of the Authority's determination.

[22] As pleaded, it was initially unclear whether the plaintiff wished to challenge by hearing de novo or otherwise as required under s 179 of the Act and as the Court has interpreted that phrase together with the non-statutory phrase "non-de novo hearing" in a number of cases. At para 5 of her statement of claim, the plaintiff asserts that the Authority was wrong to have:

> a) Prematurely determined the claim commenced by the plaintiff to recover holiday pay and minimum wages, by making orders requiring the first defendant to pay amounts quantified in the determination,
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> b) Prematurely determined a claim commenced by the plaintiff for penalties, by dismissing those claims,
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> c) Determined, at para [67] of the determination, that as a pre-condition for granting authorisation under section 234 the plaintiff was required to prove that the proposed second defendant had *deliberately* directed or authorised default in the payment of holiday pay and minimum wages.

[23] To add to the confusion, at para 32 of her statement of claim the plaintiff says that she seeks "a full hearing (a hearing de novo) of the application for authorisation

made under section 234 of the Employment Relations Act 2000 in relation to the proposed second defendant."

[24] Finally, at para 33 of the statement of claim the plaintiff pleads:

> If this challenge is upheld by the Court and the plaintiff's application for authorisation is granted, at a subsequent hearing the claims to recover holiday pay and minimum wages brought against the first and proposed second defendants, and the claim for penalties brought against the first defendant, will be presented and argued by the plaintiff, enabling those claims and the liability of the first defendant and proposed second defendant in respect of them, to be determined.

Proposed questions of law

[25] The parties together proposed that the Court should determine a number of preliminary questions of law before considering the merits of the plaintiff's challenge. Although, initially, the plaintiff was trenchantly critical of the Authority's methodology in approaching the plaintiff's s 234 application, the Labour Inspector has elected to challenge the whole of that determination by hearing de novo. In these circumstances it is unnecessary, and perhaps also inappropriate, for the Court to consider whether the Authority erred. Rather, the emphasis should be on an interpretation and application of s 234 to enable the plaintiff's application under that section to be determined, and to guide labour inspectors and the Authority in future cases. The section also has important implications for directors, officers, and agents of companies that may not pay their employees either or both minimum remuneration or holiday pay.

[26] The questions for the Court posed by the parties jointly, and after input from the Court, are as follows. Because of our decision to answer only some of these questions now and to postpone the determination of others until the hearing of the challenge, we have re-ordered these accordingly.

(i) Does s 234 of the Employment Relations Act 2000 require or permit the Court or the Authority to decide, by determination or judgment, the liability of the defendant (Cypress Villas Limited) before determining the plaintiff's application under s 234(2) of the Act,

authorising the Labour Inspector to bring an action for the recovery of the amount claimed against any officer, director or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both?

(ii) Does s 234 allow for a finding of joint and several liability for penalties in respect of both Cypress Villas Limited and Mr Brill if the Court authorises the Labour Inspector to bring an action under subss (2) and (3) of s 234 of the Act?

(iii) In deciding, under s 234(2) of the Act, whether to authorise the Labour Inspector to bring an action against Mr Brill, is the Labour Inspector required to prove that the default in payment of the minimum wages or holiday pay or both, which she says was directed or authorised by Mr Brill, was "personally and deliberately directed or authorised", or that "Mr Brill deliberately embarked on a course of action that was designed to deprive Ms Northcroft of her legal entitlements under the Holidays Act 2003 or the Minimum Wage Act 1983"?

(iv) If the plaintiff is authorised to bring an action under subs (2) against Mr Brill, and if the evidence establishes that Mr Brill, as an officer, director or agent of the company, directed or authorised a default in payment of the minimum wages or holiday pay or both to Ms Northcroft, does his seeking and obtaining advice from the company's accountant that the company would meet its obligations in law by paying Ms Northcroft as it did and in "apparent good faith", afford Mr Brill a defence to an action against him by the Labour Inspector?

The scheme and content of s 234 Employment Relations Act 2000

[27] Section 234 can only be interpreted and applied having regard to the relevant scheme of the Act in which it appears (the Employment Relations Act) Because it deals with minimum entitlements under both the Minimum Wage Act 1983 and the

Holidays Act 2003, those statutes must also be considered as part of the interpretation and application of s 234.

[28] All three Acts are part of what has been long known, albeit informally, as the 'minimum code' regulating employment in New Zealand. The Employment Relations Act goes further than specifying minimum requirements of employment but, nevertheless, does so in conjunction with the Minimum Wage and Holidays Acts.

[29] In essence, the Minimum Wage Act creates a mechanism for the periodic setting by the Executive of minimum hourly, daily, weekly and other rates of remuneration for employees in New Zealand. Parties to employment agreements cannot contract out of those minimum rates by agreeing on lesser payments by employers to employees.[9] The Minimum Wage Act includes a mechanism for recovery of underpaid wages where employers have defaulted under their statutory obligations.[10] The mechanisms for doing so generally follow s 131 and other sections of the Employment Relations Act. The obligation to pay at least minimum statutory wages and other remuneration to employees rests squarely on those employees' employers, whether they be individual persons, companies, incorporated societies, chief executives of government departments, or any of the range of legal entities that can and do employ employees in New Zealand. Minimum wages have been a feature of New Zealand statutory employment law for almost 80 years and are well-known, or ought to be, to all employers.

[30] Likewise, under the Holidays Act, minimum entitlements to annual and public holidays are provided to all employees in New Zealand. The Holidays Act also provides for minimum requirements of holiday pay to be paid by employers to employees, which also cannot generally be the subject of any contracting-out by those parties.[11] As in the case of defaults under the Minimum Wage Act, Labour Inspectors are empowered specifically to recover underpayments of holiday pay for the benefit of employees;[12] and also by proceedings under s 131 and other relevant

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[9] Minimum Wage Act 1983, s 6.
[10] Section 11.
[11] Holidays Act 2003, s 6.
[12] Section 77.

sections of the Employment Relations Act. Minimum holidays and holiday pay, like minimum wages, are a long-established feature of the employment landscape in New Zealand and cannot be unknown to employers or those who advise and represent them.

[31] In addition to the inability in law for parties to contract out of or otherwise avoid these minimum requirements, proof of liability by an employer to make those payments, and non-payment or short-payments, are sufficient to obtain orders from the Employment Relations Authority or the Employment Court. Such orders compensate for underpayments and make available the various enforcement mechanisms in the statutes. An employer's reasons for making such minimum payments are irrelevant to that employer's liabilities. Persons employing employees are therefore expected, and deemed, to know of these minimum requirements and to comply with them. Such reasons for non-compliance as ignorance of the law, commercial imperative, difficulty or even inability to pay or similar excuses, are unavailable to employers to avoid liability.

[32] It is probably not too strong to say that the minimum statutory requirements under these two Acts (and other statutes which make up the minimum code) are sacrosanct. That is confirmed, for example, by the requirement of the Employment Relations Authority that no person is entitled to settle a claim for arrears of minimum wages by agreeing to pay or receive any less than the statutory minima.[13] There is a general community consensus that employees should have at least their minimum remuneration entitlements, whether by way of wages or holiday pay, and any underpayment of these should be able to be recovered in full and expeditiously by Labour Inspectors on behalf of those employees.

[33] That is the longstanding statutory and moral context against which s 234 is to be interpreted and applied.

[34] The purpose of s 234 is to attempt to ensure that minimum employment entitlements (wages and holidays) are available to employees, even where employers which are companies may either be insolvent or otherwise unable to pay those

[13] Employment Relations Act 2000, s 131(2).

minimum entitlements. Section 234 is a liability-transfer provision, available if certain statutory prerequisites are made out. Third parties may be held liable (jointly or severally) for the defaults of their companies if they directed or authorised the defaults, but irrespective of any other elements of their personal culpability.

[35] The section's methodology is to pierce or lift an employing company's corporate veil in limited circumstances upon specific tests being satisfied, and so to sheet home to individual or other corporate persons (as agents) sufficiently associated with an employer company the responsibilities for wages and holiday pay of that company. That purpose is confirmed by the words and phrases of the section itself.

[36] The context in which s 234 came to be enacted in 2000 included the emergence of some employing enterprises where vulnerable employees, many of them new migrants or others with uncertain long-term immigration status, worked for enterprises for excessive periods and for less than minimum wages. Many of these employers were registered companies with few assets, and shareholdings of minimal value. When actions for recovery of sometimes substantial sums of underpaid wages and holiday pay were pursued against these companies, they were put into receivership or liquidation or otherwise, without assets to pay those most fundamental of debts. New Zealand is, notoriously, amongst the easiest countries in which to set up and dismantle companies. In many cases, also, it was believed that the owners of those companies subsequently set up in business again using other corporate vehicles and continued their previous employment practices but insulated against their former corporate liabilities. Significant numbers of very low paid and vulnerable employees were said to have lost their minimum wage and holiday pay entitlements by the proliferation of such practices.[14]

Statutory interpretation by recourse to extraneous materials

[37] Counsel for Mr Brill relied significantly on parliamentary legislative materials in support of his submissions for a restricted interpretation of s 234.

[14] See, for instance, <http://www.scoop.co.nz/stories/GE9911/S00060/worldwide-trend-in-sweatshops-hits-new-zealand.htm>.

However, it is first necessary to examine the circumstances in which courts can use such materials either to interpret a legislative provision or to cross-check the correctness of the Court's interpretation of words or phrases as they appear from the text of the statute.

[38] Where there is an ambiguity apparent in the statutory words, assistance can be had by recourse to legislative materials including explanatory notes to a Bill, the first reading speech particularly of the Minister introducing it to the House, the report of a select committee to which the Bill has been referred, and subsequent Ministerial speeches on a Bill's second and/or third readings. Even when a statutory provision has an apparently plain and unequivocal meaning, cross-checking this against such extraneous materials can serve to confirm that apparent meaning.

[39] Is there an ambiguity in s 234 that would permit the Court to go behind what would otherwise be the plain or unambiguous words of the statute, to resolve such an ambiguity? It is well recognised that a statutory ambiguity cannot come about simply because someone so asserts or even that it may be possible to ascribe another meaning to words used by the Legislature. The test is whether, upon legal analysis, the words and phrases used are capable in law of bearing more than one tenable meaning. If so, then recourse to extraneous materials is permissible. However, modern statutory interpretation also requires the exercise known as 'cross-checking' of even apparently unambiguous wording where new legislation is controversial. In these circumstances, even although the majority of us consider that there is no ambiguity in the relevant parts of s 234, we have nevertheless cross-checked our interpretation of these. The particular ambiguity asserted in this case relates to whether the phrase in subs (3) "… the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both …" requires proof only that this person directed or authorised the default in payment or, on the other hand, additional proof that the person did so knowing that the default directed or authorised amounted to a breach of the relevant statute and so intended that his or her action in directing or authorising was to be unlawful.

[40] A difficulty arises where, in this cross-checking exercise, a very different meaning of a provision appears from that examination of extraneous material, compared with that which the Court has determined from the plain words of the statute. This is just such a case.

[41] Another case in which this arose and was considered by this Court was the judgment of the full Court in *Gibbs v Crest Commercial Cleaning Ltd*.[15] The *Gibbs* case required the Court to interpret provisions of the then new Part 6A of the Employment Relations Act, enacted at the same time as s 234. The controversial provisions appeared, from a plain reading of the text of the Act, to indicate an unambiguous, albeit complex, interpretation and application of them. However, when the cross-checking exercise was undergone, it became apparent that the Legislature had achieved a very different result, arguably even the opposite result, to that which the proponents of the Bill appeared to have intended. Such was the clarity, however, of the words and phrases used, and the absence of provisions to deal with the facts of that case, that the Court was compelled to say that if Parliament had intended to achieve a particular result, then this had not been achieved and should be undertaken by amending legislation and not by its strained and untenable interpretation by the Court.[16]

[42] The Authority in this case interpreted s 234 by recourse to such extraneous materials without explaining how or why it was necessary or able to do so. Its research extended not only to materials from the legislative process but to what it described as "the underlying policy behind it". That appears to have been gleaned from parts of the Select Committee's report.

[43] It is correct, as the Authority noted and relied upon, that the report of the Employment and Accident Insurance Legislation Select Committee contained references to the fact that a key driver of what was to become s 234 was to address the re-emergence of "sweatshops" in New Zealand. The Committee gave several examples of what had occurred in what it had described as "sweatshops" including substantial amounts of unpaid wages due to employees, staff living and working on

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[15] *Gibbs v Crest Commercial Cleaning Ltd* [2005] ERNZ 399.
[16] At [152].

the factory premises in poor conditions, excessively long working hours, employer retention of employees' passports, and preventing employees from having what is described as "any outside contact".[17] It is notable, however, that none of those serious situations is addressed expressly, or even implicitly, by the provisions of s 234 of the Act.

[44] The Select Committee's report then went on to note: "Another common feature has been the mixture of limited liability companies, entirely owned by the individuals who are the employers." That is a somewhat enigmatic reference, apparently to "sweatshops", but complex ownership arrangements by companies and individual persons are not unique to "sweatshops"; they are a feature of both large scale and small scale employment arrangements in New Zealand.

[45] The Select Committee's report then referred to a Department of Labour report of a case:[18]

> … where the owner-employer declared bankruptcy just prior to the hearing. No assets were therefore available for distribution to employees. We believe that without a degree of personal liability the ability to effectively enforce the employment laws on such employers is severely compromised.

[46] That reference also is enigmatic because s 234 is not only directed to companies which are either in receivership or liquidation (but not individual persons who are bankrupts) but extends also to circumstances where such a company is likely to be unable to pay the amounts claimed as arrears of minimum wages and/or holiday pay.

[47] The Select Committee's report then said: "The Bill is not intended to penalise an honest employer whose business is failing, but to deal effectively with any deliberate attempt to avoid responsibility." That sentiment is, however, not reflected in the words used by Parliament. There is no reference at all, for example, to an "honest employer", however that broad phrase may be defined. Nor is s 234 penal, in the sense that it penalises persons. Rather, it is compensatory in nature and only applies in quite limited circumstances. It is surprising that if the foregoing

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[17] Employment Relations Bill 2000 (8-1) (Select Committee report) at 41-42.
[18] At 42.

passages summarise the Select Committee's intentions for the Bill, this was not reflected in the wording used and adopted by the House.

[48] Finally, there is another account of the Bill in the Select Committee's report which is disconnected from the words and phrases used by Parliament. The Committee said: "Our intention is … that [s 234] … will apply only where other avenues for recovering the amounts directly from the company have failed, because of insufficient assets …".[19] Section 234 clearly provides otherwise. Recovery against an individual may be commenced and pursued not only where "other avenues for recovering the amounts directly from the company have failed", but in parallel with those other avenues and judgment may be entered jointly and severally. That is reflected in the requirement of the statutory test under s 234(2) that a Labour Inspector may be authorised by the Authority to bring such a claim where "there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full …". So, in this regard as well, the clear words of the legislation provide for a broader application of s 234 than the Select Committee reported to the House.

[49] A Select Committee report to the House on a Bill is not an authoritative legal interpretation of the proposed Bill. It is a political assessment of the Select Committee's intention. It is provided in order to explain to the House the Committee's reasoning behind any changes that it recommends to the Bill, having considered submissions on it or, to the extent that there may not have been any submissions on a particular provision, the Committee's assessment of the desirability of a particular provision.

[50] In such a situation, as the Court concluded in the *Gibbs* case, a court's obligation is to interpret and apply the words and phrases adopted by the House in passing a Bill into an Act, whether or not these are at variance with the stated intention of a Select Committee of the House. Legislation is open to amendment if Parliament considers that a court's interpretation of it is not what was desired by the Legislature; it is not an option for an interpreting court to prefer a meaning that contradicts the plain words (or absence of them) in legislation.

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[19] At 42.

[51] A better extraneous indication of Parliament's intention is a comparative examination of the Bill as introduced by the Minister and as it was passed into law after the changes including those recommended by the Select Committee. In relation to what was to become s 234, there were a number of significant changes between those documents.

The legislative history of s 234

[52] As originally proposed by the Minister of Labour in the Employment Relations Bill, what was to become s 234 was of much broader application than the section that was eventually enacted. The original clause (245) appeared under a heading "Liability of directors, etc, of body corporate" and provided:[20]

> Where a *body corporate* that is an employer *fails to pay* to any employee of that body corporate *any wages or holiday pay or other money payable by the body corporate to the employee under the Minimum Wage Act 1983 or the Holidays Act 1981, any of* its officers, directors, or agents who directed, authorised, *assented to or acquiesced in the failure to pay* are, with the body corporate, jointly and severally liable to pay the employee the wages, holiday pay, or other money that the body corporate *has failed to pay*. (Emphasis added by italics of words or phrases not subsequently enacted)

[53] Introducing the Employment Relations Bill to the House at the time of its first reading, the Minister made no reference to the need for cl 245. The Bill was then referred to a select committee.

[54] The Minister's second reading speech, as recorded in Hansard, ends abruptly, and apparently inexplicably, after reference to Part 6 of the Act. The Minister's speech notes for the second reading give some indication as to what she may have been proposing to say about cl 245 and the Select Committee's report, as follows:[21]

> … the Select Committee has suggested some technical amendments surrounding the transitional arrangements that will lead us into the future of employment relations legislation for New Zealand. Most significant in these changes are those related to those Directors of Companies deliberately avoiding responsibilities for the payment of minimum wages and minimum holiday entitlements where the company has no funds or has become insolvent. It is a protection that has become particularly necessary in the

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[20] Employment Relations Bill 2000 (8-1), cl 245.
[21] Hon Margaret Wilson "2nd reading speech notes Employment Relations Bill", 8 August 2000. <http://www.beehive.govt.nz/release/2nd-reading-speech-notes-employment-relations-bill>.

> context of cases like the recent sweat shop cases in Auckland. The Select Committee has proposed that it be redrafted to clarify the situations in which it can apply and that proceedings can only be actioned by Labour inspectors, not by unions or employees.

[55] The Department of Labour's report to the Select Committee made some recommendations for change to the Bill. These included that the clause be clarified to:[22]

- ensure that recourse to the power in cl 245 is available only to Labour Inspectors;
- make clear that the clause covers only minimum wages and holiday pay that are payable under the Holidays Act and the Minimum Wage Act;
- make clear that the clause would be applicable only where avenues for recovering the amounts directly from the company have failed because of insolvency; and
- apply the power only to companies.

[56] With one minor exception, each of the recommendations appears to us to be reflected in what is now s 234. That 'minor exception' is that the clause is applicable not only where avenues for recovery of monies directly from a company have failed because of insolvency. Section 234 as enacted is broader than that. Recovery against individual persons may be commenced and pursued before recovery efforts have been exhausted against the company. Further, it is not only in situations of declared insolvency in which recovery from third parties may be pursued – probable inability to pay (as in this case) is an additional statutory ground.

[57] The broad provision as originally proposed by the Minister was narrowed by the House in several significant respects in response to the Select Committee's report. However, some of those changes were not reflective of some of the more

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[22] Department of Labour "Employment Relations Bill: Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee" at 190.

rhetorical statements in the Select Committee's (majority) report which, if they had been the subject of other amendments, would have narrowed what became s 234 even further.

[58] Mr Caisley was driven to argue that the Select Committee's apparent intention about the limited scope of s 234 is implicit in the words themselves. So, for example, when it was put to him that there is no reference to 'honest employers' in s 234 (that is, those whom counsel submitted were intended not to be caught by s 234), he submitted that the Court should so interpret the section by finding that it is applicable only to dishonest employers in the phrase "direct or authorised the default". Mr Caisley distinguished that phrase from other phrases such as "direct or authorise the payment", "direct or authorise the transaction", "approve the annual accounts", or "sign the employment agreement". So, counsel submitted, third parties should only be caught by s 234 if they can be proved to have been aware that their action amounted to a default and that this was authorised by them.

[59] As a hypothetical example to support his submission, counsel used Mr Brill's circumstances in this case. Mr Caisley accepted, for the sake of argument, that although Mr Brill might have authorised the employment of Ms Northcroft with particular hours of work and at a particular wage, that was not the authorisation of a default because those hours at those wages were a lawful employment arrangement, and the employee would have received at least the minimum wage for those hours. Mr Caisley hypothesised that if Ms Northcroft worked far more hours than Mr Brill was aware of and more than the company's accountant was aware of, liability should not fall on Mr Brill for authorising that default because all that he authorised was entry into a lawful employment agreement. Counsel submitted that it was only if Mr Brill knew of the default and authorised that known default, liability could attach to him as a director under s 234.

Deliberateness of default

[60] We consider it is unhelpful and inappropriate to take a phrase ("dishonest employers") from a parliamentary speech and attempt to interpret s 234 as applying only to such persons. We have already concluded that just what may have been

meant by "dishonest employers" is enigmatic. We do not accept Mr Caisley's submission that an employer who directs or authorises a default in payment of minimum wages or holiday pay is, thereby, a dishonest employer if that person did so knowing and intending that such authorisation or direction would be, and was, a breach of those minimum standards statutes.

Section 234 analysed in detail

[61] The first prerequisite for an application under s 234 is that a Labour Inspector has commenced an action in the Authority against a company to recover any money payable as minimum wages or holiday pay to an employee of the company. It is notable that this section only requires the commencement of proceedings in the Authority, and not their conclusion or even their investigation by the Authority, before s 234 may be engaged. That commencement need only be by the filing of a statement of problem, but may also occur later in the Authority's process. That commencement has occurred already in this case, so that the Labour Inspector's s 234 application to the Authority in respect of Mr Bill was made in accordance with the section.

[62] Next, under subs (2), the Labour Inspector must establish to the Authority's satisfaction on the balance of probabilities, that the amount claimed in the action, if judgment is given for that amount, is unlikely to be paid in full. Further, the Labour Inspector must establish that this improbability is either caused by the company's receivership or liquidation; or that there are reasonable grounds for the Authority to believe that the company does not have sufficient assets to pay the amount claimed in full.

[63] Those tests having been established to that standard, the Authority (or now the Court) may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director or agent of the company who directed or authorised the default in payment of the minimum wages or holiday pay. The foregoing all occurs pursuant to subs (2).

[64] Section 234(3) then addresses the Labour Inspector's proceeding against the individual persons which the Authority (or the Court) has authorised. The Labour Inspector must prove that one or more of those individual persons directed or authorised the default in payment of minimum wages or holiday pay or both. If the Labour Inspector proves (on the balance of probabilities) that direction or authorisation, the individual or individuals is or are, with the company, jointly and severally liable to pay the amounts recoverable by the Labour Inspector in the action. Judgment may be given accordingly.

A statutory piercing of the corporate veil?

[65] As Mr Caisley reminded us, legal recognition of the separate corporate legal identity of companies has been established ever since a Whitechapel shoe maker named Aaron Salomon invoked the provisions of the English Companies Act 1862.[23] In New Zealand this was endorsed somewhat more recently by the Privy Council in *Lee v Lee's Air Farming Ltd*.[24] The principle is that companies are separate corporate legal entities, as is liability for their debts which does not rest with others associated with them. As Mr Caisley accepted, both the common law and statutory law have subsequently developed the concept of corporate veil lifting or piercing in limited circumstances. Counsel described these as extraordinary and this statutory corporate veil lifting under s 234 is "even more extraordinary". That is so, counsel said, because this is not lifting a corporate veil to pursue only shareholders and directors but, at least in part, has the potential to "go after work colleagues and employees in law firms and accounting firms and other business advisory firms."

[66] Piercing the corporate veil, which is what s 234 permits in limited circumstances, runs contrary to the general legal recognition of companies as legal entities, separate and independent of those who own and/or operate them. As such, courts are cautious in interpreting an intention on the part of Parliament to pierce the veil, and require clear expression of a provision which purports to do so. Here there are two separate discretions vested in the Authority which, exercised on proper grounds, may mean that in appropriate cases, the corporate veil will not be pierced.

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[23] *Salomon v Salomon & Co Ltd* [1897] AC 22 (UK).
[24] *Lee v Lee's Air Farming Ltd* [1960] UKPC 33, [1961] AC 12.

Those discretions further limit the extraordinary process of veil piercing mandated by s 234. So the section contains safeguards to be considered on a case-by-case basis, before the corporate veil may be lifted or pierced.

[67] Those discretions are, first, under s 234(2) as to whether a Labour Inspector is to be authorised to commence proceedings against a third party. We will outline later the circumstances in which the Authority might exercise its discretion not to authorise a Labour Inspector.

[68] The second and independent discretion is contained within subs (3). Even if it is established, on the balance of probabilities, that the third party directed or authorised the default in payment of minimum wages and/or holiday pay, the Authority has a discretion whether to give judgment against such third person or persons who are jointly and severally liable along with the company and/or others of them.

[69] As in the case of the first discretion under subs (2), the subs (3) discretion not to give judgment will need to be exercised carefully, on principle, and in practice may be rarely exercised. It would be unwise to venture circumstances in a factual vacuum in which the Authority might elect to exercise that discretion against giving judgment where there is joint and several liability. But it is, nevertheless, a discretion that may ameliorate what might otherwise be considered to be a draconian piercing of the corporate veil, not by judge-made law but by parliamentary exception to the principle of corporate separateness.

The sequence of applications

[70] We now refer to the first question posed for decision by the Court: see [26](i) above. It asks, essentially, whether the Authority must first establish the company's (CVL's) liability for arrears of wages and holiday pay, before it can determine the Labour Inspector's application under s 234 of the Act, authorising her to bring an action for the recovery of the amount claimed against any officer, director or agent of the company who directed or authorised the default in payment of the minimum wages or holiday pay or both.

[71] This question is decided as a matter of interpretation of the plain words of s 234. The opening words of subs (1) ("where a Labour Inspector commences an action in the Authority against a company to recover any money payable …") means that the only restriction on a Labour Inspector's application under s 234 for orders against a third party is that the Labour Inspector's case against the company has been commenced. Equally, a Labour Inspector must have commenced a claim against the company before a s 234 remedy can be invoked. Thus, an application for authorisation to claim against a third party may be filed at the same time as, or at any time after, the commencement of the Labour Inspector's proceedings against the company. That may even be following a determination by the Authority or a judgment delivered by the Court and recovery of the amounts ordered against the company has proved difficult or impossible. An application for an order against a third party may be filed where the Labour Inspector has been able to recover part of the amount due against the company but there is an outstanding balance. Theoretically, at least, a Labour Inspector may make an application for authorisation by the Authority up to the point at which any limitation period expires. The application against the company may be investigated at the same time as the question whether to authorise a claim against a third party or the subs (3) investigation takes place.

Does s 234 apply to actions for penalties?

[72] The answer to this question is also determined by reference to the plain words of s 234(1). The parties are not in disagreement about the answer. Applications under s 234 are limited to those against a company "to recover any money payable by way of minimum wages or holiday pay to an employee of the company". Just as the applicability of s 234 does not extend to claims for penalties, nor does it extend to proceedings for wages or holiday pay recovery where the amount of the claim exceeds the statutory minima. Section 234 is a statutory mechanism designed to include employees' claims to minimum requirements relating to wages and holiday pay only.

Onus and burden of proof required under s 234(2)

[73] This is a more controversial question of interpretation of the legislation. A Labour Inspector who applies for authority to bring an action for recovery against a third party must establish on the balance of probabilities that the amount claimed in the action (by way of minimum wages or holiday pay or both) against the company, if judgment (or a determination by the Authority) is to be given for that amount, is unlikely to be paid in full. The Labour Inspector must establish to the Authority (on the balance of probabilities) one of two tests. The first is that a failure to recover that amount is or will be by reason either of the company's receivership or liquidation. The alternative (second) test is that the Labour Inspector must satisfy the Authority on the balance of probabilities that there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full. The foregoing evidential requirements both rest on the Labour Inspector and must be established on the balance of probabilities. That is clear from the plain words of s 234. The onus of proof rests on the Labour Inspector and the burden is to the balance of probabilities standard under s 234(2).

[74] Because the burden of proof is not identified expressly under subs (3) and is not adverted to at all in relation to the second part of subs (2), it is necessary to decide what Parliament intended these burdens of proof to be.

[75] In subs (3) the phrase "it is proved" clearly anticipates that the onus of proving the prerequisites under that subsection rests with the Labour Inspector. We conclude that proof is to be to a balance of probabilities standard consistent with the civil nature of the proceeding.

[76] Whether, and if so to what standard, it must be proved under subs (2) that any officer, director or agent of the company directed or authorised the default in the payment of the minimum wages or holiday pay or both, is a more difficult question because it has not been addressed expressly by Parliament at all.

[77] As we have already noted, by reference to the word "may" in subs (2), the Authority exercises a discretion in authorising the Labour Inspector to bring an

action for recovery against a third party. There will be, however, relatively narrow grounds, and probably few occasions, where the Authority will exercise that discretion against authorising the Labour Inspector to issue proceedings to recover from a third party.

[78] Instances in which the Authority may exercise its discretion not to authorise the bringing of an action against a third party might include, for example, such clear and inarguable circumstances that the named proposed third party has been declared bankrupt by the High Court; that the named proposed third party has been named erroneously (such as where he or she is the same name as the proposed third party but has never had any association with the company); that the proposed third party only became involved with the company after the defaults occurred; that the proposed third party ceased any involvement with the company before the defaults began; and the like.

[79] In being asked to exercise that discretion, the Authority will have to act in the same way as a court or tribunal must do before striking out a proceeding other than on its merits. The Labour Inspector's application for authorisation will have to be shown to the Authority to be sufficiently sure of dismissal on its merits that it cannot succeed and, by the exercise of the discretion against authorising a s 234 proceeding, should proceed no further.

[80] Mrs Carr, for the plaintiff, submitted that, despite s 234(2) not referring to this, a Labour Inspector must establish what she described as "a prima facie case" against a third party to enable the Authority to authorise the Labour Inspector to bring a s 234 proceeding against that person. In addition to a prima facie test not being referred to in the legislation (in contrast to a balance of probabilities test being required elsewhere), using a concept that is more commonly applied in criminal law may be problematic in civil proceedings such as these. A "Prima facie" case means establishment of the necessary ingredients of that case to a point where, in the absence of evidence to the contrary, no further proof is required to establish a case beyond reasonable doubt (criminal) or on the balance of probabilities (civil). While that may be an acceptable standard to apply under subs (3) if the individual person

against whom the Authority has authorised a proceeding does not defend it, neither a prima facie case nor proof of an arguable case is required under subs (2).

[81] We are confident that proof to the standard of a prima facie case is not what Parliament intended for the test of authorisation of the Labour Inspector under s 234(2).

Is proof of direction or authorisation of default required under s 234(2)?

[82] As to what the Labour Inspector must establish in addition to what one might call the financial tests under subs (2), we do not accept the defendant's submission that the Labour Inspector is required to prove at the subs (2) stage (whether to a balance of probabilities, a prima facie case or an arguable case standard) that the proposed third party was an officer, director or agent of the company who directed or authorised a default in payment of the minimum wages or holiday pay or both. To do so would duplicate unnecessarily and inappropriately the requirements of subs (3) where, if authority is granted to bring the proceeding, the Labour Inspector must establish those matters to a balance of probabilities standard. It would be a nonsensical reading of subss (2) and (3) for requirements of proof of allegations, whether to the same or different standards, to be provided at both stages.

[83] In the same way as a plaintiff may issue a claim against a defendant, making allegations of fact which, if proven, will constitute a cause of action known to law, a Labour Inspector is not required to do more than this under subs (2). If leave is granted and the Authority moves to subs (3) in respect of the third party, it may require some further particularisation of the Labour Inspector's allegations against the third party. But unless the circumstances are such that the Authority exercises its discretion not to grant authorisation under subs (2) (in cases such as those hypothesised above), the Labour Inspector's pleading obligations under subs (2) require only that the proposed third party or parties be named; that they are identified as being either one or more of a director, officer or agent of the company; and that the Labour Inspector alleges that he, she, it or they directed or authorised the default.

Service of application for authorisation to bring action against third party?

[84] Section 234 contemplates and, in our judgment, requires that the Labour Inspector must identify the person or persons in respect of whom it seeks the Authority's authorisation to bring an action under s 234. That nominated person must be an officer, director or agent of the company. We later attempt to define what is meant by "officer" and "agent" of the company, "director" being self-explanatory. We disagree with Mrs Carr's submission that an application by a Labour Inspector, authorising the Labour Inspector to bring an action against a third party, need not be on notice to that proposed third party and, it would follow logically, should not therefore allow that proposed third party to be heard on the application. It is a fundamental tenet of natural justice that, where there are proceedings which may affect another person, unless there are exceptional circumstances (such as constitute the reasons for 'without notice' applications) such a person affected should know of the proposed proceeding and have an opportunity to be heard on it.

[85] A s 234 application should almost always be on notice. That is more particularly so if, as we have determined, the question of that third person's potential liability is only, at the subs (2) stage of the matter, an allegation made by a Labour Inspector.

[86] That right of a proposed third party and obligation on the Labour Inspector and the Authority is confirmed by s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA). Although under a heading "Search, arrest and detention", the words of s 27 extend beyond criminal law processes and include proceedings such as this, when it says:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[87] The Labour Inspector's application for authorisation under subs (2) must be served on the proposed third party and he, she or it given an opportunity to be heard by the Authority before it decides whether to exercise its subs (2) discretion to authorise the action against that third party. In practice, this will enable the Authority to have all matters before it when deciding whether or not to exercise that residual discretion under subs (2).

[88] Whilst the application to the Authority for authorisation to bring an action against a third party must allege that the named person or persons has/have directed or authorised the default in payment of the minimum wages or holiday pay or both, this allegation will be in the nature of pleadings contained in a statement of problem or statement of claim. Until the subs (3) inquiry, it will not then require evidence in support of that allegation to be adduced to the Authority. That is because if authorisation is given by the Authority, the claim against the third party will be an employment relationship problem to be investigated by the Authority including, if appropriate, by disclosure and production of relevant documents and other investigative processes by which the Authority operates in other cases.

What is "default in payment of the minimum wages or holiday pay or both"?

[89] Section 11 ("Recovery of wages") of the Minimum Wage Act 1983 uses the same word used in s 234, "default", as follows:

> Without affecting any other remedies for the recovery of wages or other money payable by an employer to any worker whose wages are prescribed under this Act, where there has been any *default* in payment of any such wages or other money or where any payment of any such wages or other money has been made at a rate lower than that prescribed under this Act or otherwise legally payable to the worker, the whole or any part, as the case may require, of any such wages or other money may be recovered by the worker or by a Labour Inspector to the use of the worker by action commenced in the Employment Relations Authority in the same manner as an action under section 131 of the Employment Relations Act 2000, notwithstanding the acceptance by the worker of any payment at a lower rate

> or any express or implied agreement to the contrary, and subsection (2) of that section shall apply accordingly. (Emphasis added)

[90] Although s 11 of the Minimum Wage Act appears to differentiate “default” from payment of wages or other money at a lower rate than that described in the Act, this cannot mean logically that the reference in s 234 to “default” can cover only the situation where an employer has paid no remuneration at all to an employee. It must, sensibly, include not only that situation (which will be rare) but also the apparent alternative in s 11 of the Minimum Wage Act, the payment of wages at a lower rate than that prescribed in the Act. This (s 11) is the primary statutory ground for recovery of below-minimum wages paid by an employer to an employee or employees.

[91] Similarly, ss 77-79 of the Holidays Act 2003 provide for the recovery by a Labour Inspector of unpaid holiday pay or leave pay to which an employee is entitled under the Holidays Act. Likewise, under s 77, s 131 of the Employment Relations Act applies to such proceedings, “with all necessary modifications”. However, the word “default” is not mentioned in the relevant sections of the Holidays Act.

[92] We conclude that a “default” in the payment of minimum wages or holiday pay, or both, is the non-payment of those amounts, whether by a failure to pay, a refusal to pay, or any other description or qualification of the non-payment. It does not connote implicitly notions of intention or deliberateness. It is well established ‘minimum code’ employment law that these additional attributes are irrelevant to recovery for non-payment.

[93] Dictionary meanings of the word “default” are consistent with that interpretation and application of it. Butterworths New Zealand Law Dictionary defines “default” as “an omission of that which one ought to do; the failure to perform a legal or contractual duty or to observe a promise”.[25] A similar definition is

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[25] P Spiller, *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis NZ Ltd, Wellington, 2011).

found in a standard dictionary: "failure to fulfil an obligation, esp. to pay money, appear in a law court, etc".[26]

[94] We consider that the word "default" in subs (3) simply means the failure to comply with the relevant minimum code legislation and to make a required payment. It does not import necessarily notions of deliberateness to breach the law on the part of the third party who directed or authorised the default just as the company's default or failure to pay does not need to be shown to have been deliberately intended in the way that counsel for the proposed second defendant argues subs (3) should be interpreted. We do not consider that the matters requiring proof by a Labour Inspector for the recovery of minimum code wages and holiday pay should be more onerous (in the sense of having to prove a deliberate intention to break the law, knowing that to do so will be a breach) where the claim is against a third party under s 234, than in the Labour Inspector's proceeding against the company where no such higher standard of proof is required.

What does "directed or authorised the default in payment" mean?

[95] We have already determined the meaning of "default"; and its use in the above phrase will inform the next question interpreting and applying the words "directed or authorised".

[96] These words connote the doing of something by the third party as opposed to that person's passivity alone, for which that person will not be liable. 'Directing' connotes the giving of an instruction to another to do something and 'authorising' connotes the giving of consent to another to do something, sometimes at the request of another person. That is consistent with the legislative history of s 234 dealt with earlier in this judgment. Whereas, in the Bill as originally introduced, the words "assented to or acquiesced in" were alternatives to "directed [and] authorised", these were later deleted, emphasising the wish of Parliament that liability would attach to some overt positive action taken by the third party.

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[26] D. Thompson (ed) *Concise Oxford Dictionary,* (9th ed, Clarendon Press, Oxford, 1995).

[97] Put another way, simply because a third party is an officer, director or agent of the company, he or she cannot be liable under s 234 by way of that status alone.

Who are "officers", "directors" or "agents" of companies?

[98] The identity of a company's director is easily ascertained and obvious. A director is a statutory officer of a limited liability company and appears as such in required registration documentation. The reference to a "director" in s 234 must mean to a director holding that office at the time of the alleged default. That is because that office holding is linked to acts of direction or authorisation of the default. Thus, a proceeding can be brought against someone who was a director at the time of those events but has subsequently ceased to be a director. Likewise, an application under s 234 cannot be made in relation to a person in the capacity of a director who has become a director of the company only subsequently to the alleged direction or authorisation.

[99] The other two categories of third party under s 234 are less clearly defined. A director is an officer of a company but the section clearly contemplates that there will be persons meeting the definition of "officer" who are not directors. The New Zealand Law Dictionary[27] defines "officer" by reference to other legislation and case law as "One who holds an office of authority or trust in an organisation, such as a corporation or government department". That dictionary defines "office" relevantly as:

> A position of authority to which duties and functions are attached; an independent post, with some degree of permanence, to which successive people can be appointed. Thus, an officer is one who holds a position of rank or authority. This may be in the nature of a director of a private company or voluntary association …

[100] Other definitions of "officer" are: [28]

> A person holding a position of authority or trust, esp. one with a commission in the armed services, in the mercantile marine or on a passenger ship. … A holder of a post in a society (e.g. the president or secretary) …

[27] *Butterworths New Zealand Law Dictionary*, above n 25.
[28] D Thompson ed *Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford, 1995).

and:[29]

> Someone who holds an office of trust, authority or command. … In corporate law, the term refers esp. to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary or treasurer.

[101] In the context of a company (the relevant Acts not making reference to "officer" or otherwise assisting in the definition),[30] we consider that s 234 is intended to cover persons involved at a senior level in the directorate or management of a company and, in particular, who may have an executive or managerial responsibility for the employment of staff and the payment to them of their remuneration. Whether someone is an "officer" under s 234 will not turn only or even substantially on whether that word is present or absent in his or her title. Determining whether someone is an officer will be a question of fact and degree to be determined in each case by the Authority or the Court.

[102] Turning to the definition of an "agent" under s 234, this is similarly a matter on which only general guidance can be given for determinations in particular cases. We consider that the word "agent" was added by Parliament to take account of the now common out-sourcing of payroll functions by many companies, both large and small. As this case seems to exemplify, many small companies delegate management of payroll to their chartered accountants or other providers of a range of professional services to small companies. Larger companies often use electronic generic payroll systems which produce outcomes from inputted data, such as an annual salary or periodic rate of pay, hours worked, bespoke payments, deductions to external agencies such as the Inland Revenue Department, the Ministry of Social Development, and the like.

[103] In these sorts of cases, however, the provider of those electronic services may not necessarily fall within the definition of agent, although the person in the company providing the data may be caught by s 234, especially if he or she is an officer of the company. We do not know whether such electronic programs screen for and identify remuneration payments that may be in breach of the Minimum Wage

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[29] B A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, USA, 2009).
[30] The Companies Act 1993 and the Receiverships Act 1993.

Act or the Holidays Act. There may be other agents of companies who are their professional advisers who may direct or authorise payments of wages and holiday pay who will come within the definition of agent for the purposes of s 234. An "agent" may be an animate person or a corporate person: that is, another company, a partnership etc.

[104] Whether any person is an agent of a company will have to be determined by the Authority or the Court on a case-by-case basis, reflecting the infinite variety of agency arrangements that companies may have for the remuneration of their employees including for ensuring that minimum pay and minimum holiday pay are provided. Without determining the issue in this case (because the s 234 application is only made against Mr Brill as a director), a company's chartered accountant, advising on and performing payroll functions, may well constitute an agent under s 234.

Application of s 234 to this case

[105] So, in the circumstances of this case, s 234 allowed the following process to take place. First, the Labour Inspector commenced a claim for unpaid wages or holiday pay against CVL and specified the amount of the claim or claims made in that proceeding. This was done by the plaintiff's statement of problem (in the Authority) and now by her statement of claim (in the Court). Before the Authority determined the Labour Inspector's claim against the company, the Labour Inspector was able to and did apply to the Authority to authorise her to bring an action for recovery of those amounts against Mr Brill as an officer, director or agent of CVL. That, too, was sought in the Authority statement of problem and now in the Court statement of claim.

[106] To obtain that authorisation from the Court, the Labour Inspector will now have to persuade it, on the balance of probabilities, either that CVL is in receivership or liquidation; or, more probably in this case, that there are reasonable grounds for believing that CVL does not have sufficient assets to pay the amounts claimed by the Labour Inspector against it. Although the Authority so concluded, she (the Labour Inspector) may have to do so in the Court proceedings unless Mr Brill concedes this

point. That is because the Labour Inspector has elected to challenge the Authority's determination by hearing de novo under s 179.

[107] If the Court is satisfied to a balance of probabilities standard that one of these financial tests is met, it may exercise its discretion to authorise the Labour Inspector to bring an action against Mr Brill.

[108] Following that decision, if the Court is satisfied that Mr Brill, as an officer, director or agent of the company, directed or authorised the default in those payments, then he will be jointly and severally liable (with the company) to pay the amounts recoverable by the Labour Inspector in the proceedings, and the Court may (exercising the further discretion in s 234(3)) give judgment accordingly. That case, too, will have to meet the balance of probabilities standard of proof.

[109] The next step in the proceedings is, therefore, a hearing of the Labour Inspector's application to the Court to authorise her claim against Mr Bill personally. As set out above, that will require the Labour Inspector to persuade the Court, on the balance of probabilities, that CVL is either in receivership or liquidation or, alternatively, that there are reasonable grounds for believing that the company does not have sufficient assets to pay the amounts claimed by the Labour Inspector against it.

[110] If she is so authorised by the Court, the Labour Inspector's claims against Mr Brill will then be heard and decided.

Answers to questions posed

[111] The formal answers to the four preliminary questions posed for decision by the Court are summarised as follows:

(i) Does s 234 of the Employment Relations Act 2000 require or permit the Court or the Authority to decide, by determination or judgment, the liability of the defendant (Cypress Villas Limited) before determining the plaintiff's application under s 234(2) of

the Act, authorising the Labour Inspector to bring an action for the recovery of the amount claimed against any officer, director or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both?

Answer: No, for the reasons set out in the foregoing judgment.

(ii) Does s 234 allow for a finding of joint and several liability for penalties in respect of both Cypress Villas Limited and Mr Brill if the Court authorises the Labour Inspector to bring an action under subss (2) and (3) of s 234 of the Act?

Answer: No. Section 234 is limited to actions to recover money by way of minimum wages or holiday pay and does not extend the same liability for penalties to another person.

(iii) In deciding, under s 234(2) of the Act, whether to authorise the Labour Inspector to bring an action against Mr Brill, is the Labour Inspector required to prove that the default in payment of the minimum wages or holiday pay or both, which she says was directed or authorised by Mr Brill, was "personally and deliberately directed or authorised", or that "Mr Brill deliberately embarked on a course of action that was designed to deprive Ms Northcroft of her legal entitlements under the Holidays Act 2003 or the Minimum Wage Act 1983"?

Answer: Section 234(2) does not require proof by the Labour Inspector that Mr Brill directed or authorised the default in payments of Ms Northcroft's leave entitlements under the Holidays Act 2003 or the Minimum Wage Act 1983. Under s 234(3), however, the Labour Inspector must establish to a balance of probabilities standard that Mr Brill directed or authorised those defaults, that is that he did so by a positive act or acts rather than by mere

passivity. Section 234(3) does not, however, impose a more onerous burden of proof on the Labour Inspector in respect of a third party covered by that section than is required in respect of the employer company. It is unnecessary under s 234(3) to establish that Mr Brill directed or authorised the defaults deliberately in the sense of having embarked on a course of action that was designed to deprive Ms Northcroft of her legal entitlements.

(iv) If the plaintiff is authorised to bring an action under subs (2) against Mr Brill, and if the evidence establishes that Mr Brill, as an officer, director or agent of the company, directed or authorised a default in payment of the minimum wages or holiday pay or both to Ms Northcroft, does his seeking and obtaining advice from the company's accountant that the company would meet its obligations in law by paying Ms Northcroft as it did and in "apparent good faith", afford Mr Brill a defence to an action against him by the Labour Inspector?

Answer: We consider that this question cannot be answered in a factual vacuum without evidence and findings as to what Mr Brill may have done about seeking advice from the company's accountant about its obligations in law. In addition to the factual evidence, the inquiry will address whether, acting on incorrect legal advice (provided on request by a professional consultant), provides Mr Brill with a defence to a claim under s 234 or, if not, the answer also needs to consider the quantum of any claim and how the ultimate discretion under s 234(3) is exercised.

The parties' unanswered question

[112] The remaining question being so fact-dependent, it cannot and should not be answered in a vacuum in the same way that we have answered the previous

questions of law. To determine whether what Mr Brill did or did not do in relation to Ms Northcroft's wages and holiday pay was lawful, requires us first to determine what Mr Brill did or did not do. There will be an infinite variety of actions and inactions that officers, directors or agents of a company may do in relation to the minimum wages and holiday pay due to employees which will affect questions of their lawfulness and, consequently, the application of s 234.

[113] We have, therefore, decided that to determine the challenge fully, the Court needs to hear and see the evidence of the parties (including relevant documents that may be disclosed in the course of preparing for the hearing).

[114] We reserve costs on the preliminary questions decided by this judgment.

Where to from here?

[115] The Authority's determination dismissing the Labour Inspector's application for authorisation to commence an action against Mr Brill turned not only on what we have determined was an incorrect interpretation of the s 234 procedure, but also on the application of legal tests which we have yet to determine based on disputed facts. For this reason, therefore, the Labour Inspector's challenge will not be able to be determined until judgment has been given finally.

[116] In accordance with our conclusions above, the Labour Inspector will bear the onus (under s 234(3)) of persuading the Court on the balance of probabilities that Mr Brill directed or authorised the company's default in payment of minimum wages and/or holiday pay to Ms Northcroft. The Labour Inspector should present her case first at the hearing followed by Mr Brill's case. The Registrar should now arrange a telephone directions conference with a Judge to timetable this.

ME Perkins
Judge
(For himself and Chief Judge GL Colgan)

Judge Christina Inglis (Dissenting)

[117] I have had the opportunity of considering the majority's judgment. While I agree in part, I would answer a number of the questions of law differently for the reasons outlined below.

Question 1: Does s 234 of the Employment Relations Act 2000 require or permit the Court or the Authority to decide, by determination or judgment, the liability of the defendant (Cypress Villas Limited) before determining the plaintiff's application under s 234(2) of the Act, authorising the Labour Inspector to bring an action for the recovery of the amount claimed against any officer, director or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both?

[118] I agree with the majority that s 234 does not require the Authority or the Court to decide the liability of the employer before determining an application by the Labour Inspector for authorisation to bring a recovery action. That emerges from the words of s 234(1), which only requires that the Labour Inspector has commenced an action against the employer.

[119] It is clear from the plain wording of s 234 that neither the Authority nor the Court is prevented from deciding liability of the employer before determining the application for authorisation. I agree with the submissions advanced on behalf of the Labour Inspector that a live recovery action against the employer must be before the Authority (or Court) at the time an application under s 234 is made. In other words, and as Mrs Carr observed, there is effectively a window of opportunity for the Labour Inspector to commence the authorisation process, namely between the date on which the recovery action is commenced against the employer and the date on which determination or judgment on that recovery action is given. This follows from the wording of s 234(1), which refers to the commencement (not determination) of an action against the employer and s 234(2), which is predicated on the existence of a future (not past) event, namely judgment being given for the amount claimed.

Once judgment has been given the future event no longer exists and the window of opportunity for bringing an application for authorisation closes.

[120] I would answer question 1, as follows. Section 234 does not require the Authority or Court to decide the liability of the employer before determining an application for authorisation. It does however permit it.

Question 2: Does s 234 allow for a finding of joint and several liability for penalties in respect of both Cypress Villas Limited and Mr Brill if the Court authorises the Labour Inspector to bring an action under subs (2) and (3) of s 234 of the Act?

[121] I agree with the majority that s 234 does not empower the Authority to authorise a Labour Inspector to bring an action for penalties against an officer, director or agent of the company. Section 135 of the Employment Relations Act 2000 (the Act) sets out the circumstances in which an action for the recovery of a penalty may be brought, including where "permitted in the particular penalty provision."[31] Section 234 is solely directed at unpaid minimum wages and holiday pay and does not extend to penalties.

[122] I too would answer question 2, No.

Question 3: In deciding, under s 234(2) of the Act, whether to authorise the Labour Inspector to bring an action against Mr Brill, is the Labour Inspector required to prove that the default in payment of the minimum wages or holiday pay or both, which she says was directed or authorised by Mr Brill, was "personally and deliberately directed or authorised" or that "Mr Brill deliberately embarked on a course of action that was designed to deprive Ms Northcroft of her legal entitlements under the Holidays Act 2003 or the Minimum Wages Act 1983?"

[123] I agree with the majority's observation that s 234 has important implications for directors, officers and agents of companies that do not pay their employees their minimum remuneration or holiday pay.[32] I do not agree that the provision has the

[31] Section 135(1)(c).
[32] At [25].

reach, and potentially draconian consequences for such individuals, as an application of the majority's analysis would allow.

Difference between standard for employers and under s 234

[124] The legal relationship between employer and employee is inherently different to the relationship, and consequent liability, that an ordinary company director, officer or agent may have with an employee. The relationship between an employer and an employee is a personal one. The parties to an employment relationship are bound by their contractual, common law and statutory obligations to each other. Employers are liable to meet the minimum statutory requirements as to wages and holiday pay. As the legislation provides, those obligations cannot be divested and are strictly imposed. It is immaterial whether the employer's non-compliance arose from deliberate choice, an honest mistake, inadvertent error or insufficient funds. An employee simply has to establish that there has been a shortfall in payment of their minimum entitlements. Liability then arises for the employer.

[125] Section 234 creates an exception to the liability that otherwise resides solely with an employer, potentially extending liability to a non-employer individual on a joint and several basis. The exception uniquely applies in cases involving company employers, and is expressly limited to particular classes of individuals who could reasonably be seen as the human actors through whom the company's actions have been manifested. Section 234 effectively constitutes a statutory piercing of the corporate veil, which is only ever lifted in limited circumstances.

[126] As the authors of *Company Law in New Zealand* observe:[33]

> There are numerous examples of statutory provisions that allow the separate corporate personality of a company to be ignored. Many of these are found in general Acts (that is, ones that are not specifically directed at companies), in which *the rationale for veil lifting is usually to ensure that the purpose of the particular Act cannot be outflanked by the use of a company.*

[127] It seems to me that this aptly encapsulates the rationale for s 234. The legislative history (which I will come to) reinforces the point. Section 234 is not

[33] Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at 72 (emphasis added).

designed to ensure that employees receive their minimum entitlements in *all* circumstances where an employer fails to meet its statutory obligations. If that were so, s 234 would not be limited to non-payments by company employers only. Nor would it require proof that the officer, director or agent directed or authorised the default in payment. Establishing a mere non-payment, which is notably the condition precedent for recovery action against an employer, would suffice. The associated requirement for direction or authorisation by a person connected with the company makes it plain that something more must be established before joint and several liability will be imposed on a non-employer individual.

[128] While, as the majority point out,[34] attributes of intention and deliberateness are irrelevant in terms of an employer's duties to meet its minimum code obligations for pay and holiday entitlements, no such direct duty has been placed on individual directors, agents or officers of an employer company under the applicable legislation and I can discern no basis for reading it in to s 234 in the absence of clear wording.

The steps in s 234

[129] The sequencing in s 234 is not entirely clear. What is clear is that it is only engaged where a Labour Inspector has commenced an action in the Authority against an employer company to recover any money payable by way of minimum wages or holiday pay (monies owed) to an employee (s 234(1)). Accordingly, there must first be an alleged shortfall in payment by the employer company. The Authority may then authorise the Labour Inspector to bring an action for the recovery of the monies owed (s 234(2)).

[130] I observe that when s 234 is read together, it is arguable that it is subs (2) that is directed at the grant of authorisation to recover against an individual if judgment is ultimately given, and that subs (3) is simply the mechanism through which joint and several liability may be imposed. On this basis, before authorising recovery against a named individual the Authority must be satisfied that the requirements set out in either s 234(2)(a) and (b), and the further requirements in s 234(2), namely that the person falls within one or other of the specified classes (officer, director or agent)

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[34] At [94].

and that they directed or authorised the default in payment, are met. Such an interpretation tends to be supported by the wording of both the first and second limbs of s 234(2). Once authorisation for recovery action for the amount claimed by way of minimum wages or holiday pay or both is given against a named individual, s 234(3) makes it clear that they may be held jointly and severally liable with the employer company to pay the amounts recoverable, and judgment may be given against them. However, the case was not argued on this basis.

[131] As use of the word "may" makes plain, the Authority may, but need not, authorise a recovery action to proceed against a non-employer individual at the s 234(2) point. The majority have identified a range of potential circumstances in which the Authority might choose to exercise its discretion under s 234(2) against granting authorisation. One such example is, as the majority observe, where the named individual has been declared bankrupt.[35] Other examples given, such as where the named individual had no involvement with the company at the relevant time would, in my view, give rise to dismissal of the application on the basis that there is no arguable basis on which the threshold requirements of direction and control could be made out.

[132] I agree with the majority that the expressly named officer, director or agent is to be given notice of the application and is to be provided with an opportunity to be heard on it. Section 234(2) makes it plain that the Labour Inspector may only "target" an individual to stand in the place of or alongside[36] a non-paying company when there is a proper foundation for asserting that the named individual was an officer, director or agent of the company in default, and that the person directed or authorised the default. That is reinforced by the wording of the second limb of s 234(2).

[133] The Labour Inspector needs to prove, on the balance of probabilities, that the prerequisites in s 234(2)(a) and/or (b) are satisfied. I agree that the Labour Inspector does not need to prove on the balance of probabilities that the named individual was an officer, director or agent of the company and that they directed or authorised the

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[35] At [78].
[36] Given the preconditions set out in s 234(2)(a) and (b).

default in payment at this stage. However, the identity of the individual against whom authorisation is sought, together with the alleged basis on which they are said to have directed or authorised the default in payment, must be adequately particularised. The Authority must be persuaded by the Labour Inspector that it is appropriate to grant authorisation. This requires the Labour Inspector to lay a proper foundation and to satisfy the Authority that there is an arguable case against the named individual.

[134] If the Authority was only required to be satisfied that the requirements in s 234(2)(a) and/or (b) were met, the Labour Inspector could apply for and be granted authorisation against any person, however unconnected with the non-payment, thereby requiring the named individual to incur the expense and inconvenience of responding to an application that has no proper foundation and no prospect of success. Where there is no prospect that the application can succeed against the named individual, for example where they were not a director at the relevant time or where there is no arguable basis for alleging that the named individual directed or authorised the default in payment, authorisation ought not to be given. Such an approach is consistent with the cost effective, non technical, expeditious statutory imperatives applying in the Authority and would obviate the need for individuals to respond to a recovery action (and incur what may be significant legal and other costs) which has no hope of success. It would also avoid unnecessary delays and duplication of arguments directed first at authorisation and then at strike-out.

"Directed or authorised the default in payment"

[135] I respectfully disagree with the approach adopted by the majority in relation to the meaning of the phrase "directed or authorised the default". Joint and several liability may only be imposed where it is proved that the identified officer, director or agent of the employer company directed or authorised the default in payment of the minimum wages or holiday pay or both. As I understand the majority's approach, a non-employer individual may be held jointly and severally liable for the employer company's default in payment in circumstances where (for example) they have simply made arrangements for wages and holiday pay to be made on the

employer's behalf, which ultimately turn out to be incorrect, amounting to an underpayment.[37]

[136] I consider that an officer, director or agent of a company in default of payment can only be held jointly and severally liable with the employer to pay the shortfall where it is proved that the officer, director or agent knowingly directed or authorised the default in payment. My reasons follow.

[137] I do not think that the words "directed or authorised the default in payment" can sensibly be read in isolation from one another. They comprise a phrase. When the words are read together, it is plain that the default itself must have been directed or authorised by the individual concerned. This requires proof that the non-employer individual knew of the default and either directed or authorised it. That will be a matter of fact in each case.

[138] The dictionary definitions of the relevant terms reinforce the point:[38]

> Direct: (1) to control, guide; govern the movements of; (2) give a formal order or command to…
>
> Authorise: "to sanction, approve or countenance"[39] and "to give authority"…
>
> Default: (1) a failure to fulfil an obligation, esp. to pay money, appear in a law court, or act in some way.

[139] The point can also be made by substituting the definition of "default" for the word itself. For example, 'directed or authorised the failure to fulfil an obligation'; 'directed or authorised the failure to pay'. An analogy might be drawn with the notion of 'non-appearance'. 'Non-appearance' on its own is a neutral term. A person who is an employee might be required to attend court on a specified date. If the person does not appear because they were directed to attend a work-related meeting on that date, the employer did not "direct" their non-appearance at court. If, however, the employer knew about the obligation to attend court and directed the

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[37] At [94].
[38] D Thompson (ed) *Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford, 1995).
[39] "To sanction, approve or countenance": sourced from *Butterworths New Zealand Law Dictionary*, above n 25.

employee to attend to the work related meeting instead, it could be said that they 'directed the non-appearance'.

[140] While I have reached a clear view of the natural and ordinary meaning of the words at issue, I consider that relevant Parliamentary material provides a useful cross-check.[40] It reflects that s 234 was designed as a measure of last resort, was confined to a narrow class of persons who "directed or authorised the default" and that it would be used only where there was evidence of 'deliberate avoidance' of liability. The Report of the Select Committee emphasises the purpose of s 234 as follows:[41]

> The Bill is not designed to penalise an honest employer whose business is failing *but to effectively deal with any deliberate attempt to avoid responsibility.*

[141] While, as the majority point out, the precise meaning of the term "honest employer" is unclear, the mischief the provision was designed to address (at least from the Select Committee's perspective) is not. It was aimed at deliberate attempts by the human actors responsible for, and through whom, the company interacted with the world to avoid responsibility for the payment of minimum entitlements.[42] It seems to me that this underlying policy intent found expression in the formulation ultimately alighted on by Parliament, in the requirement that the default in payment be directed or authorised by certain individuals who shoulder joint and several liability to meet what would otherwise be the employer's sole liability. While there is a clear statutory intent that certain individuals connected with the employing company will be held personally liable for the company's compliance, it is equally clear that that was not intended to be absolute.

[142] As the authors of *Mazengarb's Employment Law* observe:[43]

> The intention, therefore, is that this provision should only apply as a last resort, where the company is unable to pay, and an officer, director, or agent

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[40] See, for example, *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 (CA) at 176 per Lord Cooke; JF Burrows and RI Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 281, 293.
[41] Employment Relations Bill 2000 (8-1) (select committee report) at 41-42 (emphasis added).
[42] Select Committee Report at 41-42.
[43] Mazengarb's Employment Law, (looseleaf ed, LexisNexis NZ Ltd), ERA 234.3at 2,101,006 (emphasis added).

> of the company has *personally and deliberately directed or authorised the failure to pay.*

[143] It is revealing that the triggers for liability identified in s 234 are limited to direction and authorisation rather than the broader formulation originally proposed at an early stage of the legislative process, which would have included the concepts of "assent" and "acquiescence".[44] The removal of these additional words followed concerns about the potential reach of the provision in terms of liability for non-employer individuals. The wording in s 234 can be contrasted with s 56 of the Health and Safety in Employment Act 1992, which provides that:

> Where a body corporate fails to comply with a provision of this Act, any of its officers, directors, or agents who directed, authorised, *assented to, acquiesced in, or participated in, the failure* is a party to and guilty of the failure and is liable…(emphasis added)

[144] The Health and Safety in Employment Act was one of the earlier New Zealand statutes allowing for a lifting of the corporate veil in order to render accountability to certain acts and omissions of non-employer individuals such as directors. Notably, however, even the broader formulation in s 56 has been criticised for its limited reach, the Royal Commission into the Pike River disaster concluding that:[45]

> The Health and Safety in Employment Act does not place on directors shared or individual responsibility for ensuring the safety of employees. Section 56 is ineffective, at least with reference to larger companies, where directors have normally delegated to executive management the operational decisions that give rise to breaches of health and safety.

[145] In relation to s 234 it appears likely that the act of delegation would fall within the broad interpretation of "direct or authorise" adopted by the majority.

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[44] Employment Relations Bill 2000 (8-1) cl 245.

[45] *Royal Commission on the Pike River Coal Mine Disaster* (Wellington 2012) vol 2 at 326, also 325; <http://pikeriver.royalcommission.govt.nz>. See too *Keeping Work Safe: The Department of Labour's Policy on Enforcing The Health and Safety in Employment Act 1992* (April 2009) at 15 <http://www.business.govt.nz/worksafe/information-guidance>. The paper notes in relation to s 56 that: "We may prosecute any officer, director or agent of a company … where it is clear the person(s) directed, authorised, assented to, acquiesced in or participated in the failure primarily where the person(s) in question had clear knowledge that the situation in question was unsafe or otherwise contrary to the health and safety legislation."

[146] Finally, the majority observe that the statutory discretion vested in the Authority under s 234(3) will act as a safeguard, limiting the circumstances in which an individual may be held jointly and severally liable to meet the employer's obligations.[46] In this regard it is said that "[the discretion under s 234(3)] may ameliorate what might otherwise be considered to be a draconian piercing of the corporate veil…".[47]

[147] While I agree that the Authority retains a discretion to decline to enter judgment, that discretion must be exercised in accordance with principle and consistently with the underlying policy of the provision. If the policy of s 234 is as broad as the majority have concluded it is, then it seems to me that there will be very limited room for the Authority to manoeuvre. So, for example, it appears that where a Human Resources manager in a company has instructed a payroll clerk/agent to make the necessary payments under an employment agreement which ultimately turn out (up to six years later[48]) to have been incorrectly calculated, that manager (who may no longer hold their position with the company) may be held personally liable on the majority's approach. That is because that is the very sort of case which the majority say s 234 is designed to capture, in the quest to ensure that employees receive their minimum entitlements. As I have said, I respectfully disagree with this approach.

[148] Moreover, under a broad approach it is at least arguable that every director of every company which was in, or about to go into, liquidation owing minimum wages or holiday pay to any employee could find themselves personally liable regardless of the factual circumstances giving rise to the company employer's failure to make such payments.

[149] In my respectful view the majority's approach undermines the concept of limitation of liability and separate legal personality that the Companies Act recognises and would have a deeply chilling effect on the desirability of accepting a role in corporate governance and management.

[46] At [66].
[47] At [69].
[48] See s 142 of the Employment Relations Act 2000, which imposes a limitation period of six years.

[150] I broadly agree with the majority as to the identity of parties who might constitute an officer, director or agent for the purposes of s 234. I also agree that whether or not an individual is such a person would fall to be determined on a case-by-case basis.

[151] I would answer question 3 as follows. Section 234(2) does not require the Labour Inspector to prove on the balance of probabilities either that Mr Brill personally and deliberately directed or authorised the default in payment or that he deliberately embarked on a course of conduct that was designed to deprive Ms Northcroft of her legal entitlements under the Holidays Act 2003 or the Minimum Wages Act 1983. In seeking authorisation the Labour Inspector does however need to satisfy the Authority that there is an arguable case that the named individual was an officer, director or agent of the company and that they directed or authorised the default in payment.

Question 4: If the plaintiff is authorised to bring an action under subs (2) against Mr Brill, and if the evidence establishes that Mr Brill, as an officer, director or agent of the company, directed or authorised a default in payment of the minimum wages or holiday pay or both to Ms Northcroft, does his seeking and obtaining advice from the company's accountant that the company would meet its obligations in law by paying Ms Northcroft as it did and in "apparent good faith", afford Mr Brill a defence to an action against him by the Labour Inspector?

[152] It seems to me that the answer to this question effectively flows from the approach adopted to the meaning of the phrase "directed or authorised the default in payment", rather than consideration of whether or not a "defence" arises. If the evidence establishes that Mr Brill directed or authorised the payments on advice that such payments would meet the company's legal obligations, it is difficult to see how he could be said to have "directed or authorised the default in payment" for the

purposes of s 234, applying my analysis of the provision. Conversely it is unclear how establishing that he acted on advice and in good faith would make a material difference in terms of the majority's analysis.

Christina Inglis
Judge

Judgments signed at 1 pm on 16 September 2015