

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2021] NZEmpC 199
EMPC 78/2021**

IN THE MATTER OF proceedings removed from the Employment
Relations Authority

BETWEEN REEGAN PAORA LAWTON
Plaintiff

AND STEEL PENCIL HOLDINGS LIMITED (IN
LIQUIDATION)
First Defendant

AND ORMOND BRIAN STOCK
Second Defendant

AND MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
Intervener

Hearing: 10-12 May 2021
(Heard at Wellington)

Appearances: P McBride and S Radcliffe, counsel for plaintiff
K Dalziel, counsel for second defendant
A Scott-Howman and G La Hood, counsel for intervener

Judgment: 18 November 2021

JUDGMENT OF JUDGE J C HOLDEN

[1] The plaintiff, Mr Lawton, seeks payment of claimed employment arrears from the second defendant, Mr Stock. The arrears Mr Lawton seeks are in relation to his employment with the first defendant, Steel Pencil Holdings Ltd (SPHL).

[2] At this point, a brief explanation of the background is needed.

[3] From 2004, the Te Kainga Lawton Trust (Mr Lawton's family trust) began acquiring shares by purchasing them from the Ormond Stock Trust (Mr Stock's family trust), so that, by July 2014, Mr Lawton's family trust owned 44 of the 100 shares in SPHL and Mr Stock's family trust owned the balance of 56 shares. In each case, the sale was effected by crediting Mr Stock's family trust's account within SPHL with the sale price and debiting Mr Lawton's family trust's account by the same amount.

[4] For most of the relevant time, Mr Lawton was the managing director of SPHL. Mr Stock was the other director and chair of SPHL. As well as being directors of SPHL, both Mr Lawton and Mr Stock were employed by SPHL.

[5] From 2014, SPHL had solvency issues and the directors did not recover their full entitlements.

[6] Mr Lawton worked in the Philippines, managing the operations of Steel Pencil Philippines Ltd Inc (SP Philippines), a subsidiary of SPHL, most recently from June 2016 until he returned to New Zealand in March 2020.

[7] In April 2020 Mr Lawton was removed as a director of SPHL.

[8] In May 2020, in order to resolve issues that had arisen within SPHL and between Mr Lawton and Mr Stock, they, SPHL and the two family trusts, entered into an agreement entitled "Agreement for Sale and Purchase of Shares" (the Agreement). The Agreement included a clause that provided that its terms were, to the maximum extent permitted by law, in full and final settlement of the issues between the parties as to shareholding and associated liability. Under the terms of the agreement, Mr Lawton resigned his employment, effective 31 May 2020 and SPHL agreed to pay Mr Lawton's salary until then as well as two months' salary in lieu of notice.

[9] In July 2020, Mr Lawton made a statutory demand against SPHL for \$120,945.38, comprising claimed annual leave entitlements accrued during his employment and not paid to him on the termination of his employment on 31 May

2020. That statutory demand also identified that there were additional sums not quantified or claimed in respect of subsequently accrued amounts of annual leave/holiday pay, arising from the employment down to 31 May 2020 and additional sums in respect of the notice paid on termination.

[10] Mr Lawton subsequently filed a statement of problem in the Employment Relations Authority (the Authority) seeking wages, holiday pay and expenses from SPHL. He also sought penalties and damages. Mr Lawton included Mr Stock as a respondent in those proceedings on the grounds he was a person involved in a breach of employment standards who should be held liable should SPHL fail to pay any sums found to be owing.¹

[11] On 26 February 2021, SPHL was placed in liquidation and the liquidator has advised he was exercising his rights and requiring a stay of proceedings against the company.

[12] By determination dated 8 March 2021 the Authority removed the proceedings to the Court.² The Authority's determination identified the reasons for removal as including that there was a preliminary question of law as to whether Mr Stock can be held liable for any moneys that might potentially be owing to Mr Lawton by SPHL in the absence of the Authority making a finding against SPHL. That question arises because of the liquidation and the decision of the liquidators of SPHL.³

[13] The removed proceedings also included Mr Lawton's substantive claims, should the Court consider that Mr Stock could be found liable for such moneys potentially owing to Mr Lawton.⁴

[14] The Ministry of Business, Innovation and Employment (MBIE) applied for leave to intervene in the proceedings, given the wider importance of the preliminary question of law identified by the Authority. The Court considered it would likely be

¹ Employment Relations Act 2000, ss 142W and 142Y; Holidays Act 2003, s 77A; Wages Protection Act 1983, s 11A.

² *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZERA 92 (Member Loftus).

³ At [19].

⁴ At [20].

assisted by hearing from MBIE on the interpretation of relevant provisions of Part 9A of the Employment Relations Act 2000 (the Act), and as to the enforcement of employment standards. The Court also considered there was no apparent prejudice to any party. MBIE's application was therefore granted.⁵

The case raises a number of questions

[15] The principal questions in this case are:

- (a) Can the proceeding be advanced as against Mr Stock, in circumstances in which it cannot proceed against SPHL?
- (b) If so, to what extent, if any, is the Agreement a barrier to recovery?
- (c) If it is not a barrier, what amounts are owing to Mr Lawton from SPHL for breaches of employment standards, in respect of:
 - (i) unpaid salary;
 - (ii) holiday pay for untaken annual leave;
 - (iii) holiday pay for work done on statutory holidays; and
 - (iv) reimbursement of expenses?
- (d) Is Mr Stock a person involved in any of those breaches by SPHL and therefore liable for any moneys due to Mr Lawton?⁶

[16] In short, and as detailed in this judgment, I find the proceedings can be advanced against Mr Stock, but that Mr Lawton succeeds in his claims against Mr Stock only to a very limited extent.

⁵ *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 48.

⁶ Employment Relations Act 2000, ss 142W and 142Y.

The arguments, in summary

[17] The case involves ss 142W and 142Y of the Act:

142W Involvement in breaches

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
 - (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
 - (a) a person occupying the position of a director of a company if the entity is a company:

...

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
 - (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
 - (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
 - (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[18] Mr Lawton argues:

- (a) He was plainly owed substantial amounts, in terms of employment standards, by SPHL.
- (b) Where SPHL is unable to pay those amounts, Mr Lawton is entitled to proceed solely against Mr Stock, as a person involved in the breach, under ss 142W and 142Y of the Act.
- (c) The claim or cause of action is then one in arrears in terms of ss 142Y and 131 of the Act.
- (d) To the extent that there is an onus on Mr Lawton to establish his entitlements under the employment standards, he has done so.
- (e) To the extent that there is an onus on Mr Lawton to establish that Mr Stock was actually a person involved in the breach, he has done so.
- (f) No reason for departing from that answer has been or can be identified including:
 - (i) the Agreement confirming the liability (or not validly contracting out of that);
 - (ii) no valid defence having been established by Mr Stock.
- (g) Mr Stock is personally liable for the sums owing under ss 142W and 142Y of the Act.

[19] While SPHL has been named as the first defendant, it is common ground that, in the absence of the consent of the liquidator or an order of the High Court, the proceeding, as against it, is statutorily barred.⁷

[20] There was no appearance by SPHL, and no representations were made on its behalf.

⁷ Companies Act 1993, s 248(1)(c)(i).

[21] Mr Stock argues that, with no finding of breach able to be made against SPHL, the claim against him cannot proceed.

[22] In any event, he says Mr Lawton cannot satisfy the elements of his claim against Mr Stock:

- (a) that there has been a default in the payment of wages or other moneys payable to Mr Lawton; and
- (b) the default is due to a breach of employment standards; and
- (c) Mr Stock is a person involved in the breach within the meaning of s 142W.

[23] Initially Mr Stock submitted that, to proceed, Mr Lawton required a declaration of breach under s 142B. This argument was withdrawn after it was realised that Mr Lawton was not seeking a compensation order under s 142J.

[24] That revised position is well taken.

[25] Section 142A(1) of the Act sets out various objects for Part 9A:

- (a) providing for a Labour Inspector to apply to the Court for declarations of breach, pecuniary penalty orders, compensation orders and banning orders;
- (b) making insurance for pecuniary penalties unlawful;
- (c) providing for persons to be found to be involved in a breach; and
- (d) providing certain defences.

[26] The object in s 142A(1)(a) is reflected in ss 142B to 142L. Here, the case is focussed on the objective in s 142A(1)(c) and ss 142W and 142Y. No issue of s 142A(1)(a) declarations or orders arise.

[27] As noted, MBIE appeared as intervener in respect of the first issue. Its position is that s 142Y can be used even where the employer company is in liquidation. MBIE points to:

- (a) the purpose of this aspect of the Part 9A regime, being to provide the Labour Inspectorate with the ability to effectively enforce standards, and provide aggrieved employees with additional measures for recovery in the case of breach, by an employer, of minimum entitlements;
- (b) one specific measure being provided by way of s 142Y – which allows for the prospect of recovery from a director (and certain other persons) of an employer company; and
- (c) that such recovery is not automatic: liability requires satisfaction of significant threshold criteria, particularly including those set out in s 142W.

[28] It says that, although s 248 of the Companies Act prevents an action against a liquidated employer company being commenced or continued in the employment jurisdiction, it does not prohibit findings being made about the employer company's breach of relevant obligations.

[29] It says:

- (a) policy considerations militate in favour of the position advanced – and, indeed, the policies underpinning Part 9A would be entirely defeated if they could be avoided by the liquidation of an employer company;
- (b) the employment institutions do, as a matter of practice, apply the provisions in the way contended;
- (c) section 326 of the Companies Act supports the interpretation advanced; and
- (d) adequate safeguards exist within the legislation in relation to the application of these provisions.

First question: The proceedings can be advanced against Mr Stock

[30] Prior to 2016, the position regarding recovery from an individual for a company default was governed by the now repealed s 234 of the Act:

234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay

- (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.
- (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—
 - (a) the company is in receivership or liquidation; or
 - (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—the Authority 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 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.
- ...
- (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.

[31] The purpose of s 234 was to ensure that minimum employment entitlements were available to employees, even where corporate employers may be insolvent or otherwise unable to pay those minimum entitlements.⁸

[32] The amendments in 2016 that led to the sections in issue here were intended to provide more effective enforcement of employment standards, including extending

⁸ *Labour Inspector v Cypress Villas Ltd* [2015] ERNZ 1091, [2015] NZEmpC 157 at [34].

accountability to persons other than the employer who were knowingly and intentionally involved in breaches of employment standards.⁹ This intention of strengthening enforcement of employment standards is also reflected in the first reading of the Bill as to the intended purpose of what became Part 9A.¹⁰ The Regulatory Impact Statement prepared by MBIE¹¹ and the Cabinet paper¹² that recommended the reforms also referred to the intention being to increase directors' and others' liability in circumstances where a company is unable to rectify a breach.

[33] That the regime created by the 2016 Amendment was more wide-ranging than had previously existed under the then s 234 was recognised by the Court of Appeal in *Brill v Labour Inspector*.¹³ The object of Part 9A was also recognised in this Court, saying it was to provide additional measures to promote the more effective enforcement of employment standards, especially minimum entitlement provisions, as well as the strengthening of culpability of directors and other persons defined in s 142W of the Act.¹⁴

[34] For an individual to be able to avoid liability under s 142Y by reason of the company having gone into liquidation and the liquidator not agreeing to the case proceeding, would be directly contrary to the objectives of Part 9A.

[35] Further, liability under s 142Y only applies to the extent that the employer is *unable* to pay the arrears in wages or other money;¹⁵ it does not apply where the employer is able, but unwilling, to pay the amounts due. Where a company is unable to pay its debts, its directors run the risk that they will be trading recklessly if the company continues to operate.¹⁶ It cannot have been the intention of Parliament that

⁹ Employment Standards Legislation Bill 2015, (53-1) (explanatory note).

¹⁰ (8 September 2015) 708 NZPD 6353.

¹¹ Ministry of Business, Innovation and Employment *Regulatory impact statement: Strengthening Enforcement of Employment Standards* (27 July 2015).

¹² Ministry of Business, Innovation and Employment "Strengthening enforcement of employment standards" <<https://www.mbie.govt.nz/dmsdocument/1019-cabinet-paper-2015-strengthening-employment-standards-pdf>>.

¹³ *Brill v Labour Inspector* [2017] NZCA 169, [2017] ERNZ 236 at [16].

¹⁴ *Labour Inspector v Fernando* [2020] NZEmpC 66, [2020] NZERA 228 at [33]; *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, [2020] ERNZ 183 at [183].

¹⁵ Section 142Y(2)(b).

¹⁶ Companies Act 1993, s 135.

s 142Y only applies to officers of companies between when the company becomes unable to pay its debt to an employee, and when it goes into liquidation.

[36] Turning then to the provision itself, it is clear that for liability to arise under s 142Y there must be a breach of employment standards by the employer; there cannot be accessory liability without there being an underlying infraction. However, it is not a precondition that proceedings be brought against the primary violator; the potential liability of a person involved in a breach is separate from any liability that the employer may face. It is, therefore, possible to proceed against only the secondary party, although it still would need to be proved that there has been a default in the payment of wages or other money due to a breach of employment standards.¹⁷ It then must be established that the person from whom payment is sought was involved in the breach.

[37] The liquidation of the employer company may give rise to evidential difficulties but if, on the evidence available, the Authority or Court can be satisfied that there has been a default in the payment of money by the employer company due to a breach of employment standards, it may consider the potential liability of individuals pursuant to s 142Y.

[38] Accordingly, the answer to the first question is yes, the proceeding can be advanced as against Mr Stock, in circumstances in which it cannot proceed against SPHL.

[39] The other questions require a more detailed review of the facts.

SPHL had significant financial difficulties

[40] By April 2014, Mr Lawton's family trust owned 25 of the 100 shares in SPHL. That month, it agreed to buy a further 24 shares from Mr Stock's family trust for \$960,000, effected by the crediting and debiting of the family trusts' respective SPHL accounts. The loan to Mr Lawton's family trust was to be repaid at the rate of \$240,000 per annum, with monthly minimum payments, and attracted interest at the rate of

¹⁷ *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [143].

10 per cent per annum. The April 2014 agreement also provided for Mr Lawton to be paid a salary of \$180,000 per annum, to be inflation adjusted annually. The April 2014 agreement was varied in July 2014, reducing the number of shares purchased to 19 and the purchase price to \$760,000 (with associated reductions in the shareholders' loan accounts).

[41] In mid-2014, it also was agreed that Mr Lawton's salary would be reduced to \$150,000 per annum. From that time too, the directors' entitlements were not fully met, but they understood that was because of SPHL's dire financial position. This led to both men having salary deferment credits.

[42] In June 2016, Mr Lawton relocated to the Philippines to manage the operations of SP Philippines.

[43] At that time, he entered into an employment agreement with the SPHL subsidiary SP Philippines. However, the evidence shows that this employment agreement was a sham. Its purpose was to enable Mr Lawton to obtain a work visa for the Philippines and all parties continued to operate as Mr Lawton being employed by SPHL.

[44] In his position in the Philippines, Mr Lawton was effectively in control of the way in which SP Philippines' activities were undertaken.

[45] In the years ended 31 December 2017 and 31 December 2019, both Mr Stock and Mr Lawton posted salary credits to their family trust accounts. In Mr Lawton's case that reduced the loan owing by Mr Lawton's family trust to SPHL and in Mr Stock's case it increased the amount owing by SPHL to Mr Stock. These transactions are recorded in the SPHL financial statements for those years and signed off by both directors.

[46] At a board meeting in March 2020, Mr Lawton proposed, and the board accepted, that his salary deferment credit was to be offset against Mr Lawton's family trust's loan account. The reason for this, from his perspective, was that the amount in the loan account of the family trust was attracting interest.

[47] However, when Mr Lawton later understood that the offsetting removed SPHL's liability for the deferred salary, he sought to reverse that arrangement, but SPHL's accountant advised him that another shareholder meeting would need to take place to change the agreed arrangement. No such meeting took place.

During the March to May period, Mr Lawton and Mr Stock discussed pathways out of their arrangements with SPHL

[48] By early 2020, differences had escalated between the directors over what caused the financial problems of SPHL and how to fix them.

[49] Also, from March 2020, Mr Lawton's position in the Philippines became very difficult as the COVID-19 situation there worsened.

[50] By email dated 17 March 2020, Mr Lawton raised his concerns regarding the position of SPHL and himself. He was critical of Mr Stock's role at SPHL. In that email, Mr Lawton said that there was over \$80,000 owing to him in salary, school fees, international money conversion fees, and dishonour fees, "not to mention holiday pay, should I choose to call on it". The email also went on to note the difficult position in Manila regarding the COVID-19 outbreak and Government orders.

[51] Mr Stock responded by email dated 19 March 2020 largely addressing the criticisms Mr Lawton had made against him. In that email Mr Stock records:

All payments to you which are the company's obligation have been made whenever funds permitted. If the company has no money it cannot make payments.

[52] The email concludes:

If your email represents what you genuinely believe then it is clear that our relationship has irretrievably broken down and I would expect your written resignation as a director. If, on the other hand, your email was written out of frustration at the Covid 19 crisis and does not represent your views then I propose we put it behind us and move on.

[53] By email dated 25 March 2020, Mr Stock noted that, after Mr Lawton's contribution of his salary to his loan account, the loan account stood at \$584,221, or a debt of \$13,277 per share for Mr Lawton's family trust's 44 shares. Mr Stock

suggested that, even if SPHL achieved Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA), which he considered to be unlikely, Mr Lawton could hope to be paid \$1,836 per share plus have his shareholding loan account nullified.

[54] Mr Stock offered two pathways to Mr Lawton:

- (a) Accept Mr Stock's leadership and do everything in his power to help achieve the company goals; this would mean meeting sales targets and allowing other general managers to manage their own roles.
- (b) Agree to Mr Stock purchasing all Mr Lawton's shares for the balance of his loan account, on the basis that this included his resignation from SPHL entirely. Mr Stock advised that SPHL would pay Mr Lawton's return airfares when that became possible and would honour other debts, such as past school fees when it was financially able to do so.

[55] Mr Lawton responded to that offer by email dated 2 April 2020. He said that he would agree to Mr Stock purchasing his shareholding (or that of his family trust) for the amount outstanding in his loan account, and that he would offer his resignation from SPHL upon completion of the following by 30 April 2020:

- receipt by Mr Lawton of confirmation of his own and his family trusts full release from all guarantees and other trading liabilities (bank loans or otherwise); and
- receipt by Mr Lawton of SPHL's and all other shareholders release from any restraint of trade applying to him;
- SPHL paying Mr Lawton's rental costs in the Philippines until July 2020.

[56] Mr Lawton also said he needed to be paid his salary no later than the 20th of each month for the remainder of the term of his employment. He noted Mr Stock's commitment that the company "will pay our repatriation costs (or cash equivalent) and honour other debts such as past school fees and dishonour fees accrued under business

transactions via our personal accounts when able”. Mr Lawton attached a record of the amounts he said was owing to him:

OUTSTANDING			
Particulars	NZD	PHP	NZD Equiv.
Flight Reimbursements – Lawton flights home	1,000		
Outstanding Wages – 8 Months	71,862.88		
Annual Leave outstanding	120,945.38		
Gem Visa Cash advances	113.59		
Metrobank (Rental Check Bounce)		8,000.00	275.86
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Jan 2020 Rental Shortfall		6,216.00	214.34
2020 Term 2 school Fees ISM		580,810.80	20027.96
Airport Clearance Fees		7,180.00	247.59
TOTAL	193,921.85	610,206.80	21,041.61
NZD Conversation (Approx)		21,041.61	
Total Owing in NZD (approx)		<u>214,963.46</u>	

REIMBURSEMENT SCHEDULE	NZD	PHP	
Rental Deposit (2 Months)	7,470.00		
Rental 3 Month Advance	11,500.00		
Rental Reimbursement	1,000.00		
Outstanding Wages (June & July 2019)	16,215.76		
AHVA Water Bill		600.00	
Petrol		500.00	
Meralco Jan Payment		10,100.00	
Ari Vaccination		8,000.00	
Petrol		2,059.46	
Driver Feb 3 Wage		4,600.00	
Driver Jan 20 – 24 Overtime		450.00	
Driver Jan 27 – 31 Full wage		6,500.00	
Reserve Care Rental (Brake Replacement)		7,833.32	
Brake Pads & Rotors (Parts)		12,799.00	
ISM Application Fee (2019 – 2020)		23,445.00	
PAYMENTS RECEIVED	36,185.76	76,886.78	

[57] Mr Stock did not accept the position outlined in Mr Lawton’s email. He said that SPHL was in no position to make any payments such as was suggested, treating Mr Lawton’s response as a refusal of Mr Stock’s offer so that “there is now no offer on the table”.

[58] Mr Lawton and his family returned to New Zealand on 19 April 2020 and remained in managed isolation and quarantine (MIQ) until 4 May 2020.

[59] Initially, Mr Stock paid for the family’s flights back to New Zealand, but he was reimbursed by SPHL.

[60] There was subsequently a special general meeting for SPHL at which Mr Stock put a motion that Mr Lawton be removed as a director of SPHL. With Mr Stock's family trust holding 56 shares and Mr Lawton's family trust holding 44 shares, and the voting reflecting that, the motion was carried.

[61] Discussions continued and, by email dated 8 May 2020 Mr Stock provisionally offered:

- SPHL to remit a portion of Mr Lawton's loan account overdraft to an amount to be advised by SPHL's accountants.
- The transfer of Mr Lawton's family trust's 44 shares to Mr Stock's family trust for an amount to be advised by the accountants.
- Termination of Mr Lawton's employment by the Steel Pencil Group effective 31 May 2020, including the return of all company property including, keys, laptops, mobile phones and any other items owned by the company.
- Mr Lawton's resignation in writing from all directorships or other roles in the company.
- Payment on 20 May 2020 of Mr Lawton's salary for May.
- Restraint of trade to apply to all Steel Pencil Group clients past and present, but not to other companies.
- Mr Lawton's agreement in writing not to, in any way, criticise the Steel Pencil Group or its employees.
- An email to be sent to all clients advising all of Mr Lawton's "retirement", which in no way would impugn Mr Lawton's reputation.
- All reasonable steps taken by SPHL and Mr Lawton and his family trust to release the personal guarantee held by ASB.

- If Mr Lawton did not intend to return to the Philippines, then he would terminate the lease for the apartment he and his family lived in in the Philippines and arrange for the refundable deposit to be paid to SPHL. If Mr Lawton intended to return to Manila, however, the refund could become payable to him. SPHL would pay a one-way fare for Mr Lawton and his family to return to Manila.
- SPHL would pay Mr Lawton a further one month's salary.
- SPHL would pay reasonable shipping costs for the Lawton family's property in Manila to Palmerston North.
- On completion of all terms in the agreement SPHL would pay Mr Lawton a further three months' salary.

[62] Mr Lawton replied the same day confirming that he believed that he and Mr Stock had "the beginning of some framework to start with here". Mr Lawton advised that he would require the following items confirmed in the first instance:

- (a) the actual amount/value of the portion of Mr Lawton's loan account overdraft; and
- (b) the amount to be paid for Mr Lawton's family trust's 44 shares.

[63] The Agreement was entered into on 15 May 2020. The evidence shows that the initial draft of the Agreement was prepared by Mr Lawton and that several drafts were exchanged between Mr Lawton and Mr Stock with changes made by each of them.

[64] Immediately before the Agreement was executed, Mr Lawton's family trust owed \$560,000 to SPHL. Pursuant to the Agreement, Mr Lawton's family trust agreed to sell its 44 shares in SPHL to Mr Stock's family trust for the sum of \$360,000 to be credited to the loan account in the books of SPHL and SPHL agreed to remit the sum of \$200,000 (or such greater amount as might be required to ensure that Mr Lawton and his associated trust had no further liability to SPHL, to Mr Stock and/or to Mr Stock's family trust).

[65] The key terms of the Agreement can be summarised as:

- (a) Mr Lawton and his family trust and associated entities would be released from all personal guarantees, charges or liens;
- (b) Mr Lawton's family trust would transfer its 44 shares in SPHL to Mr Stock's family trust;
- (c) Mr Lawton's family trust's loan account would be remitted in full, meaning that neither Mr Lawton nor his family trust would be indebted to SPHL or Mr Stock or Mr Stock's family trust, other than in terms of the Agreement;
- (d) Mr Lawton would resign his employment effective 31 May 2020 and, on 20 May 2020, would be paid salary up to the resignation date;
- (e) SPHL would pay reasonable shipping costs to transport the Lawton family's household effects from Manila to Palmerston North;
- (f) SPHL would pay Mr Lawton two months' salary in lieu of notice, at least one month of which would be paid on or before the resignation date with the balance to be paid by 30 June 2020;
- (g) Mr Lawton would be covered by the restraint of trade as contained in his employment agreement;
- (h) Mr Stock and Mr Stock's family trust personally guaranteed the payments due to Mr Lawton under the Agreement; and, finally,
- (i) the terms of the Agreement were, to the maximum extent permitted by law, in full and final settlement of the issues between the parties as to the shareholding and associated liability.

[66] Mr Lawton left SPHL on 31 May 2020.

[67] Mr Stock's evidence was that the Agreement settled all matters between the parties to it.

[68] Under cross-examination, Mr Lawton also agreed that the Agreement was to resolve all issues between SPHL, Mr Lawton and Mr Stock and their respective family trusts; that the agreement “wraps up everything”.

[69] Under re-examination, Mr McBride, counsel for Mr Lawton, asked him to explain what Mr Lawton regarded as “everything in relation to your employment?” to which Mr Lawton responded, ““Everything” meaning my wages, unpaid wages, annual leave, those other expenses.”

[70] Mr McBride referred to the proposition that was put to Mr Lawton under cross-examination that the Agreement settled all issues in relation to Mr Lawton’s “wages, holiday pay, et cetera”, to which Mr Lawton responded “Yes”. When asked “Was that your understanding?”, Mr Lawton responded “Absolutely, yes”.

Second question: What is the effect of the Agreement?

[71] Mr McBride noted that the existence and effect of the Agreement had not been pleaded by Mr Stock. I acknowledge that point. Nevertheless, the point was addressed in evidence and in submissions by both parties. It would not be consistent with equity and good conscience for the Court not to consider the effect the Agreement has on the claim.¹⁸

[72] The interpretation of the Agreement is an objective exercise to ascertain the meaning it would convey to a reasonable person having all the background knowledge reasonably available to the parties and the situation they were in at the time of the Agreement. In this exercise, context is significant and taking it into account does not depend on establishing any ambiguity in the Agreement.¹⁹

¹⁸ Employment Relations Act 2000, s 189.

¹⁹ *Firm P I I Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [62]-[63]; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZSC 73 at [1(a)].

[73] In *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, the Supreme Court found that objective evidence of a prior common consensus or mutual understanding will be relevant to interpretation.²⁰

[74] While the Agreement is headed “Agreement for sale and purchase of shares”, it refers to it being in full and final settlement of the issues between the parties as to shareholding and associated liability. The principal relationship between Mr Lawton and Mr Stock was as the shareholders in SPHL. Their employment relationship with SPHL was secondary. Nevertheless, the Agreement refers to employment matters, including wages, a restraint of trade, notice, and resignation of employment.

[75] As confirmed by both Mr Lawton and Mr Stock in evidence, the purpose of the Agreement was to resolve all matters between the parties, including in relation to Mr Lawton’s wages and holiday pay.

[76] In addressing the Agreement, Mr McBride submitted that the parties were not able to enter into a settlement that compromised Mr Lawton’s minimum entitlements, which included entitlements under the Holidays Act 1981.

[77] However, the effect of s 131(2) is not to prevent parties, as part of a settlement, from resolving the extent of disputed entitlements between them.²¹ Here, the parties have reached a global settlement, covering all matters between them, including shareholding and employment matters, on the terms set out in the Agreement. That is not precluded by s 131.

[78] Accordingly, the Agreement prevents Mr Lawton from now succeeding in claims under ss 131 and 142Y against SPHL and against Mr Stock personally.

[79] Mr Lawton raises an alternative argument that, under the terms of the Agreement, he is entitled to payment for any shortfall in salary for the full period of his employment until the date of the agreement. That turns on the meaning of the clause “Reegan will be paid salary up to resignation date, on 20 May 2020.”

²⁰ *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85 at [76].

²¹ *Crossen v Yangs House Ltd* [2021] NZEmpC 102 at [43]-[46]; *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129 at [42].

[80] I do not accept Mr Lawton's submission. The clause itself, immediately following the clause setting out Mr Lawton's effective resignation date of 31 May 2020, indicates that the parties were talking about salary from the date of the Agreement until 31 May 2020. That also is consistent with the parties' prior common consensus of the timeframe of final salary payments, demonstrated in the email exchange of 8 May 2020 previously referred to, in which Mr Stock refers to "Payment on 20th May of your salary for May" and Mr Lawton agrees they have "the beginning of some framework".

[81] There is, however, one point I do accept. In calculating Mr Lawton's final pay up to 31 May 2020, and in calculating the two months' salary in lieu of notice, there should have been an allowance made for holiday pay at 8 per cent. The evidence was that this was not done, creating a debt due to Mr Lawton under the Agreement. Mr Stock guaranteed the payments due to Mr Lawton under the Agreement and therefore this sum is payable by him.

Third question: What amounts would have been due to Mr Lawton?

[82] While the answer to question two resolves this case, I nevertheless answer the remaining questions, putting aside the effect of the Agreement.

[83] Mr Stock submitted that the burden of proof in this matter rests with Mr Lawton and never shifts to him. I agree with Mr Lawton, however, that the question is more properly one of the factual position, on the totality of the evidence before the Court.

[84] Mr Stock and others referred to Mr Lawton as a "shareholder/employee" or similar. Mr Stock also sought to rely on what he said was an industry practice not to treat leave entitlements of director/employees as a company debt. As Mr Lawton says, there is no such separate characterisations in employment legislation. Mr Lawton was an employee of SPHL.

[85] Mr Stock also noted as a relevant matter that Mr Lawton was not a vulnerable employee, and that there was no power imbalance between him and SPHL. Although

I accept that the minimum code may be particularly beneficial for employees who have little bargaining power, it is applicable to all employees.

[86] The structure of SPHL, and Mr Lawton's roles and interests in SPHL are, however, relevant context.

[87] I answer the third question under the heads:

- (a) What was Mr Lawton's salary?
- (b) What deductions, if any, were agreed?
- (c) What annual leave would have been due to Mr Lawton on termination?
- (d) What statutory holidays were Mr Lawton required to work?
- (e) What expenses would have been due to Mr Lawton?

What was Mr Lawton's salary?

[88] Mr Lawton accepts that he agreed to the reduction in his salary from \$180,000 plus inflation adjustments (although he says that was intended to be temporary) to \$150,000. He submits, however, that his employment agreement was not validly varied because the requirements of ss 63A, 64 and 65 of the Act were not met. Mr Lawton points, for example to the requirements for bargaining for an individual employment agreement, including for a variation.²² Those include that the employer must provide the employee with a copy of the intended agreement, advise the employee that they are entitled to seek independent advice about the intended agreement, give the employee a reasonable opportunity to seek that advice, and consider any issues that the employee raises and respond to them.²³ The obligations here are, in a sense, artificial given that Mr Lawton was the Managing Director of SPHL but he submits his position within SPHL does not detract from its obligations to him, as an employee.

²² Employment Relations Act 2000, s 63A(1)(e).

²³ Employment Relations Act 2000, s 63A(2).

[89] However, even assuming the process required by s 63A was not followed in July 2014, that does not assist Mr Lawton. Section 63A(4) expressly says that failure to comply with the section does not affect the validity of the employment agreement between the employee and the employer. It can expose an employer to a penalty.²⁴

[90] By agreement, Mr Lawton's salary from July 2014 was \$150,000 per annum.

What deductions, if any, were agreed?

[91] Mr Lawton argues that the credits to his family trust's loan account made from the amount due for salary do not act to reduce the debt SPHL owed to him for wages. He relies on the Wages Protection Act 1983. Pursuant to that Act, absent the written consent of a worker, or on the written request of the worker, an employer must, when any wages become payable to a worker, pay the entire amount of those wages to the worker without reduction.²⁵ Absent that consent or request, an employer cannot make deductions from a worker's pay.

[92] The Wages Protection Act does not specify the form the consent or request must take, beyond that it must be written.

[93] Here, Mr Lawton asserts that the salary credit amounted to a diversion by SPHL and Mr Stock into "another company account, so as to offset third party share purchase payments" due from his family trust. That characterisation ignores Mr Lawton's role and interest in the arrangements.

[94] The arrangements were contained in minutes of the company and accepted by both directors when they signed the annual accounts. By agreeing to the arrangements in question, which were, of course, to the benefit of Mr Lawton's family trust and, thus, indirectly to Mr Lawton, accepting the minutes of the board meetings and then signing off on the annual financial statements that recorded the transactions, Mr Lawton consented to the deductions, in writing.

²⁴ Employment Relations Act 2000, ss 63A(3), 64(4), 65(4).

²⁵ Wages Protection Act 1983, ss 4 and 5(1).

[95] Accordingly, to the extent accrued salary was credited to Mr Lawton's family trust, in reduction of the trust's debt to SPHL, those transactions reduced any indebtedness to Mr Lawton for salary.

What annual leave would have been due to Mr Lawton on termination?

[96] As Mr McBride notes, every employee has minimum rights under the Holidays Act 2003. SPHL, as with all employers, is required to keep accurate records establishing compliance with employment legislation.

[97] The purpose of s 83 of the Holidays Act and s 132 of the Act is to ensure that employees are not prejudiced by an employer's failure to maintain proper records. However, the context is important and the application of s 132 can be affected by the reality of the relationship between the parties.²⁶

[98] Section 132(2) of the Act allows the Authority (or the Court on challenge) to accept as proved all claims made by an employee in respect of wages paid to the employee and the hours, days and time worked by the employee. Section 83(3) is to similar effect with respect to claims under that Act. The wording of both provisions is permissive, as opposed to mandatory. The circumstances of the case need to be considered. Here, as managing director of SPHL and responsible for it and SP Philippines' operations in the Philippines, Mr Lawton was responsible for maintaining the annual leave records insofar as they applied to him. It would be perverse to sheet home to SPHL the consequences of Mr Lawton failing to do so.

[99] The question then becomes what does the evidence generally demonstrate as to annual leave taken by Mr Lawton. I find that he did not take his full four weeks' annual leave in each year in which he was working in the Philippines. The evidence shows that he took some annual leave in respect of a rugby trip. He also took leave during the periods when it was customary in the Philippines for businesses to be closed, although I accept that Mr Lawton may have performed some work on those days.

²⁶ *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136, [2014] ERNZ 275 at [23].

[100] In all, based on the evidence, I accept that there would be a shortfall of something in the order of two weeks' annual leave for each year Mr Lawton was in the Philippines.

[101] The enquiry, however, would not end there. There was nothing in his agreement with SPHL or in any directives he received from Mr Stock or otherwise from SPHL that prevented Mr Lawton from taking leave. He consistently signed off on financial accounts that recorded there was no entitlement outstanding for annual leave. Mr Stock relied on the signed off financial statements.

[102] This case has some parallels to the *Rainbow Falls Organic Farm Ltd* case but, if anything, the argument here is stronger. Given Mr Lawton was responsible for the operations in the Philippines, including being responsible for annual leave arrangements for himself and other staff, the fact that he did not take his leave does not, in the particular circumstances of this case, give rise to an obligation on the part of SPHL to compensate him for the untaken leave.²⁷

[103] Further, where, as here, an employee chooses of their own volition to perform some work while on annual leave, rather than being required by their employer to do so (by instruction, pressure or expectation), that does not change the days on which work is so performed from being annual leave.²⁸

[104] In short then, on the particular circumstances of this case, I do not accept that a liability for unused annual leave would have arisen.

What statutory holidays were Mr Lawton required to work?

[105] Mr Lawton claims for five statutory holidays for each of the last six years. He also claims payment at a rate of time and a half for the work done on statutory holidays and an alternative holiday in respect of each such day.

²⁷ *Rainbow Falls Organic Farm Ltd v Rockell*, above n 26, at [40]-[41].

²⁸ *Wanaka Pharmacy Ltd v McKay* [2021] NZEmpC 112 at [40].

[106] The claim is made complicated by the arrangements in the Philippines. As noted, Mr Lawton had entered into an employment agreement with SP Philippines. That agreement provided for statutory holidays recognised in the Philippines. Indeed, the evidence was that the operations in the Philippines largely ceased on those days. However, Mr Lawton points to the New Zealand statutory holidays and says that he was required by his role to work on those days. I accept Mr Lawton would have worked hard and would have worked outside business hours, likely including on some New Zealand statutory holidays. I do not accept that is enough to give rise to a liability. Mr Lawton does not suggest, and there was no evidence that SPHL made a request or otherwise required him to work on New Zealand statutory holidays. Again, the context in which this claim arises is important. The argument would have to be that Mr Lawton, as the managing director, and effective controller of the Philippines' operations, required Mr Lawton as an employee to work on statutory holidays. When seen that way, the argument must fail.

What expenses would have been due to Mr Lawton?

[107] Mr Lawton claims reimbursement of expenses:

- (a) School fees;
- (b) Flight Reimbursements;
- (c) Gem Visa Cash advances;
- (d) Metrobank (Rental Check Bounces);
- (e) Jan 2020 Rental Shortfall Interest and Penalties; and
- (f) Airport Clearance Fees.

[108] The only one of these claims over which there was some dispute is the school fees, with Mr Stock saying SPHL had not agreed to an increase in school fees, which had resulted from Mr Lawton's daughter changing schools. It is clear, however, that Mr Lawton's agreement with SPHL on his transfer to Manila, included school fees for his daughter. In his email of 25 March 2020, Mr Stock acknowledged school fees

were owed.²⁹ I accept the amount claimed under that head would have been recoverable, but for the Agreement.

[109] But for the Agreement, and to the extent they were not reimbursed, the other expenses claimed too would have been recoverable against SPHL.

Fourth question: Was Mr Stock a person involved in a breach?

[110] The final question is whether Mr Stock is a person who was involved in the claimed breaches of employment standards, who would have been liable for moneys due to Mr Lawton.

[111] An employee may recover moneys due to them as a result of a default due to a breach of employment standards by their employer from a person “involved in the breach”.³⁰ An employee wishing to do so needs prior leave of the Authority or the Court.³¹ The employee only may do so to the extent that their employer is unable to pay the arrears in wages or other money.³²

[112] Here, Mr Lawton argues Mr Stock, a director of SPHL was knowingly concerned in, or party to the breaches.³³ He seeks recovery from Mr Stock under s 142Y(1). The Authority granted Mr Lawton leave to proceed against Mr Stock.³⁴ Mr Stock admits that SPHL is unable to pay any moneys due to Mr Lawton.

[113] Although Mr Lawton refers to s 142W(1) in its entirety, he primarily relies on the broadest provision, s 142W(1)(c). The issue under s 142W(1)(c) is whether Mr Stock was knowingly concerned in or a party to the alleged breaches. Mr McBride argues that what is required for Mr Lawton to succeed is to show that Mr Stock *knowingly* acted in the ways that he did in failing and/or refusing to make the payments due. He contrasts Mr Stock’s intentional actions with, for example, a typographical error.

²⁹ See above at [54(b)].

³⁰ Employment Relations Act 2000, s 142Y(1).

³¹ Section 142Y(2)(a).

³² Section 142Y(2)(b).

³³ Section 142W(1)(c).

³⁴ *Lawton v Steel Pencil Holdings Ltd (in liq)*, above n 2, at [6].

[114] In answer to the question of whether Mr Lawton also may be a person involved in the breaches by SPHL, Mr McBride submitted that the answer was first in the timing. He said that, at least from September 2019, in no sense could Mr Lawton be the person responsible because Mr Stock had resumed responsibility for managing the company. Certainly, by April 2020 Mr Lawton had been formally removed as a director and his financial controls had also been removed. Therefore, by the time his employment ended he was not a director and nor was he a shareholder. Therefore, Mr McBride says, at that time, which was when the entitlement to holiday pay anyway crystallised, Mr Lawton could not be a person involved in the breach. In any event, Mr McBride says, even if Mr Lawton were a person involved in a breach, that would not absolve Mr Stock from being liable. I acknowledge both points.

[115] The accepted view is that “knowingly” requires actual knowledge of the essential matters constituting the breach.³⁵

[116] The difficulty that then arises is in defining the essential matters. The formulation in s 142W(1)(c) is similar to that in other legislation that provides for accessory liability.³⁶ However, the cases demonstrate that a context specific evaluation is needed. The provision in issue must be approached purposively having regard to what the Act is trying to achieve.³⁷

[117] The Court in *Southern Taxis Ltd* reviewed the background to ss 142W and 142Y.³⁸ The Court found that the language used in the criteria of s 142W(1) each suggest deliberate involvement in a breach. The Court found that was consistent with the parliamentary history, which referred to individuals or other third parties who were “knowingly and intentionally” involved in breaching employment standards.³⁹ In light of the various considerations, the Court was satisfied that proof of intentional

³⁵ *Yorke v Lucas* (1985) 158 CLR 661; (1985) 61 ALR 307; (1985) 59 ALJR 76 (HCA); *New Zealand Bus Ltd*, above n 17, at [260]; *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 116 at [136].

³⁶ See for example the Commerce Act 1986, ss 74B and 80-86; and Fair Trading Act 1986, ss 41, 43 and 46AA.

³⁷ *New Zealand Bus Ltd v Commerce Commission*, above n 17, at [146] and [148]; *Kimble Contracting Ltd v Wouldes* [2017] NZHC 1554 at [35].

³⁸ *Southern Taxis Ltd*, above n 14, at [180]-[186].

³⁹ See too above at [32].

purposeful actions on the part of the person accused of being involved in a breach is required.⁴⁰

[118] Mr McBride notes that the decision in *Southern Taxis Ltd* is currently under appeal before the Court of Appeal on this issue.⁴¹ He also points to the existence of the defence at s 142ZD that allows a person who would otherwise be involved in the breach to raise a defence that their involvement in the breach was due to reasonable reliance on information supplied by another person; or that they took all reasonable and proper steps to ensure that the employer complied with the provision.⁴² The argument is that the creation of the defence in s 142ZD would not have been necessary if knowledge of default were a prerequisite of liability. This argument was acknowledged by the Court of Appeal in *Brill*.⁴³

[119] Section 142W applies both to claims for a penalty under s 142X and claims for moneys due to an employee under s 142Y. It cannot mean different things depending on whether a penalty is sought or not. Therefore, to the extent the interpretation should reflect the person's exposure to a penalty, that interpretation also would apply where no penalty is sought. It is a well-established principle that penal provisions are to be given a restrictive, rather than expansive reading.⁴⁴ Penalty provisions have been acknowledged to have been regarded as "quasi-criminal" in this jurisdiction.⁴⁵ It is significant too that s 142W uses the language of the criminal law, which also suggests that mens rea is required.⁴⁶

[120] In turning to s 142W(1)(c) then, I consider that knowledge of the essential matters would require something more than knowing the amount of an employee's final pay, or that the employee was paid a certain amount for, for example, holiday pay, which amount or amounts turned out to fall short of the employee's statutory entitlements. The history of the legislation and its purpose, including the availability

⁴⁰ *Southern Taxis Ltd* above n 14, at [187].

⁴¹ *Labour Inspector v Southern Taxis Ltd* [2020] NZCA 337.

⁴² Employment Relations Act 2000, s 142ZD(2).

⁴³ *Brill*, above n 13, at [16].

⁴⁴ *Dollar King Ltd v Jun* [2020] NZEmpC 91, [2020] ERNZ 246 at [14].

⁴⁵ At [14]. See also *Ruapehu District Council v Northern Local Government Officers Union* EmpC Wellington W 60/92, 16 November 1992 at 17.

⁴⁶ *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [66].

of a penalty, assume some wrongdoing on the part of the person involved in a breach. To be knowingly concerned in, or party to, a breach requires two things. First, the person must have participated in the actions that constituted the breach. Second, they must have done so knowing that what they were doing was wrong.

[121] Turning then to the present circumstances. The case is an unusual one. Mr Lawton was the managing director of SPHL and was responsible for the operations of SP Philippines in Manila.

[122] While Mr Lawton was in the Philippines and Mr Stock was in New Zealand, Mr Stock had no detailed knowledge of Mr Lawton's leave arrangements. In 2020, Mr Lawton did tentatively suggest he was owed annual leave should he "choose to call on it" and then included it in his initial set of claims. However, those claims were contested by SPHL and Mr Stock. Then, by the time of Mr Lawton's departure from SPHL, which would have been when any payment for outstanding leave would have accrued, Mr Stock understood that all matters between Mr Lawton and SPHL had been resolved by the settlement contained in the Agreement.

[123] Accordingly, I do not accept that Mr Stock would have had the requisite knowledge to lead to accessory liability under s 142W for outstanding holiday pay.

[124] In respect of the claim under the Wages Protection Act I consider that, while both Mr Stock and Mr Lawton were involved in the arrangements whereby salary was transferred to the loan accounts of the two family trusts, had I found that was in breach of the Wages Protection Act, I would not have found either were knowingly involved in the breach in the sense required by s 142W(1)(c).

[125] One final point is addressed.

[126] Mr Stock has not raised s 142ZD as a defence; he says even if there was a breach (which he denies), he is not caught by s 142W(1). If I had found otherwise, on the facts as found, it may have been open to him to have also made the argument that,

in determining what SPHL was to pay Mr Lawton, he reasonably relied on information supplied by Mr Lawton, at least in respect of Mr Lawton's holiday entitlements.⁴⁷

Conclusion

[127] In conclusion, as identified in [81], Mr Stock is to pay Mr Lawton for outstanding holiday pay at 8 per cent for Mr Lawton's final pay and for the two months' notice period. Mr Lawton's claims otherwise fail.

Costs are reserved

[128] Costs are reserved. If the parties are unable to agree on costs, an application may be made within 21 days, and responded to within a further 21 day period thereafter. Costs then would be determined on the papers.

J C Holden
Judge

Judgment signed at 1.30 pm on 18 November 2021

⁴⁷ Section 142ZD(2)(a).