

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2022-485-802  
[2023] NZHC 3637**

BETWEEN                      BODY CORPORATE 68792  
   Plaintiff

AND                              HARRY MEMELINK AND CISCA  
   JOHNETTE FORSTER as Trustees of the  
   Link Trust (No. 1) (in receivership)  
   Defendants

AND                              IAIN SHEPHARD AND JESSICA  
   KELLOW as receivers of the Link Trust  
   (No 1)  
   Interested party

Hearing:                      6, 9 and 17 October 2023

Appearances:                J J Pietras and N L Donaldson for Plaintiff  
   H Memelink self-represented for Defendants  
   J D Haig for interested party

Judgment:                    12 December 2023

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**JUDGMENT OF GRICE J**  
**(Re interlocutory application to remove Mr Anthony Gambitsis as Court-**  
**appointed administrator of Body Corporate 68792)**

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## Introduction

[1] Mr Memelink has filed an interlocutory application to remove Mr Gambitsis (the administrator) as administrator of Body Corporate 68792 (the body corporate).<sup>1</sup> The administrator was cross examined following an application by Mr Memelink.<sup>2</sup>

[2] The administrator opposes the application for removal on the basis that a stay of proceedings is in place following orders made relating to the receivership of the Link Trust (No. 1), and therefore Mr Memelink and Ms Forster are unable to pursue their application as trustees of that trust. In order to pursue litigation by or for the trust, the receivers must consent or this Court grant leave for the trustees to do so.

[3] The administrator, supported by the receivers of the Link Trust (No. 1) as an interested party, says it is an abuse of process to bring an interlocutory application for removal of the administrator in proceedings which related to claims of interference by the defendants in arrangements for insurance of the body corporate. Mr Haig for the receivers says attempting to bring an interlocutory application to circumvent the stay is an abuse of process.

## Background

[4] Mr Gambitsis was appointed by order of the Court with the consent of the unit holders of the body corporate on 5 October 2017.<sup>3</sup> Before that, two other administrators had held the role. First was Mr Greenwood, who was appointed by the

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<sup>1</sup> This application and an application by the administrator for orders for an extended restraining order against Mr Memelink under s 166 of the Senior Courts Act 2016 was timetabled for a short hearing in a case management conference on 28 August 2023: *Body Corporate 68792 v Memelink* HC Wellington CIV-2022-485-802, 29 August 2023 (Minute of Harland J).

<sup>2</sup> Mr Memelink indicated at the outset of the hearing that he was in pain due to his leg and was under stress. I granted leave for Mr Memelink to be assisted and seated beside Mr Bassett-Burr, who is Mr Memelink's advisor and brother-in-law. The Registrar arranged for a higher chair to be brought into the courtroom for Mr Memelink to accommodate him. Mr Memelink sat next to Mr Bassett-Burr, who assisted Mr Memelink throughout the hearing and also addressed the Court on a number of occasions to summarise matters for Mr Memelink.

<sup>3</sup> *Body Corporate 68792 v Synergy Enterprises Ltd* HC Te Whanganui-a-Tara | Wellington CIV-2015-485-000 202, 5 Ōketopa | October 2017.

High Court on 18 March 2015.<sup>4</sup> He was replaced by Mr Naylor, who was appointed on 9 September 2016.<sup>5</sup>

[5] Mr Memelink was adjudicated bankrupt on 28 August 2018. The effective date of the bankruptcy was 6 September 2019, as the date on which the Official Assignee had received enough information to satisfy the requirement on the bankrupt to supply a statement of assets. Mr Memelink remains bankrupt. An application by the Official Assignee opposing Mr Memelink's automatic discharge from bankruptcy was granted in a decision delivered after this hearing.<sup>6</sup>

[6] Mr Memelink and Ms Forster are the trustees of the Link Trust (No. 1). Mr Memelink is a discretionary beneficiary of the trust. The trust was put into receivership by order of this Court on 31 May 2022.<sup>7</sup> The orders were subsequently varied in December 2022,<sup>8</sup> adding a provision staying proceedings by or against the trust.<sup>9</sup> The judgment putting the trust into receivership was appealed and the appeal was dismissed.<sup>10</sup>

[7] Mr Memelink and Ms Forster failed in a series of applications to this Court seeking leave to revisit the appointment of the receivers and/or the terms of the orders appointing the receivers. Mr Memelink, for the trustees, sought orders replacing the receivers, suspending the receivership, or allowing the trustees (in particular, Mr Memelink) to have control over the realisation and management of the assets, property and the businesses owned by the trust which were and presently are in the control of the receivers.<sup>11</sup>

[8] The receivership order insofar as it relates to the stay provides:<sup>12</sup>

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<sup>4</sup> *Body Corporate 68792 v Memelink* [2015] NZHC 519.

<sup>5</sup> *Body Corporate 68792 v Memelink* [2016] NZHC 2146.

<sup>6</sup> *Official Assignee v Memelink* [2023] NZHC 3044.

<sup>7</sup> *Body Corporate 81012 v Memelink* [2022] NZHC 1244 [receivership decision].

<sup>8</sup> *Body Corporate 81012 v Memelink* [2022] NZHC 3307 [receivership variation decision].

<sup>9</sup> *Body Corporate 81012 v Memelink* HC Wellington CIV-2021-485-419, 19 December 2022 (sealed interlocutory order) [sealed interlocutory order] at [1(q)].

<sup>10</sup> *Memelink v Body Corporate 81012* [2022] NZCA 581 [CA receivership appeal decision].

<sup>11</sup> *Body Corporate 81012 v Memelink* [2023] NZHC 1749 [decision declining removal of receivers] at [5] and [121].

<sup>12</sup> Sealed interlocutory order, above n 9.

- (q) Section 248(1)(c) of the Companies Act 1993 applies to the receivership of the Trust such that unless the receivers agree or the Court orders otherwise:
- (i) all proceedings by or against the Trust (in the name of the trustees) are stayed for the period the receivers are appointed; and
  - (ii) in the case of proceedings against the Trust, any such claimant shall submit a creditor claim in the receivership in accordance with order 1(h) ...

[9] Mr Memelink has filed the application now before the Court in proceedings which began as an application by the administrator on behalf of the body corporate for an interim injunction to restrain Mr Memelink and Ms Forster from interfering with the insurance arrangements for the body corporate and for the properties in the body corporate complex. The interim injunction was granted on 15 December 2022.<sup>13</sup> The judgments restrained Mr Memelink and Ms Forster from interfering with business matters relating to the body corporate.

[10] Mr Haig for the receivers indicated that the receivers took the position that this proceeding, as pleaded, was not by or against the trust. As the proceeding was brought by the administrator of the body corporate, and while the intituling indicated that Mr Memelink and Ms Forster were defendants as trustees, in fact the pleadings were directed at them personally and the injunction was granted against them personally despite the reference in the intituling to their being trustees. The trust controlled the assets, including any litigation that it was entitled to pursue or defend, given the terms of the receivership orders. The receivers had not agreed to Mr Memelink and Ms Forster interfering with the body corporate insurance. The injunction sought was to restrain Mr Memelink from contacting the underwriters and brokers of the insurance for the body corporate. Mr Memelink's objective, the administrator claimed, was to persuade the insurers to avoid the insurance because of defects in the properties or alleged failures by the administrators/receivers to meet various regulatory requirements in relation to the buildings.

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<sup>13</sup> *Body Corporate 68792 v Memelink* [2022] NZHC 3489 [result judgment]; *Body Corporate 68792 v Memelink* [2022] NZHC 3498 [reasons judgment].

[11] The statement of claim filed by the Body Corporate 68792 in the substantive proceeding pleads that the receivers were concerned about the steps taken by Mr Memelink to disrupt the sale process. It alleged Mr Memelink had sent emails to, among others, brokers and underwriters, claiming matters had not been properly disclosed to the underwriters. The administrator was of the view that if cover was cancelled, it would be unlikely the property could obtain replacement cover, and in addition a prospective sale of a unit in the complex might be compromised should the insurance be cancelled. The administrator pleaded that the units in the body corporate complex were “ultimately worthless without insurance, an outcome the Trustees obviously sought.” The statement of claim sought a declaration that the trustees had “tortiously interfered with the insurer” and a declaration that the trustees had breached earlier orders made by Cooke J prohibiting any interference with the sale process, as well as general and punitive damages. An interim injunction restraining Mr Memelink and Ms Forster was granted on 15 December 2022.<sup>14</sup> The substantive claim has not yet been heard.

[12] Mr Memelink filed a statement of defence on 12 January 2023, referring to an affidavit by him dated 12 December 2022 which had been filed with the statement of defence. The statement of defence is difficult to follow. It pleads a number of matters not relevant to the claim and is a mixture of submissions and evidence. However, insofar as relevant to this application, it pleads that Mr Memelink “has genuine concerns” that there has been non-disclosure of information to the insurers and their brokers by the body corporate administrators as to whether the cover is appropriate, and whether the cost of premiums has been fair. It goes on to plead that a building warrant of fitness was required prior to obtaining insurance and that there was “not a single year on record” where there were registered building warrants of fitness for the entire site. The statement of defence goes on to allege non-compliance in a failure to display the building warrant of fitness, that the building levies were “~3.5 times what they should be”, that Mr Gambitsis has never provided to the Court or to the defendants a breakdown of monies purported to be owed by Mr Memelink and details of ordinary levies, as well as general allegations that Mr Gambitsis had failed in his duties as “Court appointed administrator in all manner of ways and the Court should

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<sup>14</sup> Result judgment, above n 13; and reasons judgment, above n 13.

immediately remove him from that position as officer of the Court, and also remove Mr O'Connor, from the position of body corporate counsel.”<sup>15</sup>

[13] Under the heading “Notice of Defendant counter claims”, the defendants seek various orders, including the lifting of trespass orders preventing the trustees from entering trust properties, halting the receivership, halting the Lynx Trustees Ltd liquidation “as it is totally based on the false BC68792 levies.”<sup>16</sup> The counterclaim goes on to seek that all insurances be voided retrospectively and refund sought, ordinary levies recalculated correctly and refund credits applied to unit owners, as well as costs and damages, removal of Court-appointed administration and lawyers, and an acknowledgment and apology from the Court and the Court-appointed administrators for stress and damages suffered by the defendant.

[14] The statement of defence inserts comments in red under each of the allegations in the statement of claim. The general thrust of the statement of defence is that the trust was not insolvent at the time of receivership, the body corporate levies had been overcharged and were disputed, and the trustees were entitled to seek to place a caveat on body corporate units (which had led to the orders of Cooke J) by Mr Memelink as a trust beneficiary to ensure the receivers sold the units for a maximum market price.

[15] Mr Memelink then filed an application dated 26 June 2023 in this proceeding for removal of the court-appointed administrator, Mr Gambitsis. However, Mr Memelink amended the intituling in his application by adding: “In the matter of Section 141 of the Unit Titles Act 2010, an originating application to appoint an administrator”.<sup>17</sup> The body of the document is in the form of an interlocutory application on notice and is on the first page headed “Interlocutory application on notice” using the form supplied in the High Court Rules 2016. The intituling also adds “Roy William Bassett-Burr as Advisory Trustee of the Link Trust (No. 1) in Receivership”. It features a second applicant, Philco Investments Ltd (Philco). No leave application to add defendants has been filed.

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<sup>15</sup> Mr Alwyn O'Connor at that time acted for the Body Corporate. He is no longer a barrister and solicitor.

<sup>16</sup> Lynx Trustees Ltd is in liquidation. It was formerly a trustee of the Link Trust (No. 1).

<sup>17</sup> This has not been added to the intituling in this judgment.

[16] The application seeks:

- (a) the immediate removal of Mr Gambitsis as administrator of Body Corporate 68792;
- (b) the replacement of Mr Gambitsis with either:
  - (i) a committee of unit owners including the trustees, Mr Memelink and Ms Forster, or
  - (ii) a nominated party suitably qualified to replace Mr Gambitsis as administrator (noting that Mr Ben Stockbridge has indicated he is available to act as administrator on an interim basis);
- (c) the ordinary levy to immediately be set correctly for this body corporate and as per the Unit Titles Act 2010;
- (d) the receivership of Link Trust (No. 1), the liquidation of former Link Trust (No. 1) trustee Lynx Trustees Ltd, and Body Corporate 68792's claims in Mr Memelink's bankruptcy to be immediately stayed pending a full investigation and audit of Body Corporate 68792 affairs by a private investigator, Mr Clinton Bowerman, and police;
- (e) all information previously requested by the trustees and other unit owners to be immediately provided; and
- (f) CIV-2021-485-122 to be "immediately re-started".<sup>18</sup>

[17] The grounds upon which the relief is sought are that Mr Gambitsis had not followed due process and compliance with the legislation governing the body corporate, being the Unit Titles Act 2010 and the Unit Title Regulations 2011 specifically. In particular, he points to alleged failures of Mr Gambitsis, said to include:

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<sup>18</sup> This is one of the proceedings stayed pursuant to the order of Churchman J in the receivership variation decision, above n 8.

- (a) failing to hold meetings and resolutions, pursuant to ss 88–104;
- (b) failing to register his appointment on the unit titles, pursuant to s 141(9);
- (c) failing to insure buildings and improvements “to their full insurable value”, pursuant to ss 134–137;
- (d) failing to maintain things such as the body corporate common area, building warrant of fitness and fire protection systems, pursuant to s 138; and
- (e) failing to provide information to trustees, trust lenders, tenants and prospective unit purchasers, pursuant to s 206, to the trustees’ detriment.

[18] It goes on to state that Mr Gambitsis had not followed due process and compliance, had not sought court approval for his fees and operating budgets, provided reports to the Court, convened annual general meetings or extraordinary general meetings of unit owners, provided complete financial reports and budgets to unit owners or sought to “collaborative [sic] resolve issues”.

[19] The application sets out as further grounds that Mr Gambitsis had not correctly set the body corporate levies, had provided no reports, had not gained approval from the Court for his remuneration or decisions of major importance and had engaged Mr O’Connor as a lawyer. The grounds criticise Mr O’Connor’s performance. A further ground is that Mr Gambitsis “has sanctioned malicious and vexatious public defamation against the trustees”.

[20] The application concludes as follows:

**Additionally:**

4. The Trust Receivers and Lynx Liquidators were long go [sic] made well aware of the potential fraud, breaches of the [Unit Titles Act] and straight-out criminality within the BC68792 administration, as well as the

legitimate outstanding claims of the Trust against BC68792, but chose and continue to choose to not inform the Court or take any action what-so-ever.

5. I conclude by stating that the Court has a significant and growing liability for the criminality existing within BC68792 and the consequent destruction of Trust, company and personal assets, and the significant financial and health impacts to the applicant their families and their supporters.

6. If the Court does not act to put a stop to the current administration, the damages will continue against BC68793, BC68792 Unit owners and the Court.

[21] The application was signed by Mr Memelink “as Trustee of the Link Trust (No. 1), on behalf of the applicants.”

### **The body corporate/administrator**

[22] Mr Pietras submits that the interlocutory application falls foul of the receivership stay order which stays proceedings by and against the trust (in the names of the trustees).<sup>19</sup> In addition, he says the interlocutory application is being used to relitigate matters that have already been determined by the Court on a number of occasions.

[23] Mr Pietras further points out that Philco, which appears in Mr Memelink’s application intituling as second applicant, has no standing to support the application, because it was never joined as a party to the substantive proceedings. A similar issue arises in relation to Mr Bassett-Burr, who appears on Mr Memelink’s application intituling as a trustee designated as an “advisory trustee”.

[24] The body corporate points out that Mr Memelink’s submissions make no reference to its notice of opposition, in particular the fundamental issue of standing to bring the application in the light of the lack of standing and order staying proceedings.

[25] The stay is expressed as applying s 248(1)(c) of the Companies Act 1993 to the receivership in relation to all proceedings by and against the trust (in the name of the trustees) to stay such proceedings for the period the receivers are appointed. That section provides insofar as is relevant:

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<sup>19</sup> Sealed interlocutory order, above n 9.

## 248 Effect of commencement of liquidation

(1) With effect from the commencement of the liquidation of a company,—

...

(c) unless the liquidator agrees or the court orders otherwise, a person must not—

(i) commence or continue legal proceedings against the company or in relation to its property; or

(ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company:

[26] Mr Haig, on behalf of the receivers as interested party, supports the administrator's position. He says the application is an abuse of process and that all litigation has been stayed for or against the trust. Therefore, Mr Memelink and Ms Forster as trustees cannot pursue this application. They do not have the consent of the receivers nor has the Court granted leave for Mr Memelink and Ms Forster to pursue it. An application to remove an administrator would be made by a body corporate member or other interested party. The trust is the owner of the unit and a body corporate member could not bring this application other than with the consent of the receivers who controlled the trust.

[27] Mr Haig said the counterclaim was a breach of the stay because the counterclaim introduced new matters not relevant to the proceedings as set out in the statement of claim. The matters including the removal of the receivers and administrators and the disputes concerning levy and insurance were matters for the receivers to pursue if they considered it appropriate on behalf of the trust. Therefore, not having the consent of the receivers, Mr Memelink and Ms Foster purporting to be trustees were attempting to circumvent the stay by filing an application to remove an administrator, in proceedings which related to Mr Memelink and Ms Forster personally, rather than as trustees.

### **The additional applicants named in the intituling**

[28] Mr Memelink said that the added applicants, Mr Bassett-Burr as “advisory trustee” and Philco, have an interest in the proceeding and therefore could be joined.

In addition, Philco is not a trustee, and therefore Mr Memelink said it was entitled to participate in the proceeding without being caught by the stay.

[29] Mr Memelink submits that Philco has standing in the proceedings, as it is a mortgagor of one of the units and so has an interest in the insurance arrangements. Mr Bassett-Burr is a director and shareholder of Philco. When I asked him in the course of the argument (he was assisting Mr Memelink) whether he had consented to his and his company's name being added to the proceeding as an applicant, he indicated that he needed to seek advice before he consented to being part of the proceedings, either personally as a named advisory trustee or for his company Philco.

[30] Mr Memelink said he had been told by court staff to put the CIV number of these proceedings on the intituling. If he had followed the wrong procedure, he asked that the Court permit the correct procedure to be followed.

### **Complaints against the administrator**

[31] Mr Memelink spent some time going through his substantive complaints against the administrator. He also alleged that Mr Dewar, who is the solicitor on record for the body corporate, has a conflict of interest because he previously acted for Mr Memelink and for the body corporate many years ago. In addition, he said the administrator had not registered his appointment by way of court order on the relevant body corporate title with Toitū Te Whenua | Land Information New Zealand (LINZ), as it was required to do under s 141 of the Unit Titles Act.

[32] Mr Memelink spent some time in his submissions referring to historic disputes with the body corporate, including the disputes concerning the levies, amounts owing by the body corporate to Mr Memelink, and the alleged failure of Mr Gambitsis to maintain the body corporate property, to manage the insurance cover appropriately, and to seek approval for his remuneration from the Court and for various actions. He said that Mr Gambitsis had failed to provide relevant information, failed to convene required meetings in order to set the levies according to law and a number of other failures. He pointed to the fact that Mr Gambitsis was meant to sort everything out when he was appointed administrator. Mr Memelink said Mr Gambitsis was supposed

to obtain a Deloitte report to investigate the levies and the amounts due to Mr Memelink. He never did this properly.

[33] In response to the allegations against the administrator, Mr Pietras said:

- (a) The administrator had filed a “Change of address of the Body Corporate” recorded as being registered on 11.40 am on 4 July 2019 which was 19 months after the court order appointing him. Earlier memorials on the title recorded a court order pursuant to s 141 of the Unit Titles Act registered on 21 April 2015 appointing Mr Greenwood as the administrator of the body corporate until further order of the Court. Further memorials included court orders registered on 11 August 2016 and 6 October 2016 recording first the interim appointment of Mr Naylor as administrator and subsequently the appointment of Mr Naylor as administrator.
- (b) The matters concerning the body corporate levies and disputes between Mr Memelink and the body corporate had been determined and disposed of by this Court. The claims had been struck out by Cooke J in a decision dated 20 April 2021.<sup>20</sup> This was upheld by the Court of Appeal. Cooke J’s decision specifically referred to the Deloitte report.<sup>21</sup> The matters therefore had been determined by the courts and Mr Memelink could not seek to relitigate them.
- (c) Mr Gambitsis was appointed by the Court as administrator. The Court could appoint an administrator on such terms and conditions, including as to remuneration or otherwise, as it thought fit on the application of the body corporate, a creditor of the body corporate, or any person having a registered interest in a unit. In the absence of any contrary terms and conditions, the remuneration and expenses of the administrator were to be met out of the operating fund. The Court could

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<sup>20</sup> *Memelink v Body Corporate 68792* [2021] NZHC 835 [HC strike out decision], upheld in *Memelink v Body Corporate 68792* [2021] NZCA 640 [CA strike out decision].

<sup>21</sup> At [18].

in its discretion or on the application of any other person, being the body corporate, or a creditor of the body corporate or any person having a registered interest in a unit, remove or replace the administrator. No terms had been imposed on the appointment of Mr Gambitsis. The relevant parties had not sought his removal or replacement. Mr Memelink personally did not own the unit in the body corporate. The trust was the unit holder for the purposes of s 141. Therefore, even if the application for removal of the administrator had been made following the appropriate procedure, which it had not been, it could not succeed.

- (d) While the Court had appointed the administrator, without specific directions, reports were not to be filed with the Court in the normal course, as would be the case with a liquidator for instance.

[34] Mr Haig submitted that the provisions of s 141 could be read to the effect that once an administrator had been appointed and had lodged with the Registrar a sealed copy of the order, any subsequent administrators were not required to file such orders. Therefore, the filing of a “change of address of the body corporate”, which had been done by Mr Gambitsis on 4 July 2019, was sufficient to meet the requirements of s 141.

### **Analysis**

[35] Mr Memelink’s application must be struck out for a number of reasons which I now deal with.

[36] The application is not an interlocutory application in this proceeding. An interlocutory application is made to obtain an order or direction of the court for the purposes of a proceeding or intended proceeding and concerns a matter of procedure or grants some relief ancillary to that claimed in the pleading.<sup>22</sup> Mr Memelink’s application has not been brought for the purposes of the proceeding here, nor does it relate to procedure or ancillary relief. It seeks to remove not only the administrator

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<sup>22</sup> High Court Rules 2016, r 1.3 definition of “interlocutory order”.

but the receivers of the trust. In any case, if otherwise it was an appropriate application to make, as a matter of procedure it should have been brought by way of separate applications or proceedings and properly pleaded.

[37] The application is an abuse of process. An application for removal of the receivers, who incidentally are not parties to this proceeding, was dismissed recently by this Court.<sup>23</sup> Mr Memelink seeks to relitigate that.

[38] While the intituling in the substantive proceedings is styled as Mr Memelink and Ms Forster as trustees, the allegations in the claim are personal actions and not carried out with the apparent or ostensible authority of the trust. They are the personal actions of Mr Memelink who tried to interfere with the body corporate operations and units under the control of the receivers of the trust. The applications to restrain those by injunctions were personal to the defendants. The relief sought did not seek to establish a debt provable in the bankruptcy, so leave to commence and continue the applications for injunctions would not be necessary.<sup>24</sup>

[39] Any applications by the trustees as unit holders has been stayed by the receivership orders. The application to remove the administrator is therefore stayed even if it were brought correctly. Mr Memelink is therefore attempting to circumvent the stay by bringing the application to remove under the umbrella of this proceeding which amounts to an abuse of process.

[40] Mr Memelink repeated several allegations which he has made in previous proceedings. These criticise, sometimes in venomous terms, solicitors, officials and judges who have disagreed with him. He repeated the allegations concerning the disputes over the levies which had been determined by the High Court and the Court of Appeal.

[41] Mr Memelink seeks to draw fine distinctions about what was included in the determinations of the courts and what were not. These are without merit. For instance, Mr Memelink said that the decision striking out his claims against the body corporate,

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<sup>23</sup> Decision declining removal of receivers, above n 11. The appeal against the receivership decision was also dismissed: CA receivership appeal decision, above n 10.

<sup>24</sup> Insolvency Act 2006, s 76.

which was upheld by the Court of Appeal, did not deal with the fact that Mr Gambitsis was appointed to do what Mr Memelink wanted and he had not done so. This was because Mr Gambitsis had not instructed Deloitte in the terms that Mr Memelink had wanted. Deloitte therefore had not done what it should have done in its report or audit of the levies and the body corporate accounts. Mr Memelink's complaint about Mr Gambitsis not arranging that audit report was referred to by Cooke J in his April 2021 decision. That decision struck out the levy claims. The Judge, in referring to the basis upon which Mr Gambitsis was appointed administrator and Mr Memelink's arguments put by Mr Memelink's then lawyer Mr Livingstone, said:<sup>25</sup>

[20] In terms of whether the delay is excusable, Mr Livingstone relied on two matters. First, he indicated that the delay had been with agreement of the defendant. But as I understand Mr Memelink's affidavit of 28 September 2017 the Administrator was appointed as a resolution of the proceeding, not simply a deferral of them. That then leads on to Mr Livingstone's second main point, which was that the audit report had failed to address the issues that Mr Memelink had raised, and the agreement could not prevent him from proceeding with his claims in those circumstances. But it is very difficult to read paragraphs 5–8 of Mr Memelink's own affidavit as having the implied limit to "withdraw the claim" only if certain conditions were met.

[21] Even if I am ... wrong about that however, Mr Memelink would have had to have acted very promptly indeed if he was to say that he could advance this claim notwithstanding his earlier agreement. But he did not do so. The audit report in question was provided in October 2018, some two years before steps were taken to revive this proceeding.

[42] When I pointed out that the judgment of Cooke J had dealt with the audit report, Mr Memelink said the report was not wide enough and therefore Mr Gambitsis had failed to meet his obligations which Mr Memelink had relied on when he agreed to the appointment of Mr Gambitsis. That judgment also addresses the issues raised here again in relation to the levies and related body corporate claims and how Mr Memelink had chosen to deal with them.

[43] Mr Memelink relies on repetition of the same allegations in his various claims and disputes. For instance, Cooke J noted that the allegations about the levies and body corporate disputes had been at least in part dealt with in the bankruptcy process. His Honour said:<sup>26</sup>

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<sup>25</sup> HC strike out decision, above n 20, upheld in CA strike out decision, above n 20.

<sup>26</sup> HC strike out decision, above n 20.

[24] Mr Memelink then says that as a result of his bankruptcy, and the liquidation of the associated entity (Lynx Trustees Limited) since August 2018, the issue of outstanding levies has been conducted in the sphere of the bankruptcy and liquidation. But this again involves a degree of election by Mr Memelink as to where the disputes would be addressed. Given this proceeding was conducted by Mr Memelink in his capacity as a trustee, the right to pursue it did not vest in the Official Assignee. As Mr Memelink says, however, he elected to have the issues addressed in the bankruptcy, and he did not pursue this proceeding. Certain decisions were also then made by the Official Assignee in relation to his bankruptcy. Decisions were made as to whether to accept or dispute debts said to be owed to Mr Memelink's creditors, including those arising from the levies. Those matters were addressed in a decision of the Associate Judge on 15 October 2020. In *Memelink v Official Assignee* Associate Judge Johnston held:

[55] In my view, neither the Official Assignee pursuant to s 234 nor the Court in the context of an application pursuant to s 238 are required to examine in minute detail every levy to ensure that it was imposed in compliance with all aspects of the legislation and BC 68792's internal management rules. It is sufficient for the Official Assignee or the Court to be satisfied that the Body Corporate had a statutory entitlement and responsibility to levy, has done so and that those levies are prima facie payable.

[56] Of course any unit title holder is entitled to challenge the lawfulness of levies, but in my view that is something which must be done in a timely way in a separate ordinary proceeding.

[57] The trustee owners here have had years to do that and have elected not to do so.

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[61] It turns out that in fact the trustees — or at least Mr Memelink — did initiate such a proceeding in 2016, a proceeding that, for whatever reason, although still extant, is apparently moribund.

[44] His Honour went on to note that the debt in question had been confirmed in the bankruptcy proceeding and noted that to suggest that Mr Memelink could reargue the same matters against that background “may well involve an abuse of process.”<sup>27</sup>

[45] Mr Memelink sought to blame court staff for the fact that the present application was filed in this proceeding rather than as a separate proceeding. He said he had been told by court staff to put the CIV number of these proceedings on the intituling. Even if that were the case, it would be no excuse. It is framed by

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<sup>27</sup> At [25].

Mr Memelink as an interlocutory proceeding and is consistent with the claims in his counterclaim which was filed after the stay had been ordered. His application for the removal of Mr Gambitsis would have been caught by the stay against proceedings on behalf of the trust, so would have not been able to proceed without leave of the Court in any event. Mr Memelink is an undischarged bankrupt and does not have the consent of the Official Assignee to pursue such an application. He has no standing to pursue the application as he personally owns no units in the body corporate.

[46] Mr Memelink's submissions and documentation were confused, disorganised and often did not make sense. He filed a 75-page affidavit on the morning of the hearing and a 115-page affidavit the night before. He was entitled to reply to some material filed by the body corporate on 4 October 2023. However, most of the material contained in the documents that Mr Memelink filed was repetitious and irrelevant. He was given a wide margin to make his submissions, both in the documents filed and in his oral submissions. However, particularly in his oral submissions, he continually came back to the same issues of disputes with the body corporate and criticism of officials, advisors and judges. Mr Bassett-Burr was of some assistance in summarising matters for the Court on Mr Memelink's behalf at Mr Memelink's request. However, Mr Memelink was undeterred.

[47] Mr Memelink also pointed out in oral argument that he was a beneficiary, as I understand it a discretionary beneficiary, under the trust. While not fully articulated by Mr Memelink in this way, nor presaged in his interlocutory application, I understand him to be seeking by this, a way around the restrictions on the trustees and a bankrupt from bringing proceedings. His argument might go that the stay does not apply to him as a beneficiary of the trust, nor is a discretionary interest in a trust property his personal property in terms of the Insolvency Act 2006. Therefore, the Official Assignee does not have control of the commencement or continuation of proceedings brought by a discretionary beneficiary. The Court has a supervisory jurisdiction over trusts, to ensure the trustees administer a trust in accordance with the trust deed.<sup>28</sup>

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<sup>28</sup> *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [51].

[48] This argument has a number of difficulties. But for the purposes of this application, the fatal difficulty with Mr Memelink's argument is that a discretionary beneficiary does not have standing to bring an application seeking to remove an administrator. Only a person having an interest in the unit or other specified persons including the body corporate are entitled to do so. In this case the owner of the Memelink units is the trust (in receivership) and no qualifying interest by a discretionary beneficiary has been established.

[49] Mr Memelink emphasised that the appointment of receivers was null and void because Mr Gambitsis had not filed the sealed copy of the order of the High Court appointing Mr Gambitsis as administrator. It appears Mr Gambitsis went some way towards meeting this obligation by filing the notice of change of address, which refers to the order of Williams J appointing Mr Gambitsis administrator. Mr Pietras submitted that the order must have been lodged with LINZ at the same time as the notice of change of address, or the Registrar would not have caused the memorial to be entered on the title concerning the change of address. However, Mr Pietras was unable to provide evidence of the fact that the order had been lodged with LINZ. The memorial on the title did not refer to the court order, but rather referred to a "change of address of the body corporate". The fact that two earlier memorials specifically referred to the court orders appointing the predecessors of Mr Gambitsis appears to indicate that the order was not lodged in relation to Mr Gambitsis' appointment. The fact that Mr Gambitsis did not register with LINZ a sealed order specific to his appointment was confirmed in a memorandum filed with the Court by counsel for the body corporate following the hearing.

[50] The purpose of the registration is to advise the public of the appointment of administrator. I consider it unlikely that the requirement to lodge the sealed order making the appointment would only apply to the first administrator. In my view, it applies to each administrator. Therefore, while he has gone some way to ensuring that notice of his appointment is notified, Mr Gambitsis should have lodged the sealed order appointing him.

[51] However, I do not agree with Mr Memelink that the fact that Mr Gambitsis failed to lodge a sealed copy with LINZ makes his appointment null and void.

Mr Memelink argued that because of that failure to lodge, all actions by Mr Gambitsis on behalf of the body corporate were ineffective, including the application by the body corporate for the appointment of the receivers.<sup>29</sup> I do not agree. The purpose of the lodgement is to notify the public of Mr Gambitsis' appointment as administrator. The failure to lodge the order does not invalidate or avoid his appointment. It may be that in certain situations the lack of knowledge would give rise to grounds for a claim of by a person who was affected by lack of knowledge of the appointment. That is not the case here. I also consider the notice of change of address went some way toward remedying the failure to lodge the notice. That was done in July 2019.

[52] In any case, the position has now been remedied. I did not consider it appropriate to give a direction at the hearing that the position should be remedied by the administrator as soon as possible. The obligation was on the administrator and that issue had arisen as a side wind in this proceeding. Following the hearing, Mr Memelink filed an "urgent memorandum" seeking for the Court to intervene to prevent or rescind the registration of Mr Gambitsis as administrator. I issued a minute the following day recording my view that there were no grounds for making such an order, even if it had been sought following the appropriate court procedure. In any case, counsel for the body corporate has now filed a memorandum, confirming that a correct order has now been sealed and lodged with LINZ. Despite this, Mr Memelink continues to challenge the appointment of Mr Gambitsis on this point, in further submissions filed. However, I consider the fact that the sealed order has now been lodged adequately resolves the issue.

### **Conclusion**

[53] The interlocutory application seeking Mr Gambitsis' removal cannot proceed.

[54] All property of the trust is under the control of the receivers, to the exclusion of Mr Memelink and Ms Forster. All proceedings by or against the trust are stayed except with the receivers' consent or by order of the Court. The receivers do not consent to Mr Memelink and Ms Forster pursuing an application whether by counterclaim or otherwise on behalf of the trust in this proceeding. Neither has the

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<sup>29</sup> Resulting in the receivership decision, above n 7.

Court made any such order that the proceeding may be continued. To the extent the counterclaim seeks relief against the body corporate on the basis of the trust's ownership of units in the body corporate, it cannot therefore proceed.

[55] Neither Mr Bassett-Burr nor Philco are parties to this proceeding. They have no standing.

[56] Accordingly, the application by Mr Memelink and Ms Foster to, among other things, remove the administrator and any applications related to that are dismissed pursuant to r 15.1 of the High Court Rules.

### **Timetable**

[57] It may be that the administrator does not wish to pursue the proceeding any further in which case it should be disposed of appropriately. Otherwise the matter will be put in the call over list by the Registrar and the usual memoranda should be filed at least five working days before the call to timetable the substantive matter to a hearing.

### **Costs**

[58] If any issue as to costs arises, a memorandum seeking costs together with submissions should be filed and served on or before five days of the date of this judgment. Any reply should be filed and served within a further three days and any response within a further three days.

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Grice J

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