

[2] The remedial costs exceeded estimates DDC had provided. Mr Thompson became concerned about this and refused to pay four invoices totalling \$20,014.69 that DCC had issued for repair works on his two units. That sum, or a sum very close to it, was held on trust pending resolution of the dispute over these invoices.¹ The dispute had not been resolved when DDC went into liquidation.

[3] After DDC went into liquidation, Mr Thompson asked Mr Thomas to release the funds to him. Mr Thomas declined to do so. Mr Thompson applied to the High Court under s 284 of the Companies Act 1993 for Mr Thomas' decision to be reversed. The High Court granted this application.² Mr Thomas appeals from this decision.

Background

The contract for repairs

[4] The unit title development was defectively constructed and suffered damage from water ingress. Substantial remedial work, including recladding each unit, was needed. This was the subject of discussion at the Body Corporate's Annual General Meeting on 27 May 2013.

[5] Aaron Martin was on the Body Corporate Committee (and became its Chairman on 1 July 2013). He owned three of the units in the development at the time. He lived with Darryl Montgomery, the sole director of DDC before it was placed into liquidation, in one of the units. The minutes of the meeting record that they had paid for preliminary sketches to be done for the upgrade work. They had also paid DDC's quantity surveyor "to put together a budget figure for each owner to use to approach their financiers to fund the reclad project". This figure was \$350,000 per unit. Owners were to come back with their funding advice before 1 July 2013. The remedial work for each unit was expected to take 18 weeks each, or 42 weeks for all the units, if managed most efficiently.

¹ The second invoice was not entirely legible. It is for either \$4,889.28 or \$4,889.26. The four invoices totalled either \$20,014.67 or \$20,014.69. Some of the documents in the Case on Appeal indicate the amount held in trust was a few cents less. These differences are immaterial for the issues on appeal.

² *Thompson v Thomas* [2018] NZHC 1495.

[6] On 22 August 2013, a scheme was approved by the High Court under s 74 of the Unit Titles Act 2010 to carry out the works and tenders were sought from builders. Two tenders were received. One of them was from DDC. Its tender was for \$1,662,239.³ The tender included a breakdown for each unit, showing prices ranging between \$177,612 to \$235,086 (exclusive of GST) depending on the unit. For Mr Thompson's units (units five and six) the prices in this breakdown were respectively \$190,643 and \$187,946 (exclusive of GST).

[7] At a meeting on 16 September 2013 chaired by Mr Martin, the Body Corporate resolved to accept DDC's tender. It was determined that there would be some fixed price sums for subtrades, but the overall contract would be on a charge-out basis. In accordance with this decision, on 28 September 2013 a "Cost and Margin" contract was entered into between DDC and the Body Corporate (defined as "the Owner"). It was signed by Mr Martin and Mr Thompson on behalf of the Body Corporate.

[8] The contract included the following provisions:

This is a building contract in which the total price payable for the Building Work is not fixed, specified, or known at the time of entering into the Contract. ... The Parties may have chosen to enter into this form of building contract for any number of reasons, including that it is too difficult for the Builder and/or the Owner to accurately predict the precise scope of the Building Work at the outset, ...

...

Either prior or subsequent to the Parties entering into this Contract, the Builder may have given or may give to the Owner ... an estimate, indication, projection, guess, intimation, statement, assurance, warranty or representation or similar communication (together referred to as an "estimate") as to what the Final Contract Price or any component of it is likely to turn out to be. ... The Parties acknowledge that even the most carefully calculated estimate can in hindsight prove to be grossly pessimistic or optimistic, and it is impossible for the Builder to accurately predict what the final outcome of the Project will be, given that so many factors are outside the Builder's control.

The Parties therefore expressly record that any such estimate ... shall only represent the Builder's best guess, based on the Builder's experience and what the Builder knows about the Project itself to date. It shall have no legal significance or effect, and the Builder shall not be held accountable for it, unless the Parties have taken the precaution of expressly agreeing otherwise in writing. ... The fact that the Parties have chosen to enter into this form of

³ The tender letter says this sum is inclusive of GST. The attached schedule says the sum is exclusive of GST.

contract rather than a fixed price contract shall be recognised as fundamentally inconsistent with the Builder being legally bound by any such estimate.

[9] Other terms of the contract included:

- (a) The owner was required to pay the builder the actual costs of the remedial works plus a margin of 10 per cent to the builder. Progress payments and the final contract price were to be calculated on this basis.
- (b) The owner was required to pay invoices in full within five working days of the invoice being delivered or sent to them. If the owner considered that all or part of the invoiced amount was not payable, the owner was required to inform the builder of this in writing within five working days with reasons as to the disputed and undisputed amounts of the invoice.
- (c) If the builder's invoice contained or accompanied a payment claim under the Construction Contracts Act 2002 (the CCA), then any payment schedule, as defined under s 5 of that Act, had to be provided to the builder within five working days.
- (d) The owner irrevocably granted and agreed to execute in favour of the builder a registerable all obligations mortgage over all the owner's estate and interest in the property to secure payment of the builder's invoices and any other sums payable to the builder pursuant to the contract.

[10] The contract included a dispute resolution process. This process was triggered when the first written communication evidencing the dispute was delivered or sent by one party to the other. It required the following:

- (a) The parties were to meet or otherwise communicate with each other, as soon as reasonably practicable after the dispute had arisen, to attempt to resolve the dispute in good faith through negotiation.

- (b) If after 10 working days the dispute was not resolved by negotiation, the parties could agree to attempt to resolve the dispute by mediation. However, mediation was not compulsory.
- (c) If the dispute was not resolved within 20 working days of the dispute arising, and there was no agreement to mediate in force, either party could elect to have the dispute resolved by adjudication under the CCA.
- (d) However, if the dispute was for an amount more than \$500,000 then the dispute could be resolved by adjudication under the CCA, or by arbitration or by legal proceedings in court.
- (e) If the dispute was for a sum of money allegedly owed to the builder greater than \$10,000, then the owner had to pay the disputed amount into “escrow”. This meant paying the disputed amount into a solicitor’s trust account or into the appropriate court (if there were legal proceedings), or depositing the funds with an escrow agent entity meeting certain minimum requirements. The owner’s obligation to pay the amount into escrow was “an essential term” of the contract “intended to ensure that each party has a similar incentive to resolve the dispute promptly and cost-effectively”.

[11] The works did not go to plan. The \$350,000 the owners had each paid into the Body Corporate account for each unit they owned was eventually exhausted. DDC began invoicing the owners individually for the remediation costs as the excess funds required to complete works on each unit varied. There were also delays.

[12] Mr Thompson expressed concern about the costs and delays with his units in an email to Mr Montgomery on 12 December 2014. He said he was holding back paying an invoice because he wanted to discuss this. There appears to have been a discussion and on 23 December 2014 Mr Thompson paid this invoice “in line with [his] obligations” but he was “very uncomfortable with the overruns and discrepancies”.

The invoices

[13] In late February and March 2015 DDC issued four invoices to Mr Thompson totalling \$20,014.69. By this stage invoices rendered by DDC for unit five totalled \$463,373.11 and for unit six totalled \$425,490.45.⁴ Mr Thompson failed to pay or dispute these latest four invoices within the five-working day timeframe provided for in the contract. Nor did he pay the money into escrow.

[14] DDC ceased trading on about 31 March 2015 and its assets were transferred to another company.⁵ Mr Thompson was not informed of this.

[15] On 13 April 2015, Mr Thompson's solicitors sent a letter to DDC's solicitors, Turner Hopkins. The letter referred to Mr Thompson's concerns over the extent to which costs had exceeded the original estimated costs. The letter said that Mr Thompson was not willing to pay the latest invoices. Turner Hopkins replied on 21 April 2015, noting that the contract provided the estimated costs were just that, an estimate, because they could not be determined at the outset. The letter also referred to a proposed settlement and sought a response to it.

[16] Around 23 April 2015, Mr Thompson sent payment schedules (outside the time specified under the contract) for the last two of the four outstanding invoices, contending they were overcharged.⁶ He and some of the other owners also instructed a construction and cost consultancy firm to review the costs charged by DDC.

The dispute over the mortgage

[17] DDC registered mortgages on Mr Thompson's units. On 24 April 2015, the mortgages securing \$175,000 for each unit were registered without notice to Mr Thompson. Mortgages were also placed over other units.⁷

⁴ These sums appear to be GST inclusive.

⁵ This is the date in the liquidator's report. It is the same date as the last of the four invoices that are in dispute.

⁶ One invoice was for \$4,001.63 and the other for \$4,001.62. The dates on the schedule was not entirely legible. It says either 23 or 28 April 2015.

⁷ DDC received a letter dated 10 May 2015 on behalf of the owners of units two and three. The letter disputed DDC's right to place mortgages over the unit titles and expressed concern at the costs charged. It proposed that both sides "walk away" from their dispute. If this was not accepted, the owners of units two and three would pay the current outstanding invoices but a claim in

[18] On 14 May 2015, Mr Thompson's lawyers, Pidgeon Law, wrote to Turner Hopkins. Pidgeon Law said the mortgages were invalid because the "owner" under the contract was the Body Corporate and the "land" under the contract was the Body Corporate's land, not Mr Thompson's units. The letter also said that the unpaid invoices of approximately \$20,000 were less than the amount that DDC had admitted overcharging. The material before us does not provide any further information about this.

[19] On 22 May 2015, Pidgeon Law advised Turner Hopkins that Mr Thompson would be applying for an injunction to remove the mortgages. He also advised that the amount claimed by DDC on the four invoices would be held in Pidgeon Law's trust account pending the resolution of the dispute.⁸ DDC was invited to consent to that arrangement to avoid proceedings being issued.

[20] Mr Thompson's proposal was motivated by his need to refinance the mortgage he had taken from the vendor of one of his units, which he could not do while DDC's mortgage was registered on the title of that unit. The background to this was that, in April 2014, Mr Thompson had purchased unit five from the owner. The mortgage over that property had fallen due for repayment on 31 March 2015.

[21] On 15 June 2015, Mr Thompson commenced proceedings against DDC for summary judgment and an interim injunction. On 26 June 2015, Mr Thompson and DDC, through their lawyers, signed a consent memorandum. This memorandum advised the Court that the parties had reached an agreement as follows:

- (a) DDC would remove the mortgages from Mr Thompson's titles by 26 June 2015 and would not register them again, without prejudice to its position that they were validly registered;

negligence would be brought against DDC for more than \$360,000. DDC did not accept the owners' position. The owners of units two and three decided to pay the outstanding invoices with a denial of liability.

⁸ In his affidavit in support of his application for summary judgment and an interim injunction, Mr Thompson said he was unwilling, at that stage, to pay the invoiced sum to DDC to discharge the mortgages because he had no confidence that DDC would ever repay him that money or any other money if it was later determined that he had been overcharged for the remedial works as alleged. Mr Thompson was aware that mortgages had not been removed on another owner's title once they had paid the invoices and he was aware that Mr Montgomery had a history of shutting down companies that he owned and managed.

- (b) Pidgeon Law undertook to hold \$20,014.82 for the benefit of Mr Thompson and DDC pending determination of the dispute between them by agreement, order of the Court, or determination pursuant to the CCA;⁹
- (c) Mr Thompson withdrew his interim injunction and summary judgment applications without prejudice to his position that the mortgages were invalid and with costs reserved; and
- (d) Mr Thompson and DDC agreed to refer their dispute to mediation as early as possible and subject to the following timetable:
 - (i) Mr Thompson would provide details of all documents he required from DDC not less than six weeks prior to the date of mediation;
 - (ii) DDC would provide those documents not less than four weeks prior to the mediation;
 - (iii) Mr Thompson would provide DDC with a particularised statement of claim not less than two weeks prior to the mediation (DDC was not required to file a statement of defence before 30 September 2015); and
 - (iv) neither party would commence a proceeding for a determination under the CCA before 30 September 2015.

[22] The parties sought orders by consent for the mortgages to be removed and the interim injunction and summary judgment applications to be struck out with costs reserved. The High Court entered judgment on those terms.¹⁰

⁹ The sum on the memorandum is not entirely legible. It could be \$20,014.82 or \$20,014.62. The judgment appealed from records it as \$20,014.62: *Thompson v Thomas*, above n 2, at [4]. Those figures are slightly different to the total of the four invoices (\$20,014.69) but this difference is immaterial.

¹⁰ *Thompson v DD Construction Ltd* [2015] NZHC 1458 at [6].

[23] Pursuant to the consent memorandum, on 10 July 2015 Mr Thompson's lawyers wrote to DDC's lawyers requesting the following documents: all labour time sheets; scaffolding invoices; calculations and supporting documentation that had been used to construct the tender sums; the timber remediation report; critical path programmes; and all invoices and payment claims for all units in the Body Corporate. The information therefore related to the overall allegation that Mr Thompson was making about misrepresentation and overcharging, rather than being specifically directed to the four invoices that Mr Thompson had refused to pay.

[24] DDC did not reply to this request. On 11 September 2015, Pidgeon Law advised DDC's lawyers that the court proceedings would need to resume in the absence of a response. No response was forthcoming.

Mr Thompson's proceeding

[25] On 7 April 2016, Mr Thompson filed an amended statement of claim against DDC. The Body Corporate was added as a second plaintiff. Mr Montgomery and Turner Hopkins were added as second and third defendants. Mr Thompson's claim against DDC and Mr Montgomery was for false and misleading misrepresentations in breach of the Fair Trading Act 1986. Mr Thompson sought the difference between \$350,000 (the original maximum estimated costs of the repairs) and the actual costs incurred per unit.¹¹ The Body Corporate's claim against DDC was for contractual misrepresentations and breach of an implied term of reasonable cost. As against Turner Hopkins, the claim was that the firm's certification pursuant to s 164A of the Land Transfer Act 1952 was given in breach of a statutory duty to give a correct certificate.

[26] The defendants applied for summary judgment. The High Court gave its decision on 21 March 2017. Turner Hopkins was granted summary judgment (although this was later reversed on appeal),¹² and the application by Mr Montgomery

¹¹ He also claimed for the loss of rental income from the units for the repair period beyond the 18 weeks that had been represented.

¹² *Thompson v Hopkins* [2018] NZCA 197. While this Court agreed with the High Court's reasoning on the pleaded breach of a statutory duty cause of action, it considered that a new (unpleaded) cause of action in negligence was not certain to fail (at [42] and [70]). That cause of action arose in oral submissions at the Court of Appeal hearing and in subsequent memoranda.

and DDC for summary judgment was dismissed.¹³ This was because the Fair Trading Act claim required them to prove they honestly considered the construction work could be completed for \$350,000 on a reasonable basis when this opinion was given.¹⁴ They had not provided a basis on which this figure had been arrived at and at a substantive trial each side might have evidence to support their respective positions. In these circumstances the Court was not able to conclude, on a summary judgment application, that the estimate was honestly held on a reasonable basis.¹⁵ This meant that Mr Thompson and the Body Corporate's claims against all three defendants remained on foot.

DDC in liquidation

[27] On 25 May 2017, DDC was placed into liquidation by a special resolution of the shareholders of the company. Mr Thomas, the appellant in the present appeal, was appointed as liquidator. On 1 June 2017, Mr Thomas issued his first liquidator's report. The report said that DDC ceased trading on 31 March 2015 with only minimal creditors.¹⁶ Mr Montgomery, the sole director and shareholder, had formed a new company and transferred most of DDC's assets to that new entity in consideration for an intercompany loan of an indeterminate value. There was no prospect of recovery of that loan and the new company was also to be placed into liquidation and the debt written off. DDC did not have any other recoverable assets.

The dispute over the funds held in trust

[28] On 7 December 2017 a memorandum was filed on behalf of the third defendant (Turner Hopkins) by Ms Grant in the proceeding brought by Mr Thompson and the Body Corporate. The memorandum advised the Court that DDC was now in liquidation and Mr Montgomery had been made bankrupt.¹⁷ She advised that leave

¹³ *Thompson v DD Construction Ltd* [2017] NZHC 516 (summary judgment decision).

¹⁴ At [33] and [44].

¹⁵ At [44]. In other words, Mr Montgomery and DDC had not shown the plaintiffs could not succeed. As a defendant can only be granted summary judgment if the Court is satisfied that none of the plaintiff's claims against a defendant can succeed, the Court did not need to consider the other claims (see [45]–[47]).

¹⁶ The report noted that there would be an investigation into whether there had been insolvent trading by Mr Montgomery, but the six-month liquidator's report did not discuss this.

¹⁷ Ms Grant, who appeared for the liquidator on this appeal, was acting for DDC before it went into liquidation. The memorandum dated 7 December 2017 was signed off by her as “[c]ounsel for the third defendant”. By 7 February 2018 Ms Grant was “... on instructions for David Thomas,

from the Court would be needed if Mr Thompson and the Body Corporate wished to continue the proceedings against them.¹⁸

[29] On 11 December 2017, Mr McCartney (counsel for Mr Thompson and the Body Corporate) filed a memorandum in response. Mr McCartney said that Mr Thompson had not previously been advised of the liquidation and the bankruptcy. He sought release of the funds paid into court because of DDC's liquidation.¹⁹

[30] The Court issued a minute on 12 December 2017 stating that it was not prepared to release the funds until the liquidator had the opportunity to respond.²⁰ On the same day Ms Grant (as counsel for Turner Hopkins) responded, stating that the application for the release of the funds was misconceived because the plaintiffs' proceeding could not proceed without leave; and because the funds had been paid into Court as part of an agreement to settle a dispute over the registration of the mortgages (the mortgages were discharged in return for the funds being paid into Court). Ms Grant submitted the funds were arguably the property of DDC, and that DDC's property was now under the control of Mr Thomas as liquidator. She further advised:

Counsel has spoken to Mr Thomas, who has advised that he does not agree to the proceedings being continued against the first defendant. For that reason leave will be needed. He has also advised that he claims the monies paid into Court.

[31] Mr McCartney then submitted another memorandum on 7 February 2018. This clarified that the funds were not paid into Court but were held in Pidgeon Law's trust account. The memorandum said there was no point in Mr Thompson continuing the claim for damages against DDC because there was no prospect of recovering anything. Mr McCartney submitted the following:

- (a) The funds were Mr Thompson's property rather than the liquidator's. The liquidator could make a claim for the funds, by filing a counterclaim in the proceeding, but he had not done so.

Liquidator for First Defendant".

¹⁸ Companies Act 1993, s 248(1)(c); and Insolvency Act 2006, s 76.

¹⁹ This referred to the value of the four invoices that was paid into Pidgeon Law's trust account, counsel mistakenly understanding at this time that the sum had been paid into Court.

²⁰ *Thompson v DD Construction Ltd* HC Auckland CIV-2015-404-1319, 12 December 2017.

- (b) The liquidator's refusal to consent to the continuation of the proceeding and the release of the funds was vexatious and breached a duty of good faith because the funds would remain in trust forever.
- (c) The dispute effectively had been determined by agreement out of practicality since neither side wished to continue the litigation.
- (d) Mr Thompson was entitled to:
 - (i) an order granting leave under s 248(1)(c) of the Companies Act to apply for an order for the funds to be released to him and an order for the release of the funds; or
 - (ii) an order under s 284(1)(b) of the Companies Act reversing the liquidator's decision to refuse to consent to the release of the funds, on the grounds the decision was unreasonable.

[32] Mr McCartney asked the Court to make these orders without the need for a formal application.

[33] By memorandum dated 7 February 2018, Ms Grant (as counsel for Mr Thomas) advised that he opposed the release of the funds. The memorandum stated:

After investigation, he considers this sum to be the rightful property of the Company, as it represents unpaid invoices for work and materials supplied to Mr Thompson in respect of his leaky unit. It is the liquidator's opinion that the money belongs to the company and should be paid to the liquidator for the benefit of creditors.

[34] The memorandum said the amount was paid as security pending determination of the rightful owner, it therefore could not be unilaterally overridden by Mr Thompson, and Mr Thompson had not applied for leave to continue his claim against Mr Montgomery and DDC.

The application to release the funds

[35] Associate Judge Christiansen directed that Mr Thompson and the Body Corporate file an application for the return of the funds.²¹ By a memorandum dated 19 March 2018, Mr McCartney said he was taking this direction implicitly as a grant of leave to continue the proceeding against DDC under s 248(1)(c) of the Companies Act for the purpose of determining the dispute over the funds in trust. Associate Judge Christiansen confirmed this by minute dated 22 March 2018.²²

[36] What happened after this procedurally led to a disagreement between counsel on the appeal before us about the status of Mr Thompson's claim against DDC and Mr Montgomery.²³ What happened was this:

- (a) On 22 March 2018 Mr Thompson applied for an order under s 284 of the Companies Act reversing the liquidator's decision to refuse consent to the release of the funds. This was brought as an interlocutory application in the existing proceeding brought by Mr Thompson and the Body Corporate against DDC, Mr Montgomery and Turner Hopkins.
- (b) In a minute dated 6 June 2018, Associate Judge Bell noted that a s 284 application was a stand-alone proceeding, not an interlocutory application in the existing proceeding.²⁴ The Associate Judge made an order amending the names of the parties to the application to Mr Thompson as applicant and Mr Thomas as respondent. He granted leave under the High Court Rules 2016 for the s 284 application to be brought as an originating application, and he granted leave under s 284(1) for Mr Thompson to make that application.

²¹ *Thompson v DD Construction Ltd* HC Auckland CIV-2015-404-1319, 8 February 2018 at [8].

²² *Thompson v DD Construction Ltd* HC Auckland CIV-2015-404-1319, 22 March 2018 at [5].

²³ We directed counsel to file a joint memorandum about this after the appeal. That did not occur because the parties could not agree to the correct position. The position was set out in a memorandum from Mr Thompson's counsel. No memorandum was filed for Mr Thomas.

²⁴ *Thompson v Thomas* HC Auckland CIV-2015-404-1319, 6 June 2018 at [3].

- (c) Associate Judge Bell’s directions were intended to regularise the proceedings, so that the s 284 application was a stand-alone originating application. However, the application was not given a new “CIV” number (civil court file number) as it ought to have been to regularise matters, and as Associate Judge Bell apparently intended. It would not have made sense to simply amend the parties’ names in the existing proceeding as Mr Thompson’s claim against Turner Hopkins remained on foot.
- (d) The s 284 application proceeded to a hearing before Associate Judge Osborne on 13 June 2018. His judgment, given on 21 June 2018, was issued under that same CIV number, with Mr Thompson as applicant and Mr Thomas as respondent, presumably in accordance with the intituling on the parties’ submissions.²⁵ The Judge reversed the liquidator’s decision and ordered the release of the funds.²⁶
- (e) On 21 November 2018, Associate Judge Andrew made timetable directions for a two-day trial commencing on 21 October 2019 on Mr Thompson’s claim against Turner Hopkins for approximately \$22,000.²⁷ The Associate Judge queried the wisdom of proceeding to trial on a claim for that amount.²⁸ The Associate Judge’s minute also recorded that Mr Thompson was no longer proceeding against DDC and Mr Montgomery.²⁹ The Associate Judge directed that amended pleadings were to address the parties that remained.³⁰ However, the claim against Turner Hopkins settled on 2 August 2019. This occurred before Mr Thompson had amended his pleadings. It appears that a notice of discontinuance was not filed for the claim against DDC and Mr Montgomery despite counsel’s indication that it would not be pursued.

²⁵ *Thompson v Thomas*, above n 2.

²⁶ At [44].

²⁷ *Thompson v DD Construction Ltd* HC Auckland CIV-2015-404-1319, 21 November 2018.

²⁸ At [3].

²⁹ At [9].

³⁰ At [10].

[37] All of this meant that Mr Thompson and the Body Corporate's claim against DDC and Mr Montgomery remains on foot but requires leave to proceed. We disagree with Ms Grant that either Associate Judge Christiansen or Associate Judge Bell granted leave for this proceeding to continue. Leave was granted only for the application over the funds held in trust.

The High Court decision

[38] As discussed in Associate Judge Osborne's decision on Mr Thompson's s 284 application, the liquidator contended that DDC had agreed to withdraw the mortgages in exchange for these funds being paid into escrow pending resolution of the dispute over the invoices.³¹ The dispute over the invoices had not been determined by any of the agreed methods and Mr Thompson had not disputed the invoices in accordance with the agreed timeframes under the contract. Under the contract, disputed amounts were to be paid into escrow pending the determination of the dispute, so that is how the funds should be treated until the dispute was resolved.

[39] Against that background, the liquidator contended his refusal to agree to the return of the funds was reasonable because the continuance of Mr Thompson's claim was not in the best interests of DDC or its creditors and, having investigated the facts, DDC had a relatively strong claim that it owned the funds and it was in the best interests of creditors to pursue that claim. The liquidator proposed the dispute over who was the rightful owner of the funds be resolved in the Disputes Tribunal or dealt with in the liquidation.

[40] The Associate Judge discussed case law holding that the Court's power to intervene arose where there was fraud, a lack of bona fide exercise of the liquidator's discretion, or unreasonableness. Unreasonableness meant a decision that no reasonable liquidator could have acted.³²

³¹ *Thompson v Thomas*, above n 2, at [17].

³² At [26]–[28]. He referred to *Levin v Lawrence* [2012] NZHC 1452; *Callis v Pardington* (1996) 7 NZCLC 261, 211 (CA); *Re Peters, ex parte Lloyd* (1882) 47 LT 64 (CA); and *Re A Debtor, ex parte The Debtor v Dodwell (The Trustee)* [1949] Ch 236 (Ch).

[41] The Associate Judge considered the liquidator's alternatives for resolving the dispute were problematic.³³ The money in trust was above the Disputes Tribunal's jurisdictional limit and the Tribunal was not bound to give effect to strict legal rights.³⁴ If the liquidator wished to resolve the dispute in this way, he could release the funds and pursue a claim on the invoice up to \$15,000 (that is, the funds did not need to be held in trust for this to occur).³⁵ Moreover, if it was determined that Mr Thompson was liable to pay the invoices and the fund was released to the liquidator in satisfaction of the debt, Mr Thompson would have no prospect of recovering any part of it because the liquidator's report makes it clear that there are no funds to pay secured creditors, let alone unsecured ones.³⁶

[42] The Associate Judge observed that the dispute resolution process agreed to by the parties in June 2015 had failed because DDC did not comply with that process in 2015, nor subsequently before it went into liquidation.³⁷ Since becoming involved, Mr Thomas had taken no steps to have the entitlement to the disputed sum determined. With DDC in liquidation, it would be uneconomic for the dispute to be determined in the High Court and, all the more so, as leave was required and Mr Thomas opposed the granting of leave.

[43] The Associate Judge said:

[35] Ultimately, this case concerns a resolution process to which the parties committed in 2015 but which failed. It failed at the outset through the default of DDC in not providing the requested documents necessary to proceed to mediation. In the circumstances, I am satisfied that the liquidator's decision not to consent to the release of the fund back to Mr Thompson was unreasonable. It did not take into account the failure of the company itself (when not in liquidation) to honour the dispute resolution process upon which the parties had agreed. It was in that context that Mr Thompson's solicitors gave their undertaking in relation to the fund. ...

[44] The Associate Judge went on to refer to the following other matters: the liquidator had erroneously been of the view that there were other reasonable avenues

³³ *Thompson v Thomas*, above n 2, at [31]–[32].

³⁴ At [32]. The Disputes Tribunal's jurisdiction is over disputes of up to \$15,000, or \$20,000 by agreement of the parties.

³⁵ At [33].

³⁶ At [32].

³⁷ At [34].

for the dispute to be resolved;³⁸ had apparently determined the likely prospects of the claim without legal advice;³⁹ and had pointed to no evidence that Mr Thompson would not be good for payment of the sum if the liquidator exercised the available avenues to establish DDC's entitlement to it.⁴⁰

[45] The Associate Judge concluded:

[41] The only reasonable solution in these circumstances, the agreed resolution mechanism having failed, was to permit the release of the fund back to Mr Thompson. ...

[46] The Associate Judge reversed Mr Thomas's decision and released Pidgeon Law from their undertaking.⁴¹

Our assessment

[47] Mr Thomas accepts the Associate Judge correctly stated the test for reversing a liquidator's decision, but says he misapplied that test on the facts. He submits the question before the liquidator was whether he should give up the security that was held for debts due to DDC. The security gave Mr Thompson an incentive to resolve the dispute and provided Mr Thomas with valuable leverage in achieving a resolution. Mr Thomas says any reasonably commercially minded person, let alone a liquidator, would not give up their security. Far from being a decision that no reasonable liquidator could make, Mr Thomas says it was in fact the only decision a reasonable liquidator could make in the circumstances.

[48] We do not accept the question of whether a liquidator in the position Mr Thomas found himself in should give up security he holds can be so framed. The question was whether he should consent to the release of funds held by Pidgeon Law. That question could only be answered by investigating the

³⁸ At [35].

³⁹ At [39].

⁴⁰ At [41].

⁴¹ At [44].

circumstances in which those funds were paid and held.⁴² We agree with the Associate Judge's view of those circumstances.

[49] In particular, we agree that DDC in liquidation had no reasonable basis to insist on the funds being retained in trust pending a resolution of the dispute, given that: DDC had failed in 2015 to adhere to the agreed process for resolving that dispute; that agreed process had effectively replaced the dispute resolution procedures under the contract; no resolution had been reached in the subsequent two years; DDC's claim to the sum that the funds secured was bound up with Mr Thompson's unresolved damages claim (Mr Thompson was contending he should not pay for the four invoices because they were issued under a contract that had been entered into as a result of DDC's misleading and deceptive conduct about the estimated costs of the repairs); and DDC's liquidation made Mr Thompson's pursuit of that claim unrealistic.

[50] Turning to other submissions advanced for Mr Thomas:

- (a) We reject the submission that the Associate Judge should have considered the Dispute Tribunal a reasonable avenue for resolving the dispute. This would not have resolved Mr Thompson's claim for damages with which the dispute over the payment of the last four invoices was inextricably bound.
- (b) We reject the submission that the Associate Judge erred by failing to refer to the other methods of resolution the parties allowed for in the consent memorandum (the CCA process or court order). While the consent memorandum allowed for those possible methods of determining the dispute, the parties had agreed to a mediation process first. DDC took no steps to comply with that process.
- (c) We reject the submission that the Associate Judge erred by taking into account that the liquidator had not obtained legal advice before making his decision. While a liquidator is not required to obtain legal advice,

⁴² We do not accept the submission that *Callis v Pardington*, above n 32, where the liquidator's decision was unreasonable because it was made without investigation and evaluation, is distinguishable.

its absence was a relevant factor in assessing whether the liquidator had given proper consideration to whether the fund should be released. Legal advice would have assisted the liquidator to assess whether DDC had breached the agreement recorded in the consent memorandum. It would also have assisted the liquidator to assess the merits of Mr Thompson's claim that the invoices had been issued under a contract entered into because of DDC's misleading and deceptive conduct.

- (d) Mr Thomas argued that Mr Thompson could file a proof of debt with the liquidator and the liquidator would need to properly consider the claim at that time. This claim was, however, the subject of extant court proceedings and Mr Thomas, through his counsel, had declined to consent to those proceedings continuing. It is unrealistic to suggest that Mr Thomas would have considered and accepted a proof of debt for the damages Mr Thompson was claiming in these circumstances.
- (e) Finally, counsel for Mr Thomas suggested that Mr Thompson could still pursue his claim in the High Court because those proceedings remain on foot and an October trial date was scheduled. Counsel suggested the Court did not need to grant leave for the proceedings to continue, because the scope of the leave granted earlier by Associate Judge Christiansen covered this. We do not accept this submission. First, it is clear that the leave granted by Associate Judge Christiansen was for an application to be made regarding the release of the fund and not for the continuation of the proceedings. The appropriate procedure for this application was regularised by Associate Judge Bell. Secondly, it is clear that the October trial date was for the hearing of the claim against Turner Hopkins.

[51] For these reasons, we consider Mr Thomas has not established that the Associate Judge erred. We agree with the Associate Judge that the liquidator's decision was not one a reasonable liquidator could make.

Result

[52] The appeal is dismissed.

[53] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We do not certify for second counsel.

Solicitors:
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Pidgeon Law, Auckland for Respondent