IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA640/2024
[2026] NZCA 193

BETWEEN	IBC JAPAN LIMITED AND KEVYN BOTES Appellants
AND	KIERAN MICHAEL JONES, STEVEN KHOV AND THOMAS LEE RODEWALD Respondents

Hearing:	20 May 2025
Court:	Campbell, Venning and Eaton JJ
Counsel:	B D Gustafson and G R Grant for Appellants B J Burt and J Tunna for Respondents
Judgment:	26 May 2026 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C The appellants must pay the respondents costs for a standard appeal on a band A basis together with usual disbursements.

D The respondents must pay the appellants costs for a standard cross-appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Campbell J)

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Introduction

[1] Section 284(1)(e) of the Companies Act 1993 (the Act) empowers the High Court to review or fix the remuneration of a liquidator at a level which is reasonable in the circumstances. Section 312, together with sch 7 to the Act, provide that a liquidator's remuneration and the fees and expenses properly incurred by the liquidator have priority over all other payments out of the company's assets.

[2] Autoterminal New Zealand Ltd (Autoterminal) was put into liquidation by special resolution of its sole shareholder on 11 September 2021. Kieran Jones, Steven Khov and Thomas Rodewald were appointed liquidators. The liquidators resigned at various points in 2023, and Kevyn Botes was appointed in their place.

[3] On 11 September 2023, the liquidators[1] applied to the High Court under ss 284 and 312 of, and sch 7 to, the Act for an order fixing their remuneration at $1,232,801.41 and disbursements of $618,706.15.[2] Autoterminal's largest creditor, IBC Japan Ltd (IBC), opposed the application, asserting that the liquidators' fees were excessive and unreasonable and the disbursements had been unreasonably incurred. IBC contended that reasonable remuneration should be no more than $600,000 and disbursements of no more than $400,000 should be approved. Mr Botes was granted leave to intervene and adopted a similar position to IBC.

[4] Brewer J fixed the liquidators' remuneration at $1,064,429 (about $168,000 less than sought) and disbursements of $618,706.15 (the amount sought).[3] IBC and Mr Botes appeal, saying the Judge should have fixed substantially lower amounts of both remuneration and disbursements. The liquidators cross-appeal, saying the Judge should have approved the full remuneration sought. The key issues we have to determine are:

(a) Was some of the liquidators' evidence hearsay and thus inadmissible?

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1 That is, Mr Jones, Mr Khov and Mr Rodewald (although Mr Rodewald had resigned by this point). Despite their now being former liquidators, for convenience we continue to refer to them as the liquidators.

2 Unless otherwise stated, all amounts in this judgment are exclusive of GST.

3 *Jones v IBC Japan Ltd* [2024] NZHC 2454 [judgment under appeal] at [158].

(b) Did the Judge err by taking a broad-brush approach to remuneration?

(c) In any event, did the Judge err in fixing the amount of remuneration?

(d) Did the Judge err in determining that the court has jurisdiction to review disbursements (more properly called expenses) and, in any event, did he err in fixing their amount?

Factual background

[5] Autoterminal was incorporated in New Zealand in 2000. Its sole shareholder and, for the majority of its existence, sole director was Michael Tyler. Autoterminal formed the New Zealand leg of a global business venture between Robert Stone and Hohua (Jojo) Hemi dealing in the export and sale of second-hand cars from Japan. IBC, a company incorporated in Japan, would source local vehicles and export them to various markets, including New Zealand. Autoterminal operated as an importer and distributor of these second-hand vehicles in New Zealand, where it would in turn sell them to car dealerships.

[6] IBC is ultimately owned by Mr Stone and Mr Hemi. The relationship between them deteriorated from about 2014, since when they have been engaged in litigation in various jurisdictions. In July 2021, in *Autoterminal New Zealand Ltd v IBC Japan Ltd*, judgment was given in IBC's favour against Autoterminal in the sum of $38,648,006.[4] IBC set out to enforce the judgment and that led to Mr Tyler putting Autoterminal into voluntary liquidation on 11 September 2021.

[7] Mr Tyler appointed Mr Rodewald, Mr Khov and Mr Jones as liquidators. Mr Rodewald runs his own practice. Mr Khov and Mr Jones operate a separate firm.

[8] Autoterminal's debts totalled about $40 million, making IBC the principal creditor by some margin. Accordingly, IBC was closely involved with the three liquidators from their appointment until they resigned at various times in 2023.

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4 *Autoterminal New Zealand Ltd v IBC Japan Ltd* [2021] NZHC 1654.

[9] On 17 September 2021, just days after the liquidators were appointed, IBC gave them formal notice of its interest in purchasing certain Autoterminal assets. A formal offer for the acquisition of the business and assets of Autoterminal was presented soon thereafter, on 21 September. After some negotiating, a revised offer was accepted. The purchase was completed through a New Zealand incorporated subsidiary, ATNZ 2000 Ltd, and the price was paid by set-off of Autoterminal's judgment debt.

[10] As part of the set-off arrangement, IBC agreed that all other creditors (barring a handful that Mr Hemi, who effectively controlled IBC at this time, thought were associated with Mr Stone) could be paid out at 100 cents in the dollar. Those creditors were duly paid in full over the course of several months, and the liquidation continued.

[11] On 1 February 2023, Mr Rodewald resigned as liquidator. On 30 March 2023, IBC emailed the two remaining liquidators seeking to arrange a meeting to discuss some concerns about their conduct of the liquidation. At the meeting, which took place on 3 April, IBC outlined its concerns, including its view that there was significant overcharging on the part of the liquidators. The next day, IBC's general counsel, Que Tam Nguyen, asked the liquidators to resign. After further interactions, Mr Khov and Mr Jones resigned on 2 November 2023. Mr Botes was appointed in their place.

The work done by the liquidators

[12] The Judge's description of the work done by the liquidators during their appointment was not in issue before us.[5] We summarise it as follows:

(a) The early months principally involved relationship building, securing the premises and an overall appraisal of Autoterminal's position. A COVID-19 lockdown was in place at the time of their appointment. The liquidators had to liaise with Autoterminal's 21 staff and deal with the 255 vehicles on site.

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5 Judgment under appeal, above n 3, at [43]–[49].

(b) The liquidators reviewed the pre-liquidation sale of Autoterminal's workshop and undertook general administrative work, including securing staff email accounts.

(c) Discussions with IBC about its prospective purchase of Autoterminal's assets commenced a few days after the liquidators were appointed, and an agreement was entered into on 6 October 2021 with settlement occurring on 8 October.

(d) During the liquidators' tenure, 291 imported vehicles were released to Autoterminal for registration, which required ongoing administration. The liquidators produced four statutory reports and frequently provided updates to IBC as the principal creditor and the subsequent owner of Autoterminal's assets. The liquidators liaised with IBC often and IBC approved payments to other creditors. The liquidators were also involved in other claims, primarily a claim against Autoterminal by the liquidator of Nigel Thompson Motor Company Ltd (NTMC), which eventually settled for $250,000.

(e) Other workstreams included the reconciliation of accounts receivable and the engagement of experts in respect of potential litigation (the liquidators engaging eight law firms across four countries).

(f) The liquidators oversaw payments to creditors, staff and to the Inland Revenue Department.

(g) By the end of their tenure, the liquidators were in the process of analysing potential claims by Autoterminal, including against Mr Tyler.

[13] The Judge set out a table, adapted from one contained in Mr Jones' affidavit in support of the liquidators' application, which described 16 workstreams undertaken during the liquidation and the remuneration charged by the liquidators for each.[6]

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6 At [50].

The table provides a useful basis for explaining the Judge's decision and analysing the issues on appeal, so we set it out here:

	Workstream	Details	Fees (excluding GST)
1	IBC Japan	Engagement with IBC and their solicitors	$190,993
2	Securing control of the business	Identifying and engaging with stakeholders, including taking control of documents and records, staff cooperation, engaging with the director and landlord, inventory management	$78,781
3	Accounts receivable ledger	Document management in relation to the ledger, reconciliation, liaison with accounts team, adjustment and customer liaison	$36,365
4	Sale of the business and assets	Sale of the business and assets to IBC	$158,330
5	Position of the creditors in liquidation	Receipt/adjudication of creditor claims, leasing and adjusting claims, establishing credit priorities, distribution to non-IBC creditors	$36,581
6	Relations Co Ltd	Investigations with supplier	$21,134
7	Voidable transaction claim	Engagement with a law firm and accounting/consultant firm re the company's position on the claim	$170,012
8	Wheelers debt	Reconciliation of claim, including taking legal advice	$44,637
9	Aquarius/ IT issues	Engagement with Aquarius and receipt of advice	$62,355
10	AFC/ Escrow Deed	Investigation of arrangements with AFC in further receipt of advice	$72,867
11	Robert Stone	Engagement with Mr Stone and legal counsel as well as other parties	$12,119
12	Tax Losses	Review of information/position, receipt of tax advice	$6,453
13	Mike Tyler/ Claim	Extensive engagement with Mr Tyler to secure cooperation and assistance on various issues	$50,854
14	FX accounts reconciliation	Requests for, analysis and reconciliation of information with various stakeholders	$94,968
15	Internal administration	Administration of liquidation including tax obligations, accounting, reporting and records	$74,865
16	Remuneration approval	Preparation of application and affidavits for remuneration approval	$121,487

The liquidators' application and the evidence

[14] The liquidators filed their application on 11 September 2023, prior to Mr Jones and Mr Khov resigning. They applied for three orders, only two of which they ultimately pursued in the High Court. The primary order sought was one fixing their remuneration for the period to 20 August 2023 at $1,232,801.41 and expenses of $618,706.15. They also sought an order directing them to deduct their remuneration and the fees and expenses properly incurred in bringing the application from the funds held by them in the liquidation of Autoterminal. The liquidators sought these two orders under ss 284(1)(e) and 312 of the Act and cl 1(1)(a) of sch 7 to the Act. The liquidators filed affidavits in support from Mr Jones and David Webb. Mr Webb gave expert evidence. He is an insolvency practitioner at Deloitte.

[15] IBC filed affidavits from Ms Nguyen and from Malcolm Hollis. Mr Hollis gave expert evidence. He was, at that time, an insolvency practitioner at PricewaterhouseCoopers. Mr Botes also made an affidavit.

[16] All five deponents were required for cross-examination at the High Court hearing. We will address some of their evidence in more detail later in this judgment. For now, it is useful to summarise the Judge's overview of their evidence:[7]

(a) Mr Jones, who was the witness of fact for the liquidators, made three affidavits totalling some 200 pages and 6,000 pages of attachments. Thankfully, we were not burdened with all those attachments. Mr Jones' evidence was to the effect that all the work done by the liquidators was done in good faith and carried out at appropriate levels of seniority.

(b) Ms Nguyen said she found the liquidators difficult to work with from the outset; they were unduly guarded and pushed back against her expressed desire that IBC work cooperatively with them. She considered there should have been a total alignment of interests given IBC was far and away the largest creditor, it had purchased

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7 At [51]–[56].

Autoterminal's assets within a month of the liquidation commencing and it had agreed that all the other creditors (barring a few) could be paid in full.

(c) Mr Botes gave evidence in his capacity as replacement liquidator, but the Judge said he had really been commissioned to review aspects of the performance of Mr Jones, Mr Khov and Mr Rodewald. The Judge said he found Mr Botes' evidence instructive not so much for his criticisms of the liquidators but for the light it shone on IBC's practices. The Judge said it revealed that although Mr Botes appreciated he had a statutory duty of independence, he was simply taking directions from IBC (in accordance with his view that IBC was the sole remaining creditor of Autoterminal).

(d) Mr Webb made three affidavits. His view was that the fees charged by the liquidators were, for the most part, reasonable, though he did consider there to have been some overcharging. His evidence was that he would reduce the overall fees by $55,000.

(e) Mr Hollis had a completely different view. The Judge said he gave high-level evidence, meaning he looked at the state of Autoterminal at the commencement of the liquidation and at the work required to complete the liquidation. He evaluated what needed to be done on a reasonable basis and decided that an appropriate level of remuneration would be between $500,000 and $600,000. On later review, he increased that to a maximum of $700,000 to take into account the application to fix remuneration.

High Court decision

Statutory framework and legal principles

[17] The liquidators applied for their remuneration to be fixed under s 284(1)(e) of the Act, which empowers the court to fix remuneration at a level which is "reasonable in the circumstances". The Judge said the general principles applying to

the remuneration of liquidators were well settled and were found in three decisions of the High Court.[8] The first was *Re Medforce Healthcare Services Ltd (in liq)*, a decision of Salmon and Paterson JJ which set out general principles governing both prospective and retrospective applications by liquidators for their remuneration to be fixed.[9] The second, *Re Medforce Healthcare Services Ltd (in liq) (No 2)*, was a decision of Master Gambrill that provided more specific guidance on practical issues.[10] The third, *Re Roslea Path Ltd (in liq)*, was a decision of Heath and Venning JJ which built on the two *Medforce* decisions.[11]

[18] The Judge said that *Roslea Path* remained the leading case and had been endorsed by this Court in *Madsen-Ries v Salus Safety Equipment Ltd (in liq)* and *Toon v Quinn*.[12] He quoted the following passage from *Roslea Path*:[13]

> In fixing a liquidator's remuneration, the Court is making a determination of the *fairness and the reasonableness of what has been charged when measured against the work undertaken and the result achieved*. Fair and reasonable remuneration reflects the value of the services rendered to the creditors of the company and, if a surplus were achieved, its shareholders. "Value" is an elusive concept which goes beyond mathematical application of hourly rates to hours spent by individuals involved in administering the company's affairs.

[19] The Judge said that, accordingly, the court adopts a broad approach and may consider a wide range of factors, including the skill, specialised knowledge and responsibility required; the time and labour expended; the value or amount of any property or money involved; the importance of the matter to the client and the results achieved; the complexity of the matter and the difficulty or novelty of the questions involved; the number and importance of the documents prepared or perused; the urgency and circumstances in which the business is transacted; and the reasonable costs of running a practice.[14]

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8 At [24] and [26].

9 *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC).

10 *Re Medforce Healthcare Services Ltd (in liq) (No 2)* [2001] 3 NZLR 158 (HC).

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

12 Judgment under appeal, above n 3, at [31], citing *Madsen-Ries v Salus Safety Equipment Ltd (in liq)* [2022] NZCA 101, [2022] NZCCLR 12 and *Toon v Quinn* [2021] NZCA 696, [2021] NZCCLR 29.

13 Judgment under appeal, above n 3, at [32], quoting *Re Roslea Path Ltd (in liq*), above n 11, at [102] (emphasis added by the Judge).

14 Judgment under appeal, above n 3, at [33], citing *Re Roslea Path Ltd (in liq*), above n 11, at [103].

[20] Addressing matters of process and evidence, the Judge said:[15]

> [35] The touchstone is pragmatism. A court must conduct a proportionate assessment examining the evidence of the liquidator's work against the nature and complexity of the work undertaken in order to assess its value. The greater the amount claimed, the more a court will examine the evidence, and the greater the evidence required. Each case must be judged on its own facts, and a court must avoid a prescriptive approach. However, the onus is on the liquidator to justify the remuneration claimed.

[21] The Judge said there were situations in which a global approach to the fixing of remuneration is acceptable:[16]

> The authorities suggest a court should not adopt too broad an approach, i.e. simply fixing a fee thought appropriate. Rather, the authorities prefer a "global approach" in the absence of evidence:
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> > … Rather, we consider that Associate Judges should inquire into the reasonableness of the fees on the basis of the principles outlined in *Medforce 1* and other cases, but have the ability to fix a global sum as remuneration (as a matter of judgment), if the liquidator had supplied too little information to enable a clear view to be formed on whether what was claimed was or was not "reasonable". The difference is that our approach requires the exercise of a judicial judgment, as opposed to an arbitrary choice of an amount.

[22] The Judge concluded his review of remuneration principles by saying that the court should ensure that creditors and shareholders are not prejudiced as a result of inefficiency or overservicing by the liquidator on one workstream but at the same time it must be mindful that creditors and shareholders should not receive a windfall at the liquidator's expense as a result of an abundance of efficiency. The focus must therefore be on assessing the value of the work.[17]

[23] The Judge then turned to the principles governing the liquidators' claim for expenses. He referred to a passage in *Medforce* in which Salmon and Paterson JJ said it is only the remuneration of liquidators that is subject to review, not the liquidators'

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15 Judgment under appeal, above n 3 (footnotes omitted).
16 At [36] (footnotes omitted), quoting *Re Roslea Path Ltd (in liq)*, above n 11, at [142].
17 Judgment under appeal, above n 3, at [37].

expenses.[18] He noted, however, that in *Quinn v Toon* Associate Judge Bell had, after referring to that passage, said:[19]

> There is however a qualification to that. If liquidators take a course of action which is not required for the liquidation, the court may disallow both their expenses and their remuneration for that course of action. It would be absurd to refuse their remuneration while still allowing their expenses for the same matter.

[24] The Judge was satisfied that the rules about the reasonableness of remuneration did not directly apply to expenses incurred in the course of a liquidation. Nor did s 284(1)(e) provide a basis for review. However, that did not mean the courts have no jurisdiction whatsoever to determine whether an expense incurred in the course of a liquidation is unjustified. The Judge said he concurred with Judge Bell and that the legal basis for review is found in cl 1(1)(a) of sch 7 to the Act, which, in describing the priority of payments to preferential creditors, provides that liquidators may be paid the fees and expenses "properly incurred". Accordingly, the Judge concluded that the Court has jurisdiction to review a liquidator's expenses.[20]

Analysis of evidence and factual findings

[25] The Judge then described the work undertaken by the liquidators and gave an outline of the witnesses and evidence (which we have summarised at [16] above). He briefly dealt with an admissibility objection raised by Mr Botes, as follows:

> [59] The intervenor, Mr Botes, challenges the liquidators' evidence on the basis that it contains hearsay. I do not think anything turns on that. This is not a case where any particular piece of evidence will influence the outcome. The analysis is broader than that and the approach more global.

[26] The Judge said IBC's central argument was that the liquidators spent too much time at unreasonably high rates, and that they overserviced and overworked the file. As a result, the fees sought were unreasonable.[21] IBC also criticised the workstreams identified by Mr Jones, saying they were inaccurate and unhelpful due to substantial overlap. The Judge said he disagreed with that criticism of the workstreams. Whilst there was overlap, the workstreams provided a useful breakdown of the work

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18 At [38], citing *Re Medforce Healthcare Services Ltd (in liq)*, above n 9, at [19].
19 Judgment under appeal, above n 3, at [39], quoting *Quinn v Toon* [2020] NZHC 816 at [119].
20 Judgment under appeal, above n 3, at [40]–[42].
21 At [60].

completed. And in any event, IBC's fundamental opposition was to the overall amount charged by the liquidators.[22]

[27] The Judge said that Mr Hollis' analysis focussed on five workstreams (chosen because they stood out as having high charges) but that IBC's closing submissions specifically addressed two workstreams. These were the foreign exchange transactions workstream and the NTMC voidable transaction claim workstream.[23] The former involved the liquidators' efforts in reconciling Autoterminal's considerable foreign exchange transactions. IBC was critical of the volume of work done by the liquidators in relation to this workstream, saying that the liquidators were aware from an early stage that IBC had engaged BDO to perform the reconciliations. The liquidators should therefore have waited to receive BDO's report before deciding whether further work was necessary, rather than undertaking duplicative work.[24] The latter involved the liquidators defending a voidable transaction claim (of approximately $3.3 million) by the liquidator of NTMC against Autoterminal. As noted above at [12(d)], the claim settled for $250,000, and the liquidators maintained that this workstream demonstrated a significant benefit to Autoterminal from their efforts. IBC, on the other hand, maintained that most of the legal work had been completed by Autoterminal's lawyers by the time the liquidators became involved and that the claim was exceedingly unlikely to succeed. This workstream involved 455 hours of work, the majority of which was completed by Mr Jones and Isaac Lowther (a junior insolvency analyst). Mr Jones deposed 26 meetings took place to discuss the defence of the claim.[25]

[28] The Judge considered there was overservicing by the liquidators on both of these workstreams.[26] As regards the NTMC workstream, the experts were agreed that the costs appeared high, notwithstanding the positive outcome for creditors.[27] And with respect to the foreign exchange transactions workstream, the Judge was satisfied

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22 At [61].
23 At [63]–[65].
24 At [73].
25 At [66]–[68].
26 At [72] and [77].
27 At [71].

that the liquidators should have taken steps to ensure there was no unnecessary duplication of the work BDO was performing.[28]

[29] The Judge then focussed on seven issues to help assess the overall reasonableness of the liquidators' remuneration:[29]

(a) *The complexity of the liquidation*. The Judge considered the liquidation was not particularly complex. It was not multi-jurisdictional (in that Autoterminal was almost entirely based in New Zealand). There were no major disputes with creditors. The only litigation in progress was the NTMC voidable transaction claim, which was settled quickly.[30] IBC purchased Autoterminal's business within a month of the liquidation commencing and agreed that almost all remaining creditors could be paid out fully.[31] There were some complexities. For instance, IBC was a Japanese company and there was acrimony between its shareholders. However, most of the work was "standard fare" for a liquidator.[32]

(b) *Whether it was necessary to retain three liquidators*. The Judge did not regard this as a significant issue.[33] Whether three were required was beside the point, as three had been appointed.[34] There was a good reason for the appointment of Mr Rodewald, as he was someone Mr Tyler could work with, and in the initial phase of the liquidation engaging positively with Mr Tyler was to the benefit of the liquidation.[35] The Judge also accepted Mr Jones' evidence that there were advantages to having three liquidators in the initial period affected by the COVID-19 lockdown and that work was apportioned between the liquidators.[36] There were only relatively minor added

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28 At [77].
29 At [79].
30 At [88].
31 At [89].
32 At [90].
33 At [98].
34 At [99].
35 At [102].
36 At [100].

costs as a result of the appointment of three liquidators.[37] It followed that this issue was not of material relevance to the overall question of the reasonableness of the liquidators' remuneration.[38]

(c) *Whether the liquidators performed too much of the work themselves*. The Judge accepted that the model employed by the liquidators was top-heavy, with less division of labour and delegation than would typically be utilised. That was a function of the structure of the liquidators' firms. The firms were smaller practices without the junior structure found in larger insolvency practices.[39] In the Judge's view, the liquidators' firms' business model was justified by the lower hourly rates charged, with the evidence showing that the $450 per hour charged by the liquidators was well below that which would have been charged by practitioners at a large firm who were well below partner level. The same was true for the support staff employed by Mr Jones and Mr Khov's firm.[40] The Judge concluded that in determining whether the claimed remuneration was reasonable, the major issue was not the rates at which the work was charged but rather the number of hours that were charged.[41]

(d) *Whether too much time was spent on the liquidation*. The Judge said that the processes in relation to payments were elaborate and it was inefficient for both firms to be involved, that there were significant charges for administration which were largely unexplained, and that on occasion there was more than one law firm employed on the same workstream.[42] He said he would take this into account in his global analysis.[43]

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37 At [101].
38 At [103].
39 At [116].
40 At [117].
41 At [119].
42 At [122].
43 At [123].

(e) *Whether the engagement with IBC justified greater remuneration or expenses*. The Judge accepted that IBC, as the only creditor of note, was entitled to be kept informed of the progress of the liquidation, to make suggestions and to be consulted on major decisions. It was not, however, entitled to take control of the liquidation, and the liquidators were required to maintain a reasonable level of independence.[44] The Judge did not accept Mr Hollis' criticism of the liquidators providing comprehensive reports to IBC. It was understandable that the reports were comprehensive, and IBC never demurred.[45] The liquidators were entitled to charge for the time they spent liaising with and reporting to IBC and the Judge refused to reduce the remuneration claimed on account of this workstream.[46]

(f) *The liquidators' engagement with Mr Tyler*. IBC criticised the way the liquidators dealt with Mr Tyler. Again, the Judge said IBC was not entitled to control the liquidation. He accepted Mr Jones' evidence that the liquidators saw value in maintaining a good relationship with Mr Tyler (which is why Mr Rodewald, who had a good working relationship with Mr Tyler, was appointed liquidator). This aspect of the liquidation was not a reason for reducing the remuneration claimed.[47]

(g) *Whether the liquidators unnecessarily engaged advisors across various workstreams, incurring expenses without a corresponding reduction in the liquidators' work*. The Judge found that the expenses of around $620,000 claimed by the liquidators were "disproportionate" to the requirements of the liquidation.[48] The vast majority of that sum was paid for legal advice but there was no real evidence that the receipt of that advice had led to a more efficient liquidation. To the contrary, Mr Jones' evidence was that he spent considerable time examining

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44 At [131].
45 At [133].
46 At [132] and [134].
47 At [138]–[139].
48 At [147].

the advice (including doing legal research) to decide whether to accept it. There was also some duplication of effort between law firms.[49] But the Judge said this finding did not mean the expenses were "improperly incurred".[50] The Judge had no doubt they were incurred by the liquidators in the belief they were reasonably necessary for the proper conduct of the liquidation.[51] However, the expenses had resulted in further and unnecessary attendances by the liquidators. The correct approach was therefore to reduce the liquidators' remuneration.[52]

Conclusion

[30] The Judge said he was not to fix reasonable remuneration by undertaking a line-by-line analysis of every hour worked. Rather, on a "global approach", he was to assess the fairness and reasonableness of the remuneration charged against the work undertaken and the result achieved.[53]

[31] The Judge's "global assessment" was that the liquidators had, to some extent, overworked and over-resourced the liquidation.[54] In quantifying the appropriate reduction to the remuneration charged, the Judge accepted IBC's submission that hindsight has its place, subject to the stipulation that the court will not impose too stringent requirements on liquidators.[55]

[32] The Judge noted that Mr Hollis' expert evidence as to the appropriate amount of remuneration incompletely explained how he reached his view that the total remuneration should be no more than $700,000. Mr Hollis had failed to explain how the workstreams he had not analysed (being 11 of the 16 workstreams), which did not have the same appearance of overcharging and which themselves came to almost

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49 At [147].
50 At [148].
51 At [148].
52 At [149].
53 At [150], citing *Re Roslea Path Ltd (in liq)*, above n 11, at [102].
54 Judgment under appeal, above n 3, at [151].
55 At [153].

$700,000 in claimed remuneration, could be squared with the total remuneration he recommended.[56]

[33] The Judge put to one side the remuneration claimed for the IBC workstream (which he had earlier found was justified) as well as that claimed for the remuneration approval application (which he dealt with separately). The balance was $920,321.[57] The Judge reduced that part of the claim by 15 per cent, explaining:

> [156] In my view, the disbursements paid to lawyers and other experts illustrate the approach taken by the liquidators. They are disproportionate. The liquidators performed more work as a result. And, overall, there is no evidence that the liquidators, by doing most of the work in the liquidation themselves, were more efficient than if more work was done by less expensive staff. I have concluded that the remuneration claim of $920,321 should be reduced by 15 per cent, or $138,000 (rounded). The result is $782,321.

[34] As to the $121,487 claimed for the remuneration approval application, the Judge considered this to be significantly higher than it should have been. It was about 11 per cent of the total remuneration claim. There was no need for Mr Jones' very lengthy affidavits and the thousands of pages of attachments. The Judge reduced this part of the claim by 25 per cent, to $91,115.[58]

[35] The Judge accordingly fixed the liquidators' remuneration to 20 August 2023 at $1,064,429[59] and expenses of $618,706.15.[60]

Issues on appeal and cross-appeal

[36] IBC and Mr Botes were separately represented below but joined forces on appeal. They say the case law establishes that a "broad-brush" approach should be taken to the assessment of whether liquidators' remuneration is reasonable, using the touchstones of value and proportionality. On that approach, they say

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56 At [154].
57 At [155].
58 At [157].
59 This was the sum of the amounts approved by the Judge for the IBC workstream ($190,993), the remuneration approval application to the High Court ($91,115) and the balance of the workstreams ($782,321).
60 At [158].

the remuneration should have been fixed at a substantially lower amount, for two reasons:

(a) Mr Jones' evidence as to the work carried out by Mr Rodewald and two staff members at his firm, Rodewald Consulting Ltd (RCL), was hearsay and thus inadmissible. The liquidators had therefore failed to prove that the fees charged by Mr Rodewald's firm were reasonable. No remuneration for RCL should have been approved.

(b) In any event, the cross-examination of Mr Webb established there was overcharging on five of the 16 workstreams. Reasonable remuneration was no more than $688,000.

[37] As to the expenses, IBC and Mr Botes say the Judge was correct to find the court has jurisdiction to review expenses incurred by liquidators. They say the Judge should not have approved any expenses, or alternatively should have approved less of them, as there was no evidential basis for concluding the expenses were properly incurred.

[38] The liquidators dispute all these points and say, on their cross-appeal, that the full amount of their claimed remuneration and expenses should have been approved. They say that to the extent any of Mr Jones' evidence contained hearsay statements with respect to the work performed by RCL, an exception to the rule against hearsay applied. As to remuneration, they say a broad-brush approach to approval of liquidators' remuneration is appropriate only where the liquidators have failed to provide sufficient information to the court. Here, the liquidators provided detailed evidence. Consequently, the Judge erred by taking a broad-brush approach and by making arbitrary reductions to the liquidators' claimed remuneration. The evidence did not support any reductions.

[39] As to expenses, the liquidators say the Judge erred in law in determining that the court has jurisdiction to review these, including by reducing the liquidators' remuneration as a consequence.

[40] We address the issues that arise in the following order:

(a) Was Mr Jones' evidence regarding RCL's work inadmissible and, if so, what is the consequence?

(b) Did the Judge err by taking a broad-brush approach to fixing remuneration?

(c) Did the Judge err in fixing remuneration at $1,064,429?

(d) Did the Judge err in determining that the court has jurisdiction to review the expenses claimed by liquidators?

(e) Did the Judge err in approving expenses of $618,706.15?

Was Mr Jones' evidence regarding RCL's work inadmissible and, if so, what is the consequence?

Background

[41] Mr Jones, in his first affidavit dated 11 September 2023, gave evidence about the work undertaken by Mr Rodewald and his staff at RCL. In so doing, he produced time records from RCL. Mr Jones also gave some evidence about interactions between Mr Rodewald and others (mostly Mr Tyler) that he would not have observed.

[42] Some of this evidence, such as the RCL time records, was plainly hearsay (a matter which we address below at [54]). IBC did not object to any of the evidence. To the contrary, IBC filed detailed affidavits in opposition on 13 October 2023 that engaged with the evidence. For example, IBC's expert, Mr Hollis, referred to the liquidators' time records, including the RCL time records.

[43] The remuneration application was promptly, on 26 October 2023, allocated a three-day fixture commencing 4 June 2024.

[44] Mr Botes was appointed liquidator of Autoterminal on 2 November 2023. He was by then aware of the remuneration application. By 10 November 2023 at the latest, he was aware of Mr Jones' first affidavit.

[45] Mr Botes did not apply for leave to intervene until 9 May 2024. He made a comprehensive affidavit in support of his application. In that affidavit he referred to and analysed some of the RCL time records. Mr Botes did not indicate that he challenged the admissibility of any of the evidence in Mr Jones' affidavit.

[46] On 15 May 2024, all parties sought consent orders that Mr Botes be granted leave to intervene and that certain directions be made in respect of the hearing. Those directions included that all deponents were to be available for cross-examination. The parties also raised a concern as to whether the three days allocated for the hearing would be sufficient, given the addition of a further party and witness. The parties proposed that the three days be used for brief opening statements and the examination of witnesses, with an additional fourth day scheduled for closing submissions. The parties did not raise any admissibility issues.

[47] On 23 May 2024, Mr Jones made an affidavit in reply to Mr Botes' affidavit.

[48] On 27 May 2024 — about one week before the hearing — Mr Botes objected to the admissibility of those parts of Mr Jones' first affidavit that gave evidence about the work undertaken by RCL. Then, on 31 May, Mr Botes filed a schedule specifying the evidence to which objection was taken. Mr Botes said the challenged evidence was all inadmissible hearsay.

[49] Mr Botes pursued the objections at the hearing in the High Court. It appears, from the written submissions, that IBC did not. The scheduled hearing was occupied, as proposed by the parties, by brief openings and the examination of witnesses. Closing submissions were made a little over two weeks later.

[50] As noted, the Judge said he thought nothing turned on whether Mr Jones' evidence contained hearsay, because the case was not one "where any particular piece of evidence will influence the outcome" but rather the "analysis is broader … and

the approach more global".[61] As Mr Burt, counsel for the liquidators, acknowledged, the effect of the Judge's approach was to treat all Mr Jones' evidence as admissible.

The challenge and the response

[51] Mr Gustafson, counsel for IBC and Mr Botes, says the challenged evidence is all hearsay. It is therefore inadmissible by virtue of s 17 of the Evidence Act 2006, unless an exception applies. He says no exception applies.

[52] Mr Burt acknowledges that the RCL time records are hearsay but says the other evidence is not. He says the RCL time records, although hearsay, are admissible under the exceptions in ss 18 and/or 19 of the Evidence Act.

Which of the challenged evidence is hearsay?

[53] A "hearsay statement" is a statement made by a person other than a witness which is offered in evidence to prove the truth of its contents.[62]

[54] The liquidators produced the RCL time records to establish the truth of their contents, namely the time spent by Mr Rodewald and RCL staff on various tasks in the liquidation and the specific work undertaken. The time records therefore contain, as Mr Burt acknowledged, hearsay statements.

[55] There are other parts of the challenged evidence that contain hearsay statements. Mr Jones gave evidence, for example, about some of the initial interactions between Mr Tyler and Mr Rodewald and about Mr Rodewald's views at that time. Implicitly, Mr Jones was offering evidence of a statement made by someone else (likely Mr Rodewald) to prove the truth of its contents. However, these parts of the challenged evidence were not the focus of Mr Gustafson's submissions (which centred on the RCL time records). They merely formed part of the background to the liquidation. That background was not in dispute and was also referred to by Ms Nguyen in her evidence (for example, the acrimony between Mr Hemi and Mr Stone). The challenge to these parts of Mr Jones' evidence therefore had no

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61 At [59].
62 Evidence Act 2006, s 4(1) definition of "hearsay statement".

bearing on the outcome of the application and has no bearing on the outcome of this appeal. We need not determine it.

[56] Some of the challenged evidence is not hearsay. For example, Mr Jones produced copies of some written communications from Mr Rodewald and Mr Tyler. It appears to us that these were produced to prove that the communications were made rather than to prove the truth of their contents.

[57] We therefore turn to the remaining issue on the admissibility challenge: are the RCL time records admissible under ss 18 or 19 of the Evidence Act?

Are the RCL time records admissible under ss 18 or 19 of the Evidence Act?

[58] Section 18(1) of the Evidence Act provides that a hearsay statement is admissible if:

> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[59] Mr Burt submitted the RCL time records were, in terms of s 18(1)(a), reliable: they were created in the ordinary course of an insolvency engagement by Mr Rodewald or his staff; Mr Rodewald is a chartered accountant and a licensed insolvency practitioner; Mr Rodewald was, in carrying out the liquidation, subject to statutory and fiduciary duties. Mr Gustafson did not engage with the reliability issue, focussing instead on s 18(1)(b).

[60] We accept Mr Burt's submission. The circumstances to which he referred give a more than reasonable assurance that the time records created by Mr Rodewald and RCL staff are reliable.

[61] As to s 18(1)(b), Mr Gustafson said it was only Mr Rodewald, and not the other staff of RCL, who would have been required as witnesses. He submitted there would not have been undue delay or expense in requiring Mr Rodewald to be a witness.

[62] However, Mr Botes' admissibility challenge said the hearsay in the RCL time records was the coding of "various [RCL] directors and staff time". The challenge was not limited to Mr Rodewald's time records. To avoid the RCL time records being hearsay, Mr Rodewald and the other staff of RCL would all have had to give evidence. Mr Botes' challenge did not say or suggest that only Mr Rodewald was required.

[63] Undue delay would have been caused had Mr Rodewald and the other staff of RCL been required to be witnesses. The parties had already, on 15 May 2024, expressed concern that with Mr Botes' addition as a party and witness, the three-day hearing would not be sufficient unless it was confined to brief openings and the examination of witnesses. Had Mr Rodewald and the other RCL staff been required to be witnesses, the scheduled hearing would not have provided enough time for the examination of all witnesses. Given that the admissibility issue was raised shortly before the scheduled hearing, the hearing inevitably would have been adjourned. Indeed, that would have been a likely outcome even if only Mr Rodewald had been required. Any adjournment would have been for a substantial — and undue — time.

[64] We also consider that undue expense would have been caused had Mr Rodewald and the other RCL staff been required to be witnesses. As Heath and Venning JJ emphasised in *Roslea Path*, the information required by a court in fixing remuneration should be proportionate to the amount sought and to the nature, complexity and extent of the work undertaken by the liquidators.[63] This statement provides context for assessing whether the expense of requiring Mr Rodewald and other RCL staff to make affidavits would have been "undue". Given the substantial remuneration sought by the liquidators, the expense involved in Mr Rodewald making an affidavit (had the issue not been raised so late)[64] may not have been undue. But we consider the expense of having the other RCL staff make affidavits (which likely

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63 *Re Roslea Path Ltd (in liq)*, above n 11, at [108].
64 See *Keshvara v Blanchett* [2012] NZCA 553, (2012) 21 PRNZ 475 at [35].

would have said little more than that they had carried out the work indicated by the time records) would have been undue. *Roslea Path* anticipates, unsurprisingly, that usually a remuneration application will be supported by an affidavit made by one liquidator, who will describe the work that was carried out, who among the liquidators or their staff carried it out, and how much time each person spent.[65]

[65] We accordingly consider the RCL time records are admissible under s 18(1).

[66] We also consider the RCL time records are admissible under s 19. The time records are clearly a "business record" in terms of s 16(1). Undue expense would have been caused had Mr Rodewald and the other RCL staff been required to be witnesses.[66] We also think no useful purpose would have been served by requiring the RCL staff to make affidavits, as they could not reasonably have been expected, given the passage of time and the nature of the time records, to have recollected the matters dealt with in those records.[67]

Did the Judge err by taking a broad-brush approach to fixing remuneration?

[67] Mr Burt submitted the Judge had taken a broad-brush approach to fixing the liquidators' remuneration (including by making arbitrary deductions). He said such an approach was available only where liquidators provided insufficient information to the court. That was not the case here. Mr Burt did not otherwise take issue with the Judge's approach or with his statement of relevant principles taken from *Medforce*, *Medforce (No 2)* and *Roslea Path*.

[68] In order to assess Mr Burt's submission, it is necessary to say more about the so-called "broad-brush" approach.

The broad-brush approach

[69] In the course of their judgment in *Roslea Path*, Heath and Venning JJ addressed a decision of the Court of Appeal of the Supreme Court of Western Australia,

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65 See Heath and Venning JJ's discussion in *Re Roslea Path Ltd (in liq)*, above n 11, at [64], [67] and [76].
66 Evidence Act, s 19(1)(c).
67 Section 19(1)(b).

Conlan v Adams.[68] That decision was on an appeal against an order made by a Master fixing remuneration at $200,000, significantly less than the sum claimed by the liquidators.[69] The Master had taken what was described as a broad-brush approach to fixing remuneration.[70] Heath and Venning JJ explained that McLure JA, who gave the principal judgment of the Court of Appeal:[71]

> [78] … rejected the "broad brush" approach taken by the Master. She expressed agreement with counsel for the liquidators' submission that, in taking that approach, the Master had failed to consider the specific information on which the assessment of fair and reasonable remuneration was to be based and, therefore, had failed to exercise his discretion judicially …

[70] Heath and Venning JJ returned to that topic later in their judgment, when addressing the information that liquidators should place before the court in a retrospective remuneration application. In the course of so doing, their Honours said:[72]

> [141] … In some cases, liquidators will put inadequate information before the Court. While there are risks that a judgment based on such information might be unfair to the liquidator, we consider that the exercise of a judicial discretion to fix an amount on a global basis is preferable to the liquidator being required to provide more detailed information which is likely to increase the cost to creditors and the delay in distribution of remaining funds. An approach of that type can be justified on the basis that the liquidator bears the onus of establishing that the claimed remuneration is "reasonable" and that the benefit of any doubt, based on the inadequacy of information provided by a liquidator, should be resolved in favour of the creditors.
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> [142] The criticism of a "broad brush" approach in *Conlan v Adams* was based, primarily, on the Master's failure to consider the information supplied and to reach a judgment on whether the remuneration was reasonable. Instead, he took a "broad brush" approach and fixed a fee that he thought appropriate. The Court of Appeal did not consider that was a proper exercise of a judicial discretion. We are not advocating the type of approach adopted by the Master in that case. Rather, we consider that Associate Judges should inquire into the reasonableness of the fees on the basis of the principles outlined in *Medforce 1* and other cases, but have the ability to fix a global sum as remuneration (as a matter of judgment), if the liquidator had supplied too little information to enable a clear view to be formed on whether what was claimed was or was not "reasonable". The difference is that our approach requires the exercise of a judicial judgment, as opposed to an arbitrary choice of an amount. The Court will, of course, retain the ability to seek further information, if it considered

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68 *Conlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521.
69 At [1].
70 At [2].
71 *Re Roslea Path Ltd (in liq)*, above n 11, citing *Conlan v Adams*, above n 68, at [92].
72 *Re Roslea Path Ltd (in liq)*, above n 11.

> that the liquidator ought to be given an opportunity to provide additional information on matters of concern identified by the Court.

[71] Heath and Venning JJ were, therefore, using the label "broad-brush" to refer to an arbitrary assessment of remuneration. They were saying that such an approach was *never* appropriate. They considered the court might sometimes fix remuneration on a "global basis" when liquidators put inadequate information before the court, but even then the court should do so on the basis of the principles outlined in *Medforce* and other cases. That this is what they meant is clear from their later summary:[73]

> In relation to retrospective applications, we have authorised a modified procedure, based on a voluntary disclosure regime, the purpose of which is to inform creditors/shareholders of remuneration deducted, from time to time and their rights to challenge the amounts. … If that new procedure were not adopted, in determining the "value" of the work undertaken, *the Court is not entitled to fix a fee on an arbitrary ("broad brush") basis but must exercise a judicial judgment on the fee to be approved*, bearing in mind the onus placed on the liquidator to justify remuneration …

[72] In *Salus Safety Equipment Ltd*, this Court described *Roslea Path* as the "leading authority" on the fixing of liquidators' remuneration under s 284(1)(e).[74] The Court then set out a summary of principles relevant to retrospective applications that had been prepared by counsel assisting the Court. Those principles included: "A broad brush approach is acceptable provided that there is an exercise of judicial judgment as opposed to an arbitrary choice of amount."[75]

[73] As will be apparent, that statement of principle does not reflect what Heath and Venning JJ said in *Roslea Path*. This particular principle was not in issue in *Salus Safety Equipment Ltd*, and the Court did not examine it further.

[74] We agree with Heath and Venning JJ's approach in *Roslea Path*. An arbitrary assessment of remuneration is never appropriate. Remuneration must always be assessed by applying the relevant principles in *Medforce* and other cases. Where liquidators have put inadequate information before the court, those principles must still be applied, even when the court decides to assess remuneration on the basis of

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73 At [187(c)] (emphasis added).
74 *Madsen-Ries v Salus Safety Equipment Ltd (in liq)*, above n 12, at [13].
75 At [15(g)].

the information before it (fixing what Heath and Venning JJ called a "global sum") rather than to seek further information.[76]

What approach did the Judge take?

[75] Mr Burt submitted that the Judge had taken a broad-brush approach to fixing the liquidators' remuneration. He referred to this paragraph of the judgment:[77]

> [150] As I said at the outset, my task is to fix the remuneration of the liquidators at a level which is reasonable in the circumstances. I am not to do that by undertaking a line-by-line analysis of every hour claimed to have been worked. Instead, at a higher level (a global approach), I will assess the "fairness and reasonableness of what has been charged when measured against the work undertaken and the result achieved".

[76] Mr Burt said that although the Judge referred to taking a "global" approach, the Judge had effectively applied a "broad-brush" approach. Mr Burt said the Judge had applied a "blanket reduction" of 15 per cent to 14 of the 16 workstreams and a 25 per cent reduction to the workstream relating to the remuneration application. Mr Burt said the Judge did not articulate a basis for the amounts of those reductions, instead making an "arbitrary" choice.

[77] We do not accept that characterisation of the Judge's remuneration assessment. The Judge set out the relevant principles from *Medforce*, *Medforce (No 2)* and *Roslea Path*. He then engaged in a detailed analysis of the evidence, the workstreams and seven issues that he said would help him assess the overall reasonableness of the liquidators' remuneration. As he did so, he indicated how those issues would affect his assessment. Finally, he prefaced his final assessment by noting (in the passage quoted above at [75]) that he would be assessing the "fairness and the reasonableness of what has been charged when measured against the work undertaken and the result achieved" — a statement of principle from *Roslea Path* that was approved by this Court in *Salus Safety Equipment Ltd*.[78] Thus, the Judge engaged with the information before him and delivered a reasoned judgment on it. Percentage reductions are judicial

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76 *Re Roslea Path Ltd (in liq)*, above n 11, at [142].

77 Judgment under appeal, above n 3 (footnotes omitted).

78 *Re Roslea Path Ltd (in liq)*, above n 11, at [102], cited with approval in *Madsen-Ries v Salus Safety Equipment Ltd (in liq)*, above n 12, at [13].

if a court gives reasons for the reductions — which the Judge did. His approach was anything but arbitrary.

[78] It was perhaps an error for the Judge to describe what he was doing as a "global" approach.[79] But it is the substance of what the Judge did that matters, not the label that he attached to it.

Did the Judge err in fixing remuneration at $1,064,429?

[79] The appeal and cross-appeal each challenge the amount of remuneration fixed by the Judge. IBC and Mr Botes say it should have been substantially lower. The liquidators say the Judge should have fixed remuneration at the amount they claimed.

Should the Judge have fixed lower remuneration?

[80] Mr Gustafson submitted the Judge erred because Mr Webb accepted under cross-examination that the liquidators had overcharged on five different workstreams in amounts that totalled $329,000,[80] substantially more than the $55,000 Mr Webb had acknowledged in his affidavits. Mr Gustafson said the Judge made no allowance for this. He submitted that Mr Hollis' assessment was more balanced and should have been accepted by the Judge.

[81] The first workstream Mr Gustafson referred to was the reconciliation of what the Judge described as Autoterminal's "considerable foreign exchange transactions".[81] The liquidators had charged $94,968 for this. IBC had also engaged BDO to do the same reconciliation. Some work and cost had consequently been duplicated. Mr Hollis had, in his review of the fees charged across the various workstreams, therefore deducted 50 per cent of the remuneration claimed for this workstream. Mr Gustafson submitted that Mr Webb had accepted in cross-examination that this deduction was reasonable.

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79 Judgment under appeal, above n 3, at [150]. The Judge used similar language at [59] and [123].

80 This was the total stated by Mr Gustafson in his written submissions on appeal. In oral submissions he adjusted some of the amounts that made up this total.

81 At [73].

[82] We do not accept Mr Gustafson's submission about Mr Webb's evidence. He directed us only to the initial part of Mr Webb's answer. It is clear from Mr Webb's full answer that he was merely agreeing that there would have been some "synergies" and cost savings had the liquidators and BDO cooperated more.

[83] Determining reasonable remuneration in relation to this workstream was not merely a matter of considering the competing expert assessments. A key issue was whether the liquidators were in any way at fault for the duplication. The Judge found the liquidators were to some extent at fault. He found there was "over servicing" in this workstream, explaining:

> [77] I consider that this is another area of over servicing. The liquidators were aware that BDO was doing work in this area and they were in frequent contact with IBC. They should have taken steps to ensure there was no unnecessary duplication of work.

[84] Mr Gustafson did not address this finding, which was in IBC's favour. We have no doubt the Judge allowed for the overservicing in the reduction he made to the liquidators' claimed remuneration. No error has been shown here.

[85] The second workstream concerned dealings with Mr Tyler and the consideration of a claim against him. No claim by the liquidators eventuated. The liquidators sought remuneration of $50,854. Mr Hollis' view was that about half that amount would "seem more reasonable" for this workstream. Mr Gustafson submitted the amount claimed was very high, given Mr Tyler was never examined by the liquidators and no claim against him was drafted. Mr Gustafson suggested that Mr Webb said in cross-examination that he was not sure if the remuneration for this workstream should be reduced by 25 or 50 per cent. But in fact Mr Webb went on to say that he did not accept that there should be any reduction.

[86] The Judge dealt with this workstream carefully. It is apparent that he saw the issue primarily as whether the liquidators had acted reasonably in the way they dealt with Mr Tyler. He noted the liquidators took the view that it was in the interests of Autoterminal for them to engage cooperatively with Mr Tyler at the outset of the liquidation. The liquidators intended to pursue Mr Tyler once his usefulness was over. That pursuit began towards the end of the liquidators' time in their role. It was

eventually agreed that IBC would take action against Mr Tyler rather than the liquidators. The liquidators provided information to IBC for that purpose and IBC subsequently took action against Mr Tyler.[82] The Judge said IBC may have wanted the liquidators to take a more aggressive approach to Mr Tyler but it was not entitled to control the liquidation.[83] He found that this aspect of the liquidation was not a reason for reducing the remuneration claimed by the liquidators.[84]

[87] Mr Gustafson did not engage with the Judge's reasons. We see no error in them.

[88] Next, Mr Gustafson submitted that Mr Webb had accepted that there had been overcharging for the workstream relating to the liquidators' dealings with IBC. A significant part of the remuneration claimed for that workstream was for meetings with IBC. Often, all three liquidators attended the meetings. Mr Gustafson referred us to a passage in the cross-examination of Mr Webb in which he accepted that the cost of the meetings would have been reduced by about $90,000 if only one liquidator had attended. But all that Mr Webb accepted was "the maths" in that proposition. He did not agree that a reduction to the claimed remuneration was appropriate. He said that because different liquidators were running different workstreams, there was an argument for having each liquidator at the meetings. He also explained that if only one liquidator was at the meetings, there would have been additional time required outside the meetings to brief the other liquidators.

[89] The Judge found the liquidators were entitled to charge for the time they spent liaising with (and reporting to) IBC. He found that IBC was made aware of the cost of the liquidation and that the decision later in the liquidation to limit the attendance of lawyers at the meetings must, to an extent, have been to save cost.[85] He therefore said he would not reduce the remuneration claimed for this workstream.[86] Having considered Mr Webb's full answer to the question about the meetings, we consider there is no error in these findings.

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82 At [136].
83 At [138].
84 At [139].
85 At [132].
86 At [134].

[90] The fourth workstream challenged by Mr Gustafson was for dealing with the NTMC voidable transaction claim. NTMC had claimed $3.3 million. The claim settled for $250,000.[87] The liquidators claimed remuneration of $170,012 for this workstream. In his initial report, Mr Webb said that although the outcome was positive for creditors, the costs appeared high and could be reduced by around $30,000. Mr Gustafson initially submitted that Mr Webb had, in cross-examination, accepted that there should be a reduction of $60,000 to $80,000. In oral submissions, however, Mr Gustafson acknowledged that Mr Webb had remained of the view that the appropriate reduction was $30,000. The Judge found this was an area where there was some overservicing, and this would have been reflected in the remuneration he fixed.[88] There is no error.

[91] Finally, Mr Gustafson addressed the workstream for the remuneration application itself. For this workstream the liquidators claimed $121,487.[89] A substantial part of this amount reflected time by Mr Jones (156.1 hours) and Mr Khov (68.8 hours). This included Mr Jones spending about 15 hours compiling the exhibits for his affidavit. Mr Webb said in his initial report that the total amount claimed for this workstream was reasonable remuneration. In cross-examination he was questioned about the hours Mr Jones had spent compiling the exhibits. Mr Webb accepted that, on the face of it, 15 hours seemed like "a lot of hours" and that a junior staff member would usually do that work. Mr Webb also said that he had never seen such an extensive affidavit as Mr Jones' on a remuneration application, and that normal practice was simply to attach timesheets and the liquidators' statutory reports to an affidavit.

[92] On the basis of that exchange, Mr Gustafson submitted that Mr Webb had accepted there should be a reduction of $60,000 to $90,000 from the remuneration claimed for this workstream. Mr Gustafson did not explain the origin of those

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87 At [66].

88 At [72].

89 This was the amount claimed for the period to 20 August 2023. The liquidators subsequently sought, as part of costs in the proceeding, further remuneration for their attendances on the remuneration application from 11 September 2023 (the date the application was filed) to 1 September 2024 (two days after the Judge delivered his substantive judgment). In a subsequent costs judgment, the Judge declined to order that any further remuneration be paid to the liquidators: *Jones v IBC Japan Ltd* [2024] NZHC 3442 at [23].

amounts, which are not found in the cross-examination of Mr Webb. Further, Mr Webb said that in his view the normal practice for a remuneration application was not appropriate in the circumstances, given the level of concern that IBC had raised about the fees charged by the liquidators. To give that evidence some context, IBC had not merely asserted that the liquidators' fees were unreasonable. Mr Jones' evidence was that IBC had made it clear it did not believe the liquidators' time records were genuine.

[93] The Judge did not allow the full amount of the claimed remuneration, instead reducing it by a little over $30,000:[90]

> [157] As to the claim of $121,487 for the remuneration approval application, I consider this is significantly higher than it should be. I infer that Mr Jones, smarting at the criticism of Mr Hemi and Ms Nguyen, set out to demonstrate emphatically that the liquidators had acted entirely professionally. But the result is a claim for around 11 per cent of the total remuneration claim. There was no need for the very lengthy affidavit and the thousands of pages of attachments, the work being done entirely by the liquidators. A focused description of what was done and the results obtained was all that was required. Replies to specific criticisms could then be filed. I will reduce the claim by a quarter to $91,115.

[94] The cross-examination to which Mr Gustafson directed us, when considered in the light of the other evidence to which we have referred, does not provide any basis for saying that the Judge erred in not making a greater reduction in relation to the remuneration workstream.

[95] Having rejected Mr Gustafson's submissions with respect to the five workstreams, we can deal briefly with his submission that the Judge erred in not preferring Mr Hollis' evidence. Mr Hollis' first report was prepared without having seen Mr Jones' detailed affidavit. Mr Hollis said, in his second report, that his first report was based on a "high-level" approach. He produced a second report after seeing Mr Jones' affidavit and addressed five workstreams that he said "standout as being high". In cross-examination, he accepted that his analysis was that the liquidators had overcharged in the range of $234,000 to $268,000 for those five workstreams. He was then asked how he explained the difference between that range and the amount of

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90 Judgment under appeal, above n 3.

$600,000 that he said the liquidators had overcharged for the liquidation as a whole. Mr Hollis answered:

> A. That's an interesting reconciliation that I have not done, because I — the reason I did the second part of this exercise was to do that, but it doesn't compute. I can't get to my view of five to $600,000, perhaps $700,000 with the latter costs included, as against running this process.
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> Q. Right, so you can't sort of — if I can summarise, you're of the view that the liquidators have overcharged by $500,000 but you're unable to find in the time records where that overcharging might have occurred?
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> A. No, I just haven't done that exercise …

[96] In light of that evidence, it is unsurprising the Judge said Mr Hollis did not explain how the unanalysed workstreams which did not have the same appearance of overcharging as the five workstreams he did analyse nonetheless equated to the total remuneration he recommended.[91]

Should the Judge have fixed remuneration at the amount claimed by the liquidators?

[97] Mr Burt submitted the Judge's decision to fix remuneration below the level claimed by the liquidators was in error because it rested on six incorrect factual findings. We have addressed some of these findings in the course of dealing with Mr Gustafson's submissions, so we can be relatively brief.

[98] First, Mr Burt said the Judge erred in finding there had been overservicing on the NTMC voidable transaction workstream.[92] Given Mr Webb's view that the fees charged by the liquidators appeared high and could have been $30,000 lower, it is difficult to see any error in the Judge's finding.

[99] Secondly, Mr Burt challenged the Judge's finding that there had been overservicing on the workstream for the reconciliation of the foreign exchange transactions.[93] As noted, the Judge found the liquidators were aware BDO was also doing work on this workstream and, given their frequent contact with IBC,

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91 At [154].
92 At [72].
93 At [77].

the liquidators should have taken steps to ensure there was no unnecessary duplication. Mr Burt submitted the liquidators were initially unaware BDO was undertaking similar work and, in any event, the liquidators would still have needed to undertake an independent and objective analysis of the transactions. This submission, with respect, misses the point of the Judge's finding. The Judge's point was that once the liquidators became aware of BDO's involvement they should have discussed the matter with IBC to ensure work was not duplicated. Consideration of who should have done the work was irrelevant to that finding.

[100] Thirdly, Mr Burt referred to the Judge's finding that it was inefficient for both firms to make payments, that the payment processes were elaborate and there were significant charges for administration that were largely unexplained.[94] Mr Burt said that Mr Jones dedicated four pages of his first affidavit to explaining the liquidators' administrative processes. But Mr Jones' explanations do not answer the Judge's concerns. The Judge's finding rested on, for example, the three liquidators personally having incurred 86.63 hours ($38,981) on administration and on Mr Webb's view that the amount of time spent by the liquidators "appears … to be high".[95] Indeed, Mr Webb's opinion was that the remuneration claimed for the internal administration workstream could be reduced by $5,000 to $10,000.

[101] Fourthly, Mr Burt submitted that, contrary to the Judge's findings, the liquidators engaged more than one law firm only on the NTMC voidable transaction workstream. This does not show any error. The Judge merely found there was "on occasion" more than one law firm employed on the same workstream and that there was "duplication of effort between law firms".[96] Further, the Judge's main concern was that the legal advice across the workstreams had led to Mr Jones "spending considerable time examining the advice (including doing legal research) to decide whether to accept it".[97]

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94 At [122].
95 At [121].
96 At [122] and [147].
97 At [147].

[102] Fifthly, Mr Burt submitted there was no or insufficient basis for the Judge's conclusion that the liquidators spent too much time on the liquidation.[98] We consider there was ample basis for this conclusion: the overservicing on the NTMC voidable transaction and foreign exchange transactions reconciliation workstreams; the inefficiencies in internal administration; Mr Webb's view that the liquidators' fees could overall have been $55,000 lower; and the unnecessary work undertaken examining the legal advice.

[103] Sixthly, Mr Burt said the Judge should not have reduced the remuneration for the application itself in circumstances where the liquidators faced broad allegations of overcharging, including allegations that their time records were not genuine. We acknowledge the breadth and seriousness of the allegations made by IBC. Such allegations warranted a detailed response. But it was not necessary to draft an affidavit running to more than 120 pages with thousands of pages of exhibits. Nor was an adequate explanation provided for Mr Jones doing so much of the work in compiling those exhibits. We agree with the Judge's assessment, set out above at [93].

Conclusion

[104] Neither the appellants nor the respondents have persuaded us that the Judge erred in fixing remuneration at $1,064,429.

Did the Judge err in determining that the court has jurisdiction to review the expenses claimed by liquidators?

[105] Mr Burt submitted that the review jurisdiction in s 284(1)(e) of the Act is limited to remuneration and does not extend to expenses incurred by liquidators. He said this view had been expressed in *Medforce* and *Roslea Path* and adopted by this Court in *Salus Safety Equipment*. In oral submissions, he said he was not suggesting the court had no jurisdiction whatsoever to determine whether expenses incurred by liquidators could be deducted from the company's assets. But he said any such jurisdiction was not found in s 284(1)(e) and had not otherwise been engaged in this case. Mr Gustafson, by contrast, submitted that the court has a power to review expenses and that the jurisdiction was engaged here.

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98 At [152(d)].

[106] We accept Mr Burt's submission that s 284(1)(e) does not confer jurisdiction on the court to review expenses. That provision empowers the court to review or fix "remuneration". As a matter of ordinary language, "remuneration" means payment for services but does not include out-of-pocket expenses.[99] That this is the meaning of remuneration used in s 284(1)(e) is confirmed by s 278, which says both the "expenses and remuneration of the liquidator" are payable out of the company's assets. This was the view taken by the High Court in *Medforce*.[100]

[107] We also acknowledge that there are statements in *Roslea Path* and *Salus Safety Equipment* to the effect that the court can only review remuneration and not expenses.[101] Those cases, however, were concerned solely with the scope of the jurisdiction under s 284. They were not concerned with whether there is jurisdiction to review expenses outside s 284.

[108] The Act does not, in contrast with the express power in s 284(1)(e) to review remuneration, have a provision expressly empowering the court to review expenses. But it does not follow from the absence of an express provision that the court lacks jurisdiction to review expenses. The absence is explained by the fact that liquidators are fiduciaries,[102] and the general law applying to fiduciaries treats the right to be paid remuneration and the right to be repaid expenses quite differently.

[109] The general rule is that a trustee is, subject to the terms of the trust, not entitled to any remuneration for his or her services.[103] In contrast, the general rule is that a

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99 See J A Simpson and E S C Weiner (eds) *Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol 13 at 604, which defines "remuneration" as "Reward, recompense, repayment; payment, pay" and "remunerate" as "To repay, requite, make some return for (services, etc.)" and, secondarily, "To reward (a person); to pay (one) for services rendered or work done."

100 *Re Medforce Healthcare Services Ltd (in liq)*, above, n 9, at [19]. See also *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 (SC) at 100–101, where the Full Court of the Supreme Court of Western Australia reached the same conclusion in respect of the Corporations Act 1989 (Cth) (since repealed). The view that there is a distinction between remuneration and expenses for the purposes of the external administration provisions of the Corporations Act 2001 (Cth) was endorsed by the Federal Court of Australia in *Australian Securities and Investments Commission v Marco (No 15)* [2024] FCA 347 at [56].

101 *Re Roslea Path Ltd (in liq)*, above n 11, at [157]; and *Madsen-Ries v Salus Safety Equipment Ltd (in liq)*, above n 12, at [74].

102 See *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [22]. See also Andrew R Keay *McPherson & Keay: The Law of Company Liquidation* (5th ed, Sweet & Maxwell, London, 2021) at [8-049].

103 Steven Elliot (ed) *Snell's Equity* (35th ed, Sweet & Maxwell, London, 2025) at [7-035].

trustee is entitled to be indemnified from the trust property against out-of-pocket expenses. That entitlement is limited to expenses that the trustee properly incurred in connection with the performance of their duties and the exercise of their powers and discretions as trustee.[104] These rules apply also to those who are in fiduciary positions, such as liquidators.[105]

[110] The Act modifies the general rule against remuneration and allows liquidators to be remunerated. To address the rationale for that general rule, namely the conflict between the interests of the liquidator in receiving remuneration and the interests of the creditors who bear the cost of the remuneration,[106] the Act's provisions on this matter are detailed and include an express power of review on the part of the Court.

[111] By comparison, given that liquidators have an underlying general right of indemnity for expenses properly incurred, the provisions on that topic are less detailed. Section 278 says the "expenses … of the liquidator are payable out of the assets of the company". This statement must be interpreted in the context of the underlying general right of indemnity. The right in s 278 does not extend, for example, to expenses of the liquidator that are unconnected to the liquidation. Clause 1(1)(a) of sch 7 to the Act gives a preference to "expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator". This is consistent with — indeed, it essentially expresses — the underlying general right of indemnity.

[112] Given that a liquidator's right of indemnity for expenses is limited to expenses properly incurred in carrying out the duties and exercising the powers of the liquidator, the court must be able to review such expenses, in the sense of determining whether the expenses fall within the right of indemnity, if that issue is brought before the court. The court's power to do so arises under the general law.[107] It does not require an express empowering provision in the Act.

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104 At [7-035]–[7-037]; and Lynton Tucker, Nicholas Le Poidevin and James Brightwell (eds) *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [19-003].

105 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638 (Ch) at 648–649. See also *Attorney General of Trinidad and Tobago v CL Financial Ltd (in liq)* [2025] UKPC 41, [2026] 2 All ER 617.

106 See *Madsen-Ries v Salus Safety Equipment Ltd (in liq)*, above n 12, at [15(a)].

107 See *Re AAA Financial Intelligence Ltd (in liq) (No 2)* [2014] NSWSC 1270, (2014) 32 ACLC 14-052 at [14].

[113] As noted, Mr Burt said that in any event the court's jurisdiction to review expenses had not been engaged in this case. We do not accept that submission. IBC raised concerns about both remuneration and expenses. In response, the liquidators brought an application seeking approval of both their remuneration and expenses. IBC joined issue on both. Whether the liquidators were entitled to be indemnified for their expenses (that is, whether they were properly incurred) was therefore squarely before the Court.

Did the Judge err in approving expenses of $618,706.15?

[114] The vast majority of the expenses were for legal fees. The liquidators engaged seven different law firms to advise on or assist with various aspects of the liquidation. The legal fees were the focus of the dispute about the approval of expenses, both in the High Court and on appeal.

[115] Mr Gustafson said the liquidators had failed to lead evidence, other than "at the highest level", about how the legal fees were incurred. That high-level evidence did not explain what work the law firms were doing, who was doing the work, how much time they were spending and what they were trying to achieve. He submitted this meant there was no admissible evidence that the legal fees were reasonable. Consequently, he said, the Judge should not have allowed the liquidators to recover any of the legal fees.

[116] The liquidators' evidence on legal fees was provided by Mr Jones. His first affidavit contained regular references to the matters in respect of which the liquidators engaged lawyers. On each occasion, he explained why the liquidators did so and what they engaged the lawyers to do. He explained why so many law firms were engaged. Among other things, three of the firms were offshore (in Japan, the Philippines and Singapore, respectively) because advice was needed on the law in those jurisdictions (reflecting the transnational nature of Autoterminal's business). In some instances, Mr Jones identified the individual lawyers who did the work. At the end of his affidavit, Mr Jones annexed schedules that show the legal fees incurred, by date and law firm.

[117] IBC led contrary evidence through Mr Hollis. He commented only briefly on the legal fees. He said it seemed that few, if any, legal actions were actually taken and expressed the opinion that "[m]ost of the legal work could be described as 'defensive' or liquidator protection in nature". In cross-examination, however, Mr Hollis was asked about several of the matters which Mr Jones said the liquidators had engaged lawyers in relation to. Mr Hollis was not aware of any of them. He could not identify a single instance of "defensive" legal work.

[118] Mr Jones' evidence on the legal fees was much more than "at the highest level". It provided an ample basis for finding that the legal fees were properly incurred. The contrary view of Mr Hollis did not survive gentle cross-examination. We therefore consider the Judge was right to approve the full expenses claimed.

[119] We acknowledge that the Judge expressed the view that the expenses claimed were "disproportionate to the requirements of the liquidation".[108] He explained this view by saying that there was "no real evidence that the receipt of the [legal] advice led to a more efficient liquidation".[109] We doubt that efficiency is the touchstone for determining whether expenses are properly incurred. But we need not explore this further, given the Judge made clear that his finding "[did] not mean that the disbursements were improperly incurred" and he allowed them in full.[110]

Costs

[120] At the hearing, counsel agreed that the appeal and the cross-appeal should each be categorised as a standard appeal for costs purposes. It is appropriate that costs be fixed on a band A basis.

Result

[121] The appeal is dismissed.

[122] The cross-appeal is dismissed.

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108 Judgment under appeal, above n 3, at [147] and [152(g)].
109 At [147].
110 At [148].

[123] The appellants must pay the respondents costs for a standard appeal on a band A basis together with usual disbursements.

[124] The respondents must pay the appellants costs for a standard cross-appeal on a band A basis together with usual disbursements.

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