IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA279/2025
[2026] NZCA 209

BETWEEN	DONG QIAN First Appellant
	QRZ PROPERTIES LIMITED Second Appellant
AND	JIAQING DONG First Respondent
	NAC INTERNATIONAL TRADING LIMITED Second Respondent
	YU WEN Third Respondent
	JIPING LI Fifth Respondent

Hearing:	19 February 2026
Court:	Courtney, van Bohemen and Andrew JJ
Counsel:	K J Crossland and J K Boparoy for Appellants D J Chisholm KC, J M Phillips and O M J Reeves for First and Second Respondents T D Rea and K L Chiu for Third and Fifth Respondents
Judgment:	28 May 2026 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Proceeding CIV-2021-404-132 is reinstated. The matter is remitted to the High Court to be timetabled to trial.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] The appellants, Mr Qian and QRZ Properties Ltd (QRZ) (which Mr Qian's wife, Jing Zhou, controls), were the plaintiffs in High Court proceedings for which a three-week trial was scheduled to start on 5 May 2025. On 2 April 2025, Jagose J made an "unless order", directing that unless they complied with specified timetable directions, "[their] third amended statement of claim dated 30 October 2023 is struck out and the proceeding is dismissed". The timetable directions required Mr Qian and QRZ to file and serve the common bundle by 7 April 2025, which they failed to do.

[2] At a pre-trial telephone conference on 9 April 2025, counsel for Mr Qian and QRZ asked that the proceeding not be struck out. Robinson J advised that the effect of the unless order was that the proceeding had already been struck out. Nevertheless, he allowed the plaintiffs to make an application to extend the time to comply with the unless order. The Judge heard the application the following day and reserved his

decision. In a decision delivered on 14 April 2025, the Judge declined the application for relief.[1]

[3] Mr Qian and QRZ appeal. The decision whether to grant relief from the consequences of an unless order involves the exercise of discretion. The Court will only interfere if the Judge erred in law, took into account irrelevant considerations, failed to take into account relevant considerations, or was otherwise plainly wrong.[2]

[4] At a high level, the appellants say that the Judge failed to consider whether the sanction imposed by the unless order was disproportionate to the breach, that the sanction was in fact disproportionate and that the Judge was therefore plainly wrong to decline relief. The specific complaints are that the Judge erred in:

(a) failing to recognise that the basis on which the unless order had been made, namely Jagose J's characterisation of the breach as an abuse of process, was wrong;

(b) mischaracterising the breach as requiring a bundle to be prepared "from scratch" and failing to take into account the fact that external providers had been engaged to produce a compliant bundle;

(c) failing to consider the nature and extent of the prejudice to the respondents in preparing for and conducting their defences if the bundle were provided by 22 April 2025 and relatedly, whether the trial date could be preserved; and

(d) failing to identify and assess the nature and extent of the prejudice to Mr Dong of the freezing orders.

[5] The appellants also complained that the Judge put too little or too much weight on certain factors. However, because the weight to be given to relevant factors in the

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1 *Qian v Dong* [2025] NZHC 907 [judgment under appeal] at [28].
2 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

exercise of a discretion is a matter for the Judge and does not amount to an error that warrants interference on appeal, we do not need to address those complaints.

Jurisdiction

[6] A preliminary issue arises as to whether Mr Qian and QRZ have a right of appeal to this Court or whether they required leave from the High Court (or, if leave was refused, from this Court) to bring the appeal. This question turns on whether the decision declining relief from the effect of the unless order is properly viewed as a decision dismissing or striking out the proceeding for the purposes of s 56(4) of the Senior Courts Act 2016.

[7] Section 56 of the Senior Courts Act relevantly provides:

> **56 Jurisdiction**
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> (1) The Court of Appeal may hear and determine appeals—
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> (a) from a judgment, decree, or order of the High Court:
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> …
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> (3) No appeal, except an appeal under subsection (4), lies from any order or decision of the High Court made on an interlocutory application in respect of any civil proceeding unless leave to appeal to the Court of Appeal is given by the High Court on application made within 20 working days after the date of that order or decision or within any further time that the High Court may allow.
>
> (4) Any party to any proceedings may appeal without leave to the Court of Appeal against any order or decision of the High Court—
>
> (a) striking out or dismissing the whole or part of a proceeding, claim, or defence; or
>
> …

[8] The respondents say that the application for relief was an interlocutory application for the purposes of s 56(3) and that it did not result in the dismissal of the proceedings for the purposes of s 56(4). As a result, they say Mr Qian and QRZ did not have a right of appeal and should have sought leave from the High Court to bring the present appeal. Mr Rea, for Mr Wen and Ms Li, argued that it was Jagose J's decision to make the unless order that effectively brought the proceeding to an end

and that the decision by Robinson J declining relief merely declined an attempt to the revive the proceeding.

[9] In the recent decisions of this Court in *Dokad Trustees Ltd v Auckland Council*,[3] and *Stewart v Eversons International Limited (in liq)*,[4] a purposive approach has been taken to s 56, described by Goddard J in *Dokad* as follows:

> [10] The scheme of s 56 is that appeals as of right are reserved for final determinations in respect of a proceeding. A leave filter applies to appeals from decisions on interlocutory applications in order to avoid delay and unnecessary cost. The underlying assumption is that such decisions are made in the course of a proceeding, and appeal rights should be exercised when the proceeding comes to an end. If a procedural decision has affected the ultimate outcome, that issue can be raised in an appeal against the substantive High Court decision that concludes the proceeding: see s 56(6). I consider that s 56(4) must be interpreted purposively, to apply to decisions that have the effect of bringing to an end the whole of a proceeding. Such a decision is, for the purposes of s 56(4), a decision that dismisses the proceeding.

[10] The question in this case is whether, under a purposive approach to s 56(4), there is an appeal as of right from a refusal to grant relief from the effect of an unless order. We start with the decision in *Houghton v Saunders*, which concerned an appeal brought (without leave) against the making of an unless order that required payment of security for costs. The order was not complied with.[5] The notice of appeal challenged the making of the unless order and, in the alternative, sought relief from non-compliance. At the hearing of the appeal the appellant did not seriously argue that the Judge had erred in making the unless order. Instead, he submitted that this Court should excuse the non-compliance (on the basis that he was now able to comply with the order).

[11] Although there was no serious challenge to the making of the unless order, the appeal did not fail on that point. Instead, the Court proceeded to consider whether the non-compliance should be excused. The Court considered that where there was no real challenge to an unless order, and the only issue was whether a failure to comply

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3 *Dokad Trustees Ltd v Auckland Council* [2022] NZCA 177.

4 *Stewart v Eversons International Limited (in liq)* [2024] NZCA 104 at [51]. See also *A F Scott Forestry v Orion New Zealand Limited* [2025] NZCA 241 at [33].

5 *Houghton v Saunders* [2020] NZCA 638.

with such orders should be excused, the proper course was to make an application for relief from the effects of the unless order to the High Court. However, counsel all sought a determination regarding relief and the Court considered that it could, and should, determine that issue, despite the fact that no application for relief had been made in the High Court.[6]

[12] We view the approach taken in *Houghton* as indicative that the question of the validity of an unless order and whether relief from the effect of an unless order should be granted are, effectively, two sides of the same coin and intertwined for the purposes of appeal. Given that leave is not required to appeal an unless order where the order has taken effect to strike out the proceedings, we consider that an application for relief from the effect of an unless order is properly viewed as not requiring leave either.

[13] In this case, Mr Qian and QRZ could have appealed Jagose J's decision to make the unless order without leave, and we think it is artificial to treat the determination of the application for relief — made within days of the unless order taking effect — as not being determinative of the proceeding and therefore requiring leave to appeal.

[14] We see the present case as analogous to *Stewart*.[7] In *Stewart*, liquidators obtained judgment from Nation J against Mr Stewart on the basis of a deed of settlement, relying on r 15.16 of the High Court Rules 2016 (admission of a cause of action). Rule 15.16(5) allows the court to set aside a judgment on an admission and Mr Stewart made an application to have the judgment set aside. The application was dismissed by Churchman J. Mr Stewart filed an appeal in this Court. The Court agreed that the application to set aside the judgment was an interlocutory application but held that it fell within the exception in s 56(4) on the basis that the decision declining the application for relief effectively brought the proceeding to an end:

> [51] In our judgement, Mr Stewart has an appeal as of right under s 56(4) of the Senior Courts Act and he does not require leave of the High Court or this Court to bring the appeal. This is because the effect of Churchman J's judgment declining to set aside Nation J's judgment or to direct Mr Stewart to bring a proceeding to determine whether the judgment was wrongly entered, brings [the proceeding] to an end. The judgment entered by Nation J could be

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6 At [82]. The Court ultimately considered that relief from the effect of the unless order should not be granted, with the result that the appeal was dismissed.

7 *Stewart v Eversons International Limited (in liq),* above n 4.

> enforced against Mr Stewart and he would have no ability to challenge the same. We adopt the purposive approach taken by Goddard J in *Dokad* and as required by s 10(1) of the Legislation Act 2019.

[15] So, although Nation J's judgment could properly have been regarded as bringing the proceedings to an end, it was Churchman J's refusal to set aside that judgment that was treated as having that effect because, without the judgment being set aside, Mr Stewart could not alter his position (without leave).

[16] The position in the present case is similar because the respondents would have been entitled to seal judgment against Mr Qian and QRZ and seek costs upon the unless order taking effect, with the only course for Mr Qian and QRZ to challenge the outcome being to apply for leave to appeal.

[17] The principles in *SM v LFDB*[8] clearly contemplate that an unless order will not be the final step in the proceeding — the final step will be, if non-compliance is not disputed, the declining of relief, which is what happened here. We therefore consider that the application for relief fell within the exception in s 56(4) and Mr Qian and QRZ were entitled to appeal as of right Robinson J's refusal to grant relief.

The nature of the claim and the procedural history

Mr Qian and QRZ commence the proceedings

[18] The High Court proceeding can be summarised, broadly, as follows. In 2019 Jiaqing Dong purchased a development property at 39 Wicklam Lane, Greenhithe (the property).[9] He sold the property to an associate, Mr Wen.[10] Mr Wen on-sold part of the property to Yu Homes Group Ltd.[11] However, Mr Qian and QRZ[12] contend that Mr Qian and Mr Dong had agreed to develop the property together, either by way of

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8 *SM v LFDB* [2014] NZCA 326.

9 Mr Dong was the first defendant in the High Court proceeding and is the first respondent in the appeal.

10 Mr Wen was the third defendant in the High Court proceeding and is the third respondent in the appeal.

11 Yu Homes Group Ltd was the fourth defendant in the High Court proceedings and was initially the fourth respondent in the appeal but the appeal against it has now been abandoned: *Qian v Dong* CA279/2025, 23 September 2025 (Minute of Cooke J).

12 Mr Qian's wife, Jing Zhou, is the sole director and shareholder of QRZ Properties Ltd (QRZ). Mr Qian used QRZ as a vehicle for property development activities. Mr Qian and QRZ were the plaintiffs in the High Court proceedings and are the first and second appellants respectively.

a partnership or joint venture and that Mr Qian and QRZ contributed over $1.5 million towards the development. They say that the sale to Mr Wen was made without their knowledge or consent, was funded by Mr Dong and his former wife, Ms Li,[13] in a "money-go-round" arrangement and was intended to defeat Mr Qian's and QRZ's interest in the property. They say that Mr Wen holds the property as a constructive trustee for them.

[19] The respondents deny the allegations. Mr Dong says that, while Mr Qian and QRZ did provide money to him which he used for the development, they did so merely as lenders and had no interest in the property. Originally, Mr Wen said he knew nothing about Mr Qian and QRZ and was a bona fide purchaser for value without notice. Later, however, pleading to the third amended statement of claim, he admitted that he had received the property as a bare trustee for Ms Li.

[20] In February 2021 Mr Qian and QRZ brought proceedings against Mr Dong and NAC International Trading Ltd (NAC), which Mr Dong used as a vehicle for property development, and which is controlled by Ms Li. They amended the claim shortly afterwards to add Mr Wen and Yu Homes Group Ltd as defendants.

[21] Mr Qian obtained freezing orders against properties owned by Mr Dong and his interests on an undertaking to do all things reasonably necessary to ensure the substantive claim was heard as soon as possible. He also caveated the title of the property, thereby preventing settlement of the sale to Yu Homes Group Ltd.

The proceedings progress slowly

[22] Progress towards trial was not straightforward. Mr Dong applied to vary the freezing orders, which was ultimately achieved by consent. Mr Wen applied (unsuccessfully) for summary judgment against Mr Qian and QRZ.[14] Mr Qian and QRZ applied (successfully) for further and better discovery from Mr Dong and NAC.[15]

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13 Ms Li was the fifth defendant in the High Court proceeding and the fifth respondent in the appeal. She is the sole director and shareholder of NAC International Trading Ltd, the second defendant in the High Court proceeding and second respondent in the appeal.

14 *Qian v Dong* [2022] NZHC 378 at [68].

15 *Qian v Dong* [2022] NZHC 744 at [43]–[47].

Mr Wen applied (unsuccessfully) to remove Mr Qian's caveat.[16] These various applications were finalised in August 2022.

[23] Eventually, a 10-day trial was scheduled for 2023. Discovery and inspection were completed. Briefs of evidence were served. However, in February 2023, several counsel expressed concern that the trial could not be completed in 10 days. Then, the plaintiffs' counsel advised that a change in Mr Wen's position indicated in his brief of evidence, and late discovery from him, meant that the trial could not proceed in any event. The trial was vacated, with a new fixture to be allocated in 2025.[17]

[24] A third amended statement of claim was filed in October 2023, adding Ms Li (Mr Dong's former wife and sole director and shareholder of NAC) as the fifth defendant. A cause of action in dishonest assistance was added against Mr Wen and Ms Li, jointly to accompany a cause of action in knowing receipt against Mr Wen. In the knowing receipt cause of action, it was alleged that Ms Li had provided the funding for the purchase of the property by Mr Wen and they had agreed that Mr Wen would be guaranteed $100,000 for becoming the registered owner of the property and would receive a share of the profits over $100,000. Ms Li did not plead to this allegation, which was not expressly repeated in the dishonest assistance pleading. However, in his statement of defence to the amended pleading, Mr Wen "[admitted] that he hoped to obtain a benefit as a result of development of 39 Wicklam Lane but [said] further that the property was transferred to him as a bare trustee on behalf of [Ms Li]". We infer that this admission was the change of position that was a factor in the 2023 trial being vacated.

[25] A three-week trial was scheduled for May 2025. In October 2023, Lang J made timetable orders by consent which required (1) the plaintiffs' updated briefs and list of documents for the common bundle to be served on 2 December 2024; (2) defendants' updated briefs and list of documents for the common bundle to be served by 12 February 2025; and (3) the plaintiffs to file and serve the common bundle on 5 March 2025. To this point there was nothing unusual in the conduct of the

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16 *Wen v Qian* [2022] NZHC 1586 at [24].
17 *Qian v Dong* HC Auckland CIV-2021-404-132, 15 February 2023 (Minute of Gault J).

proceeding. The slow progress was clearly attributable to the various interlocutory steps taken, all of which were unremarkable.

Problems emerge

[26] The first indication of a problem came in late September 2024. Until then, Mr Qian and QRZ had been represented by K3 Legal Ltd which had engaged senior counsel, Mr Blanchard KC (as he then was). K3 Legal Ltd then sought leave to withdraw because of unpaid legal fees.[18] A joint memorandum of counsel for the defendants dated 30 September 2024 expressed concern about the lack of representation for the plaintiffs jeopardizing the trial date and the possibility of the plaintiffs being unable to meet a costs award if necessary. However, the defendants considered that the trial date should be safe provided the plaintiffs engaged new lawyers (acknowledging that Mr Qian was entitled to represent himself) and signalled the possibility of an application for security for costs.

[27] In a minute dated 3 October 2024 Anderson J directed Mr Qian and QRZ to file a memorandum advising of their new representation by 8 November 2024.[19] No memorandum was filed. At a conference on 21 November 2024, Mr Zhang appeared and advised that he was only instructed to appear that day but anticipated receiving further instructions and engaging counsel. Venning J declined the defendants' request for an unless order based on the failure to comply with Anderson J's minute. However, he added to the timetable for the defendants' security for costs application an unless order requiring the plaintiffs to file a notice of opposition to the application, failing which the proceeding would be stayed.[20] Mr Qian and QRZ complied with this order.

[28] So far so good. However, by 12 February 2025 the plaintiffs' updated briefs of evidence and the updated list of documents to be included in the common bundle (which were to be served on 2 December 2024) had not been served. The defendants jointly sought an amendment to the timetable. This was not opposed. The plaintiffs' new counsel, Mr O'Callahan, advised that no updating briefs and no updated list of documents had been filed because the plaintiffs did not intend to file any.

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18 *Qian v Dong* HC Auckland CIV-2021-404-132, 2 October 2024 (Minute of Anderson J).
19 *Qian v Dong* HC Auckland CIV-2021-404-132, 3 October 2024 (Minute of Anderson J).
20 *Qian v Dong* HC Auckland CIV-2021-404-132, 21 November 2024 (Minute of Venning J).

[29] On 19 February 2025, Gordon J varied the timetable to require the defendants to serve updating briefs of evidence and documents for inclusion in the common bundle by 5 March 2025, the plaintiffs to prepare and provide the common bundle by 26 March 2025 and amended briefs of evidence with hyperlinks to the common bundle to be served by 11 April 2025.[21]

[30] On 28 February 2025, another firm, Righteous Law Ltd, took over conduct of the plaintiffs' case. It found that the common bundle had not been prepared. On 24 March 2025, it sought an extension for the preparation of the common bundle. The defendants, although unhappy at the prospect of any further extension, did not formally oppose an extension for a week but sought an unless order requiring preparation of the bundle by 2 April 2025, failing which the proceedings should be stayed.

[31] Ms Chen, a partner of Righteous Law Ltd, filed a memorandum explaining that there had been difficulties uplifting the files from Zhang Law Ltd, which had been unresponsive to requests. The files were not provided until 11 March 2025. They contained some 12,000 documents with a total size of 17.58GB. A review of the uplifted files began immediately upon receipt and there were concerns that the files were not complete. The specific problems were that a number of files were corrupted or saved incorrectly and could not be opened, there were duplicates, and the files were organised differently between those maintained by K3 Legal Ltd and Zhang Law Ltd.

[32] Mr Qian was not proficient in English and many of the documents therefore required translation. Moreover, the plaintiffs were apparently unaware of some of the timetabling directions made by Gordon J, including the fact that they were entitled to serve updated briefs of evidence, and an updated list of documents for inclusion in the common bundle, which they wished to do.

[33] The plaintiffs sought an extension to 7 April 2025 for filing the common bundle.

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[21] *Qian v Dong* HC Auckland CIV-2021-404-132, 19 February 2025 (Minute of Gordon J).

The unless order

[34] There was a conference before Jagose J on 2 April 2025. In his minute recording the outcome, the Judge said:[22]

> [3] The plaintiffs' continued pursuit of their amended claim through new solicitors while failing to meet timetable orders is, in the context of this proceeding, an abuse of the process of the court: "improper use of [the court's] machinery"[23] or the use of a court process "for a purpose or in a way which is significantly different from [its] ordinary and proper use".[24] I have a duty to prevent such abuses. Rule 15.1 of the High Court Rules 2016 entitles me to strike out a pleading as an abuse of process and dismiss the proceeding.
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> [4] I therefore **direct—**unless the plaintiffs serially:
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> (a) file and serve the common bundle in terms of r 9.49(5) of the High Court Rules 2016 **by 7 April 2025;**
>
> …
>
> the plaintiffs' third amended statement of claim dated 30 October 2023 is struck out and the proceeding is dismissed.

[35] A bundle was filed and served by email late on the night of 7 April 2025. The following day, the defendants' counsel filed a memorandum setting out the deficiencies in the bundle: there were numerous duplicates (which appeared to be the result of duplicating lists supplied by other parties rather than listing documents in a chronological sequence); the bundle was not properly paginated; there were some 500 missing documents (which had been nominated by the defendants but not included); and there was no hyperlinking. The defendants' position was that the plaintiffs had failed to comply with the unless order and the proceeding was accordingly dismissed.

[36] Ms Chen responded in a memorandum. She said that assistance from the defendants would be required to provide missing documents but that, with such assistance, the bundle could be completed. She also asserted that the plaintiffs had

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22 *Qian v Dong* HC Auckland CIV-2021-404-132, 2 April 2025 (Minute of Jagose J).

23 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [87], citing Simon Goulding, DB Casson and William Blake Odgers *Odgers on Civil Court Actions* (24th ed, Sweet & Maxwell, London, 1996) at [10.15].

24 *Te Wakaminenga o Nga Hapu Ki Waitangi v Waitangi National Trust Board* [2023] NZCA 63, [2023] NZAR 180 at [14], citing *Attorney-General v Barker* [2000] 1 FLR 759 (QB) at 764.

diligently prosecuted the claims and that the most significant delay in progress had been due to the change in position of Mr Wen and Ms Li.

[37] There was a telephone conference before Robinson J on 9 April 2025. Counsel for the defendants sought confirmation that the proceedings had been dismissed in accordance with the unless order. Ms Chen asked that the proceeding not be struck out, indicating that a compliant common bundle could be filed within the week if the defendants were directed to assist with it. As noted earlier, Robinson J explained that the effect of the unless order was that the proceeding had already been struck out. However, he granted leave for an application for relief from the effect of the order to be made by day's end, which he would hear the next day. We turn now to the Judge's decision declining that relief, which is the subject of the appeal.

The decision declining relief

The application and opposition

[38] The plaintiffs filed an application on 9 April 2025, seeking, among other things, orders extending the time to comply with the unless order so that the common bundle would be filed by 22 April 2025 and hyperlinked amended briefs of evidence by 28 April 2025. The application was supported by a memorandum from Ms Chen and an affidavit from Mr Meng, a law clerk employed by Righteous Law Ltd.

[39] Ms Chen asserted that the plaintiffs' inability to produce a compliant bundle was partly due to the defendants' failure to provide all the essential documents (she later accepted that this was not the case). She advised that third party assistance had been engaged to complete the bundle and anticipated that being done by 22 April 2025. She proposed that the trial be adjourned and a back-up fixture allocated. She raised the possibility of the freezing orders being relaxed if the defendants paid security into court. She submitted that the effect of the unless order — irreversible prejudice to the plaintiffs from losing the opportunity to have their claim heard — was disproportionate to the plaintiffs' failure to produce a compliant bundle.

[40] Mr Meng confirmed that a third-party provider had been engaged to assist with the preparation of the agreed bundle and, on the basis of their response, the bundle

was expected by 22 April 2025. He also said that the defendants' assistance had been sought in relation to missing documents.

[41] The defendants opposed the application. Mr Dong filed an affidavit explaining his belief that the proceedings were brought to damage his business and reputation and his concern about the trial date being lost. None of the other defendants filed an affidavit.

The decision

[42] It is common ground that the principles applying to the granting of relief against the effect of an unless order are those set out by this Court in *SM v LFBD*.[25] The Judge began by setting out these principles:[26]

> (a) As an unless order is an order of last resort, it is properly made only where there is a history of failure to comply with earlier orders.
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> (b) An unless order should be clear as to its terms. That is, it should specify clearly what is to be done, by when and what is the sanction for non-compliance. That sanction should be proportionate to the default.
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> (c) The sanction will apply without further order if the party in default does not comply with the order by the time specified. However, the party in default may seek relief by application to the Court.
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> (d) Justice may require that the party in default be relieved of the consequences of the unless order where the Court is satisfied that the breach resulted from something for which that party should not be held responsible. The party should not assume that belated compliance will suffice.
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> (e) Where the unless order has been deliberately breached — that is, flouted — it is difficult to conceive of any situation where the interests of justice would require granting the flouter relief from the sanction imposed, notwithstanding belated compliance with the order.
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> (f) In deciding whether or not to excuse breach of an unless order the question for the Judge is: what does justice demand in the circumstances of this case? Considerations in answering that question include:
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> (i) The public interest in ensuring that justice is administered without unnecessary delays and costs.

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25 *SM v LFDB*, above n 8, at [31].

26 Judgment under appeal, above n 1, at [7], citing *SM v LFDB*, above n 8, at [31].

(ii) The interests of the injured party, in particular in terms of delay and wasted cost.

(iii) Any injustice to the defaulting party, although that consideration is likely to carry much less weight in the circumstances than considerations (i) and (ii).

[43] The Judge considered that it would not be in the interests of justice to grant relief because:

> [24] … If the document electronically filed at 11.37 pm on 7 April 2025 had been compliant, or largely so, such that any residual non-compliance could be remedied in short order, relief might have been appropriate. But that is not the case. It is clear that the plaintiffs are largely having to start the common bundle from scratch, which explains why they have sought another two weeks.
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> [25] I do not accept the plaintiffs' contention that the defendants are in any way responsible for this delay (although in fairness I note that Ms Chen did not pursue that point strongly in oral submissions). The defendants provided the documents they require to be included in the bundle some time ago. The plaintiffs are solely responsible for the breach.
>
> [26] On the other hand, I accept counsel for the defendants' submission that they would be significantly prejudiced in their trial preparation if they were not to receive the common bundle until 22 April 2025, seven working days before trial. The plaintiffs do not seriously dispute that the defendants would be prejudiced. Although I accept that Ms Chen was endeavouring to be "constructive and pragmatic" when she suggested an adjournment with a back-up fixture, I do not consider that would remedy the prejudice. A three-week fixture would not be available until 2027. It would not be realistic to expect a suitable back-up fixture to become available in the meantime. Nor do I consider that the on-going prejudice of the freezing orders would necessarily be remedied by Ms Chen's suggestion, subject to instructions, that they be replaced by a Tomlin Order with the defendants' paying security into Court.
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> [27] I acknowledge the significant effect of the unless orders taking effect to strike out the plaintiffs' claims. Ms Chen emphasises the importance that the plaintiffs have access to justice. The plaintiffs have had access. It is equally important that they prepare for trial so as not to prejudice the ability of the defendants to defend the various claims against them. Timetable orders are not just flexible guidelines. The plaintiffs have had every opportunity to prepare a compliant common bundle but they have not done so. Accommodations have been made. In all the circumstances I do not consider that the interests of justice [require] the defendants to proceed to trial having only received the common bundle seven working days in advance.

[44] The precise reasons the Judge gave for concluding that it was not in the interests of justice to grant relief can be summarised as: (1) the plaintiffs would need to prepare a bundle from scratch; (2) the plaintiffs had had plenty of time to prepare

the bundle; (3) the plaintiffs were solely responsible for the delay; (4) the defendants would be significantly prejudiced in preparing for trial if they did not receive the bundle until 22 April 2025; (5) there were no alternative trial dates available until 2027 and a suitable back-up fixture becoming available in the meantime was unrealistic; and (6) there was ongoing prejudice to the defendants from the freezing orders that could not be adequately addressed by way of a Tomlin Order.

Appeal: did the Judge err in exercising his discretion?

[45] From the various complaints identified by Mr Crossland for the appellants, we find that the grounds of appeal can fairly be summarised as being that the Judge erred in:

(a) failing to characterise the nature of the breach within the *SM* framework;

(b) mischaracterising the breach as requiring a bundle to be prepared "from scratch" and failing to take into account the fact that external providers had been engaged to produce a compliant bundle;

(c) failing to consider the nature and extent of the prejudice to the respondents in preparing for and conducting their defences if the bundle were provided by 22 April 2025 and, relatedly, whether the trial date could be preserved;

(d) failing to identify and assess the nature and extent of the prejudice to Mr Dong of the freezing orders; and

(e) failing to properly assess whether the sanction of striking out the proceeding was proportionate to the breach.

The nature of the breach: issues (a) and (b)

[46] There is no complaint about the Judge's finding that the appellants were solely responsible for the failure to provide a compliant bundle within the specified time.[27] The complaint is that the Judge by-passed the point made in principle (e) of *SM* that "where the unless order has been deliberately breached — that is, flouted" it is difficult to conceive of a situation in which the interests of justice would require granting the "flouter" relief. Mr Crossland submitted that without considering the nature of the breach it was not possible to properly reach a conclusion as to what the interests of justice require.

[47] We agree that consideration of the nature of the breach needs to be identified in order to conduct an assessment of what the interests of justice require. There is a significant difference between a party who deliberately flouts an order and one whose culpability is much less, even though both may be regarded as responsible. The Judge's failure to consider this aspect was an error.

[48] The Judge proceeded on the basis of Jagose J's characterisation of the appellants' conduct, which the appellants say was wrong. In making the unless order, Jagose J described the appellants' "continued pursuit of their amended claim through new solicitors while failing to meet timetable orders" as an abuse of process.[28] This description suggested a course of deliberate conduct involving multiple breaches of timetable orders. But that was not the case. Despite the respondents' assertions, a review of the procedural history does not show a course of delay and non-compliance by the appellants in relation to their dealings with the respondents.[29] Until the failure to comply with the timetable for filing the bundle, the only incident of non-compliance was the failure to file a memorandum relating to legal representation. This was hardly a serious breach and Venning J rightly viewed it as not warranting sanction.

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27 There had, initially, been an assertion on behalf of the appellants that the defendants had contributed to the delay and that they had not responded to requests for assistance. This was refuted by the respondents and we agree there is no basis for the complaint.

28 *Qian v Dong,* above n 22, at [3].

29 We do not consider the plaintiffs' dispute with their previous solicitors over fees to be relevant to their compliance with Court orders.

[49] We therefore accept Mr Crossland's submission that the appellants' conduct up to that point was not properly characterised as an abuse of process and that the Judge erred in not recognising that fact. We therefore turn to consider the nature of the appellants' breach.

[50] Mr Chisholm submitted that that the breach was a deliberate flouting of the order or, if not deliberate, then reckless. While this submission was directed towards the appellants, it was actually based on the conduct of their lawyers for such things as delegating responsibility for the bundle to a law clerk and filing the deficient bundle knowing that more time was required to complete it. These criticisms also need to be viewed in context; Mr Qian lives in China and does not read or write English. His current solicitors were engaged at a very late stage, appear to have inherited a file that was poorly organised and did not receive the co-operation that might be expected from the previous solicitors. They have made attempts to remedy the situation. Without downplaying the difficulties that this creates for opposing counsel, assertions of deliberate flouting and recklessness do not seem apt.

[51] As to the extent of the breach, the Judge considered it irremediable. He determined that the plaintiffs would essentially need to start from scratch in preparing the bundle. Mr Chisholm supports this description, and particularly points out that numerous documents (Mr Dong puts it at more than 2,700) that should be included in the bundle are missing from the current draft.

[52] The number of missing documents is, of course, a significant omission. On the other hand, Mr Dong has been able to identify those documents and, indeed, provided a schedule of them in his affidavit. While the bundle is clearly far from complete, it does not seem to us quite a blank slate. Further, in assessing this aspect, the Judge did not seem to take into account the fact that external providers had been engaged, which should have provided some assurance that the bundle could have been completed within the further two weeks sought. The real problem was the effect on the respondents in terms of preparation for trial.

Prejudice to the respondents: issues (c) and (d)

[53] In opposing the application for relief, counsel for Mr Dong and NAC had said that their preparation for trial had already been severely prejudiced and that preparation without an indexed and paginated electronic bundle was virtually impossible. Counsel for Mr Wen and Ms Li said that there would be significant prejudice to them from further delay but did not provide specifics. The Judge accepted that the defendants would be "significantly prejudiced" in their trial preparation if they were not to receive the common bundle until 22 April 2025.[30]

[54] Mr Crossland submitted that the Judge took a wrong approach to the question of prejudice to the respondents. While he accepted that the failure to comply with the order was entirely down to the appellants, he submitted that the breach was remediable and the prejudice to the respondents was, in reality, largely administrative. He said that the purpose of the common bundle is chiefly one of convenience — bundles are a case management tool which collate the documents, ensure that briefs of evidence can be cross referenced, and ensure that counsel, witnesses, and the judge are working off the same page numbers. The respondents have had all the documents that were relevant since the 2023 fixture was vacated.[31] The late arrival of the bundle did not necessitate abandoning the trial.

[55] Mr Chisholm did not accept this characterisation of the common bundle. He submitted that it was an important part of preparation for cross-examination and submissions. This was a document-heavy case, with numerous communications between the parties and financial evidence. He also pointed out that failure to provide the common bundle showed the appellants were not ready to conduct the trial.

[56] We accept that a common bundle is now regarded as an essential tool for the efficient running of trial and, therefore, for the efficient disposal of court business and use of scarce court time. We have no doubt that counsel would have been greatly inconvenienced if the bundle were not available until a week before trial. Preparation would have been much slower, and it is likely that that the efficiency of the trial itself

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30 Judgment under appeal, above n 1, at [26].

31 This of course cannot be true of the fifth defendant, who was only joined to the proceeding in October 2023.

would have been affected, at least initially. However, none of the respondents' counsel actually asserted that they would have been unable to proceed to trial. As a result, consideration of this issue required greater analysis that simply accepting that the defendants would be significantly prejudiced in their preparation for trial. The Judge did not delve further into exactly how the respondents would be affected, both in preparation for and in the conduct of the trial. There was no consideration as to how the prejudice could be alleviated — for example by the use of a core bundle prepared by the respondents from their own documents. This aspect is relevant to the question of proportionality, which the appellants say the Judge failed to address and which we come to shortly.

[57] The other aspect of prejudice recognised by the Judge was the "on-going prejudice of the freezing orders".[32] The Judge was, of course, right to identify this as an aspect of prejudice to Mr Dong. However, there was no specific finding as to the nature of that prejudice. It is self-evident that having property subject to a freezing order entails a level of prejudice. However, it is not clear what the extent of that prejudice was. Mr Dong filed two affidavits in relation to the difficulties created by the non-compliant bundle in which he referred to the fact that the freezing orders had been granted. However, there was no elaboration as to the effect they had had on him personally or his business. On the material before the Judge, there was no basis on which to find that there was prejudice beyond the usual inconvenience. This is important because it too goes to the question of proportionality.

[58] Mr Rea, for Mr Wen and Ms Li, asserted that they were affected by the caveat still lodged over the property because they wished to complete the development and settle the sale and purchase agreement (presumably to Yu Homes Group Ltd). However, neither filed an affidavit.[33] So, while we can readily accept that a level of inconvenience exists from the fact of a caveat being lodged over property, in the absence of evidence from the parties concerned there was no basis on which the Judge could have assessed the actual extent of that prejudice.

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32 Judgment under appeal, above n 1, at [26].

33 Following Robinson J's decision in the judgment under appeal, van Bohemen J made an order that the caveat be removed: *Qian v Dong* [2025] NZHC 1047 at [12].

The question of proportionality: issue (e)

[59] We come to the question which underlies the appeal generally — that in finding it was not in the interests of justice to grant relief, the Judge failed to consider whether striking out the proceeding was a proportionate sanction to the appellants' failure to comply with the direction to file and serve a (compliant) common bundle by 7 April 2025.

[60] As Venning J observed in *Spak (1996) Ltd v Leroy*, the purpose of unless orders is to enforce compliance with court orders and ensure the efficient progress of litigation.[34] But, as *SM* recognises, these objectives must be approached on the basis that an unless order is a last resort and the sanction it imposes must be proportionate to the breach.[35] The complaint in this appeal is that the Judge did not consider this aspect at all.

[61] The interests of justice require that court business is conducted in a way that gives the public confidence that genuine claims will be heard and determined in a fair and transparent manner. The striking out of proceedings is a serious step and not to be taken lightly.[36]

[62] The Judge's conclusion essentially rested on the defendants' assertion that they would suffer significant prejudice and his view that the plaintiffs had had the opportunity to advance their claim and ought to prepare for trial without prejudicing the ability of the defendants to defend the claims. There was, however, no consideration as to whether preventing the plaintiffs from having their claim determined at trial was a proportionate response to their failure to provide the bundle.

[63] The claim in this proceeding was large and reasonably complex. It had survived a challenge by way of summary judgment and a challenge to the related caveat. Until late 2024, there had been no criticism of way the case had been conducted. Despite the respondents' assertions, there was not a history of delay and non-compliance. The loss of the 2023 trial was not attributable to the plaintiffs. The

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34 *Spak (1996) Ltd v Leroy* [2021] NZHC 3278 at [11].
35 *SM v LFDB,* above n 8, at [31].
36 *Body Corporate 331094 v Landings Parnell Ltd* [2013] NZHC 3560 at [57].

only prior instance of non-compliance was the failure to file a memorandum advising the court of the plaintiffs' legal representation. In these circumstances it would be a very serious step to strike out the proceeding, which had been awaiting trial for so long. Prejudice of a kind that would have prevented the defendants from advancing their defences at trial or which could not have been addressed through costs (for which security had been given) might reasonably have been regarded as justifying striking out the proceeding. But the evidence did not show that level of prejudice.

[64] We accept Mr Crossland's submission that the breach in this case is significantly less serious than the breaches in cases in which relief has been refused. These cases include *Houghton v Saunders* which concerned failure to provide security for costs over a long period and an "impressive record of non-compliance with timetabling directions";[37] and *Withers v The Registrar of Companies* where the appellant had consistently sought to delay hearing of the appeal, making three adjournment applications over 16 months,[38] with grounds relied on including involvement with parallel court proceedings and ongoing family, health, and financial difficulties. The appellant finally breached an unless order requiring him to file and serve his common bundle in time. Nor is it comparable to *SM v LFDB* where the party in default, after a "protracted game of 'chicken' with the Court", as described by the High Court, belatedly complied and then asked to be excused.[39] This Court refused to grant relief because the sanction was proportionate to the repeated defaults, and he had been provided with many indulgences.[40] In contrast to these cases, which the appellants' submit involved "entrenched, contumelious conduct", the present situation involved a "curable misstep."

[65] We conclude that the Judge erred in not expressly considering whether the sanction was proportionate to the breach as required by *SM*. In our view, the circumstances of the case and the evidence before the Judge did not demonstrate that striking out the proceeding was a proportionate response to the failure to provide the bundle within the requisite time.

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37 *Houghton v Saunders*, above n 5, at [24].
38 *Withers v Registrar of Companies* [2021] NZHC 3046.
39 *SM v LFDB* [2013] NZHC 3105 at [10].
40 *SM v LFDB,* above n 8.

Result

[66] The appeal is allowed.

[67] Proceeding CIV-2021-404-132 is reinstated. The matter is remitted to the High Court to be timetabled to trial.

Solicitors:
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Tompkins Wake, Auckland for First and Second Respondents
Cuncannon, Auckland for Third and Fifth Respondents