IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-2847
[2013] NZHC 2495

UNDER THE	Companies Act 1993
IN THE MATTER OF	of an application under s266 for the Production of Documents and Examination Orders re Pakiri Investments Limited (in Liquidation)
BETWEEN	MARK HECTOR NORRIE AND PATRICIA VAN DER WENDE as Joint & Several Liquidators of PAKIRI INVESTMENTS LIMITED (IN LIQUIDATION) of Greenpark Rd, Penrose, Auckland Applicants
AND	IGOR SUTICH of 148 Quay Street, Penthouse 3, Auckland Company Director First Respondent
	LARRIE NEWMAN Second Respondent
	RAJENDRAN RAVIKULAN Third Respondent
	EVAN JAMES READ Fourth Respondent
	ARRON GLYN JUDSON Fifth Respondent

CONTINUED OVERLEAF

CIV-2013-404-003305

IN THE MATTER		of an application under s 295
BETWEEN		MARK HECTOR NORRIE AND PATRICIA VAN DER WENDE as Joint & Several Liquidators of PAKIRI INVESTMENTS LIMITED (IN LIQUIDATION) of Greenpark Rd, Penrose, Auckland Applicant
AND		TIME3 GLOBAL LIMITED Respondent

Hearing:	29 August 2013
Appearances:	Mr M H Norrie - Liquidator in person for Applicants in both proceedings Mr R B Hucker for Respondents in both proceedings Mr R B Hucker for fourth defendant (appearing under protest)
Judgment:	24 September 2013

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***24.09.13 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..

Background

[1] Pakiri Investments Limited was placed in liquidation by the High Court at Auckland on 15 February 2013. The applicants were appointed liquidators. The liquidators have taken steps to acquaint themselves with the business which the liquidated company carried on. They say that the directors have not assisted them in the way that they are obliged to.

[2] The liquidators have taken steps to set aside what they consider were insolvent transactions involving the company. One of those transactions involved Time 3 Global Limited. It is alleged that the transaction involved the transfer of all assets of Pakiri to Time 3 Global Limited from 18 June 2012 onwards as part of what was described as a "restructure arrangement" by directors of the company, including MrEvan Read, a former director of the company and now a bankrupt.

[3] No steps were taken to oppose the notice that was served on Time 3 pursuant to s 292 of the Companies Act 1993 and the liquidators thereafter filed a notice of originating application for orders under s 295 of the Companies Act requiring Time 3 to pay to Pakiri the sum of US $120,000,000.

[4] Briefly, the background to the issuing of the voidable transaction notice was as follows. In a letter which Mr Read wrote to interested parties in his capacity of a majority shareholder of Pakiri, reference was made to a "company profile" which accompanied the letter. In the profile, Pakiri was described as a New Zealand registered company that had developed and owned the intellectual property and proprietary rights to various software components.

[5] However, by a series of transactions about which the liquidators say they do not understand, steps were allegedly taken by Mr Read and others to "restructure" the affairs of Pakiri with the result that the technology left Pakiri and ended up with Time 3 Global Limited. Other information which was circulated by Pakiri through the person of Mr Read indicated that the software suite had vast earning potential to be measured in the tens of millions of dollars. It is said for the liquidators that there

is now no evidence of the software being owned by Pakiri any longer and it is thought that as part of the restructure all or part of it was transferred to Time 3 Global Limited.

[6] The position that the liquidators took was that the failure of Pakiri involved substantial loss to creditors and shareholders. Creditors are estimated by the liquidators to be in the vicinity of $400,000 and there are no substantial assets of any kind available to meet their claims.

[7] This limited overview of the steps that the liquidators have taken is advanced by them to show that the affairs of Pakiri call for investigation. They say however that they find themselves in a position where there is an almost complete absence of company records. They have managed to recover from the company's bank account records going back some years. Other sources such as the Inland Revenue have not been productive of any useful information. The position of the directors I will come to next.

[8] The personnel who were involved in Pakiri were the following:

a) Messers Sutich and Newman who are currently directors;

b) Messers Ravikulan and Read were shareholders;

c) Mr Judson who resigned as a director on 1 March 2012 and remains a shareholder.

[9] The liquidators exercised powers conferred on them by the Companies Act 1993 to require three of the persons just mentioned, Messers Newman, Ravikulan and Judson, to deliver company records to the liquidators pursuant to s 261 of the Companies Act 1993. Apparently such notices were not served on Mr Read, possibly because he is currently resident in Russia. For various reasons further notices were served in replacement of the earlier ones which required the same people to attend for examination before the liquidators and to provide various documents which were listed in the replacement notices pursuant to s 261 of the

Companies Act 1993. Thereafter Mr Norrie as liquidator of Pakiri applied to the Court for orders requiring the respondents to produce documents and be examined on oath pursuant to s 266 of the Companies Act. Mr Read was included as a respondent to that particular application. He has filed a protest to jurisdiction. Mr Hucker told me at the hearing on 29 August that he appeared on behalf of Mr Read only for the purposes of maintaining the protest to jurisdiction and addressing the Court on steps that might be required to bring the issue of the Court's jurisdiction in the case of Mr Read to resolution. The protest to jurisdiction has been dealt with by way of a Minute I issued on 29 August 2013. The liquidator is to advise whether he intends to proceed against Mr Read.

[10] The application refers to the role that the above mentioned individuals played in the company (whether as directors or in the case of Mr Ravikulan as Chief Financial Officer, for example) and states that the orders are sought because they are necessary to enable the liquidators to properly discharge their function and duties.

[11] The respondents other than Mr Read filed notices of opposition which set out as grounds the fact that there is no jurisdiction for the Court to make orders under s 266, that the applicant liquidators had pre-determined issues in the investigations they wished to undertake, that the respondents had complied with their obligations and made available such documents to which the liquidator is entitled and that they had completed questionnaires submitted to them by the liquidator. The notice of opposition also stated that some of the documents sought were not company records or other documents which the liquidators were entitled to and that some of the documents were outside the range of the authority which the liquidators had authority to compel disclosure of. Further, the notice of opposition stated that in relation to the discretion which the Court has to make orders, it is the case that the liquidators are using the s 266 procedure "inappropriately to gain a collateral advantage in the litigation and/or prosecution of the directors".

[12] In the course of the hearing, Mr Hucker developed a further ground of opposition which was that there was no jurisdiction to make the orders sought because the liquidators had not specified with any exactitude what documents they required. Nor should the Court make an order that required the respondents to

provide documents unless it was sure those documents were in the custody or control of the respondents for to do otherwise would expose them unjustly to penalties for non-compliance with the Court's order.

[13] The orders sought are for the respondents to immediately produce to the liquidators "any books, records, or documents relating to the business, accounts, or affairs of the applicant in that person's possession or under that person's control". The liquidators also sought an order that the respondents attend before the Court and be examined on oath or affirmation by the Court.

[14] At the hearing on 29 August, the liquidator appearing advised that the liquidators would be content, in place of an order for examination before the Court, for an order that the respondents appear for examination on oath before the liquidators.

[15] Against that statement of background I turn to consider the issues that arise in this case. The issues that require to be determined are these:

a) Have the liquidators demonstrated that the orders sought are justified and what are the grounds for the Court coming to the conclusion that they are;

b) What specific documents or classes of documents are the respondents to be required to produce;

c) Can the Court make an order directing production of documents in the absence of evidence that the documents are in the custody or control of the respondents;

d) Ought the orders to be declined on discretionary grounds including the ground that the liquidators are attempting to use the powers under s 266 for collateral purposes, namely, to assist them in the litigation which they have brought against some or all of the respondents,

namely the proceedings in CIV-2013-404-3305 which relate to the voidable transactions.

Issue one – justification for orders sought

[16] The position of the liquidators is that the creditors have an interest in any steps that might be taken by way of litigation or otherwise to recover any assets that were transferred out of the company. The shareholders have a similar right to recover any property of the company and both groups have an interest in the liquidators investigating whether they have any basis upon which they can bring claims against, amongst others, the directors, de facto director (in the case of Mr Read) and the former chief financial officer of the company.

[17] The liquidators referred me to the decision of Associate Judge Abbott in *Official Assignee v Grant Thornton* where his Honour made the following comments:[1]

> [25] Against that background the Assignee says that he is making his own inquiries to determine whether there are any available actions that he can pursue for the benefit of Rockforte's creditors. In relation to the present application, he says Rockforte's books and records are in a poor state, and the information and explanations that the directors provided to Grant Thornton may include information not available elsewhere. He says that the correspondence will not provide the complete picture, as it may not record all communications (particularly oral communications which may be recorded in the working papers). He refers to the fact that Grant Thornton issued unqualified audit reports, and says that this needs investigation in light of what the receivers have discovered (he has still to assess whether there is any basis for a claim against Grant Thornton, and needs to make that decision after considering all relevant information).

[18] As that quotation will make apparent the respondent in that case was an auditor but the comments that the Judge made are not of restricted applicability and in my view are of relevance to the present case. In his judgment the Judge also said that:

> [27] I accept that the Assignee is seeking the documents in good faith, as part of an investigation that he is bound to undertake to establish whether there is any action he can pursue for the benefit of Rockforte's creditors. I consider that the Assignee has put sufficient evidence before the Court to allow it to balance the competing interests: the Assignee's reasonable requirements to carry out his duties as against the burden placed on Grant Thornton. I take the view that the Assignee's investigation should not be limited to specific transactions or circumstances that he

[1] *Official Assignee v Grant Thornton* [2012] NZHC 2145.

can identify in advance. This was not required in *British & Commonwealth Holdings Plc*. The breadth of the orders will cause Grant Thornton inconvenience but, as was pointed out in *British & Commonwealth Holdings Plc*, that, of itself, does not make the order unreasonable. Mutual cooperation will make the task more manageable and less disruptive. The public interest in investigating the circumstances that lead to Rockforte's collapse on this occasion must trump Grant Thornton's interests to privacy and confidentiality.

[19] Further, the responsibilities of liquidators are set out in the following terms in s 253 of the Companies Act 1993:

> **253 Principal duty of liquidator**
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> Subject to section 254 of this Act, the principal duty of a liquidator of a company is—
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> (a) To take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and
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> (b) If there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4) of this Act—
>
> in a reasonable and efficient manner

[20] Sections 256 and 260 are also relevant:

> **256 Duties in relation to accounts**
> (1) Subject to subsection (2) of this section, the liquidator of a company must—
> (a) Keep accounts and records of the liquidation and permit those accounts and records, and the accounts and records in the company, to be inspected by—
> (i) Any liquidation committee appointed under section 314 of this Act, unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; and
> (ii) If the Court so orders, a creditor or shareholder; and
> (b) Retain the accounts and records of the liquidation and of the company for not less than 1 year after completion of the liquidation.
> (2) The Registrar may, whether before or after the completion of the liquidation,—
> (a) Authorise the disposal of any accounts and records; and
> (b) Require **[**any**]** accounts or records to be retained for longer than 1 year after the completion of the liquidation.
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> **260 Powers of liquidator**
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> In order to carry out his/her duties the liquidator has the following powers as described in the Act:

(1) A liquidator has the powers—

(a) Necessary to carry out the functions and duties of a liquidator under this Act; and

(b) Conferred on a liquidator by this Act.

(2) Without limiting subsection (1) of this section, a liquidator has the powers set out in Schedule 6 to this Act.

[21] Schedule 6 to the Act includes power to commence, continue, discontinue and defend legal proceedings.

[22] The statutory provisions to which I have made reference make it clear that the duties of the liquidators include retaining the accounts and records of the company.[2] That suggests that the liquidator, standing in the place of the directors from the point where liquidation occurred, has an obligation and right to take steps to obtain possession of the company's accounts and records. Without them the liquidators cannot perform their functions. But additionally under s 261 it is made clear that the liquidator has power to obtain documents and information and s 266 gives additional specific power to require a person who has not complied with a requirement under s 261 to deliver to the liquidator the books, records and documents of the company to and direct that a person does the same.

[23] That general statement of the functions of the liquidator in relation to the company's books and records makes it plain that the liquidator does not have to demonstrate any particular purpose or objective in view when he/she takes steps to recover the documents and records of the company. The liquidator is the proper custodian of those documents from the time of liquidation.

[24] At the commencement of liquidation, the liquidator replaces the company's directors and officers as the proper custodian of the company records. That is why there is power under ss 261(2) and (3) to require a director, former director,

[2] Companies Act 1993, section 256.

shareholder and others involved in what might be termed the management and control of the company, to hand the records to the liquidator.

[25] The books and records which the liquidator has authority to obtain must include the books, records and accounts which the law requires the company to maintain. The directors have an obligation to comply with the Act.[3] The records include those described in ss 189 and 194 which relate to accounting records which must be kept.

[26] That leads to the issue of what the liquidators should be required to prove before they are entitled to an order under s 266. The starting point must be that it is assumed that the company will have complied with its statutory obligations to keep books of record and account. If on taking control of the company, the liquidator finds that such documents are not present, then it must be open to him or her to take steps either to investigate where those documents are or to give directions to the company officers and directors to provide them.

[27] In an earlier case, *Re Rolls Razor Limited (Number 2)* Megarry J said:[4]

> The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.

[28] It is also necessary to keep in mind that exercising the discretion to make an order involves balancing a number of factors including the interests of those against

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[3] Companies Act 1993, section 134.
[4] *Re Rolls Razor Limited (Number 2)* [1970] Ch 576 at 591-592.

whom the order is sought. The process was described in this way *In Re British and Commonwealth Plc* by Lord Slynn of Hadley: [5]

> At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved – on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned.

[29] What is required is for the applicant to make a proper case for the making of an order. Lord Slynn further on in his speech said:[6]

> The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements an application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others.

[30] In addition to enabling the liquidator to assemble replacement documents which are part of the company's records, the statutory power to obtain documents and interrogate company officers enables another function of the liquidators which is to take proceedings where necessary in the interests of the creditors of the company and others. It is for that reason that the authorities also acknowledge that better equipping a liquidator for litigation is a legitimate objective of exercising the power contained in s 266.[7] In *Northrop,* the company had been placed in liquidation and the liquidator developed suspicions as to the validity of a debenture which it had granted and was also suspicious of the possible undervalue involved in the sale of some shares.[8] The liquidator wished to examine a former secretary and director of Northrop and the secretary concerning the sale of the shares. It was said for the liquidator that he was entitled to examine witnesses before committing himself to any possible proceedings (the witnesses being the two company officers that I have already mentioned). McGechan J having set out the background of the matter and

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[5] *In Re British and Commonwealth Plc* [1993] AC 426 at 439.
[6] At 439, line G.
[7] *Re Northrop Instruments &Systems Ltd* [1992] 2 NZLR 361 (HC).
[8] At 362, line 40.

having referred to one of the objectives of an examination being the "reconstitution" of the previous knowledge of the company went on to say:[9]

> However, I have little doubt, the desirability of enabling a liquidator to confirm or dismiss information as a sufficient evidential basis for prospective proceedings, in a swift and economical way, has played some role in New Zealand decisions, without separate consideration of any "reconstitution" test. Having said that, I suggest a similar result often will follow, whether the balance on one side is assessed by a need to explore available evidence, or by an arguably different "reconstitution" approach.

[31] In that case the Judge said that the liquidator already had information but it might not be sufficient to bring proceedings because it may well present hearsay or at least weight problems at trial, and that understandably the liquidator wanted to go to the source in the person of the two company officers to verify the position. He said:[10]

> On the material before the Court, I am satisfied the proposed examination for this purpose is not some mere fishing expedition, and is not some mere polishing option. It is a genuine investigative step, taken bona fide with a view to reaching an informed decision whether to proceed further. Will unfairness be involved? I do not think so. Of course, there will be some advantage to the liquidator in the availability of the [examination] procedure, but such is always the case the question of unfairness is one of degree and ultimate balance. The alternative to [an examination] is for the liquidator either to abandon any further attempt to discharge his functions, or alternatively to issue proceedings based on hope that necessary evidence will turn out to be available.

[32] McGechan J went on to comment that that was not a case where the liquidator was attempting to seek to "improve an already sufficient position, or is bringing pressure to bear for some ulterior purpose".[11] It appears that the Judge's view was if the liquidator's objectives were to achieve the purposes that he referred to, this was not a legitimate reason for invoking the powers of the liquidators under the Act.

[33] In this case, the liquidators' view is that an order for examination is justified both on the basis of reconstituting the records of the company and looking at any possible claim for the loss of the intellectual property which seems, in their view, to

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[9] At 364, line 17.
[10] At 364.
[11] At 364.

have disappeared from the company. In my view the position that the liquidators take is a legitimate one. It is neither more nor less than a case of liquidators attempting to carry out their proper statutory functions in an unexceptional way.

[34] As to the question of prejudice to the respondents, the following points can be made. The fact that not even a meagre amount of the company's records have been located tends to suggest that the company officers have not properly applied themselves to their obligation of stewardship of the company's property and records and the preparation of proper financial statements, which by statute they are bound to see to. A reasonable inference arises that the very state of affairs which the liquidator is attempting to correct was brought about by the respondents' omissions. It is a legitimate use of the power to now require the company officers to assist the liquidator to help him overcome the handicap that lack of information poses. They are not minded to do so voluntarily judging by the minimal responses that have been forthcoming from them to the liquidator's efforts to get information from them to date. The fact that once armed with any material that might be thrown up as a result of exercise of the statutory power to examine, the liquidator may issue proceedings, is a permissible objective of carrying out the examination. The fact that some or all of the very officers who are required to provide information might be targets for litigation is not a reason for exempting them from orders under the Act.

[35] Mr Hucker drew my attention to the fact that the liquidator had issued a notice to set aside a voidable transaction on 7 May 2013. Mr Hucker pointed out that the liquidator had obviously managed to become sufficiently informed to take that step without first having to examine the respondents. This was the foundation for a further submission that there was therefore no requirement for an examination to be ordered. I disagree. The service of a notice setting aside an insolvent transaction is a procedurally simple extra-curial statutory remedy that is available to liquidators. It does not require preparation of a detailed case and the accompanying process of assembling admissible evidence to enable a liquidator to prove a case in Court. In this case, based upon the scanty material they had, the liquidators say that they considered there had been a large scale abstraction of wealth from the company without any apparent corresponding benefit to the company. The liquidator acting in the matter served a notice which was not responded to and effectively won that

round by default. However, the respondents have now instructed counsel, Mr Hucker, and it would seem that the ambit of his brief will include resisting the grant of any relief in furtherance of the setting aside of the transactions to which the voidable transaction notice related. This stage of the proceedings, in other words, is not likely to go by default. Before the liquidator can responsibly commit to a decision to persist and seek orders under s 305, he needs to know what documentary material is available from the company's records which will assist their cause. There was nothing improper or illegitimate about that approach, in my view.

[36] A further aspect of the factual matters that is relevant to whether a discretion ought to be exercised to direct the respondents to attend for examination and whether an order directing them to produce documents ought to be made, is the response that each of them made to the questionnaire which the liquidators asked them to complete. While some criticisms can possibly be made of the questionnaire on the grounds that it went into unnecessary levels of detail, that does not explain the apparently offhand and minimal response that the respondents provided to it. The lack of an effective response is another factor which can be taken into account when the Court is enquiring into whether making an order under s 266 is desirable or necessary.

[37] To summarise, the powers which are contained in the Act are necessarily broad. They should be given full effect to. They should not be exercised past the point where unfairness results. The power to require the directors and others to provide documents is a salutary one. It can be viewed as making good a requirement that the directors as former custodians of the company retain vestigial obligations designed to ensure that their successor as custodian of the company, the liquidator, is able to administer the affairs of the company in accordance with the law. Further, given the circumstances in which liquidators frequently find themselves on taking possession of a company which they have known nothing about previously, it would be quite inconsistent with the observations just made that they should have to specify in advance the very documents that they hope to find by exercising their powers under s 261 and s 266 of the Act. The fact that the directors may be required to provide documents which, after all, are not theirs but the company's is part of the context in which the Court has to judge whether the liquidator's requirements are

oppressive. The fact that such documents may indirectly lead to the liquidator on behalf of the company taking action against those required to produce the documents may be exactly in step with the legislative intent because, after all, it is not an uncommon occurrence that liquidators find themselves required to bring proceedings against former directors in order to vindicate the rights of other classes who have an interest in the company such as creditors and shareholders.

Issue two – the documents or classes of documents to be produced

[38] The form of the request for documents which the liquidators served on the respondents pursuant to s 261 which was dated 1 May 2013 is the following. I shall make comment on some of the individual groups of documents specified.

(a) All Company records required to be kept under s 189 of the Companies Act 1993 (the Act); and
(b) All Company accounting records required to be kept under s 194 of the Act; and
(c) All invoices and statements for all goods and services bought or sold by the Company within the last 7 years; and
(d) All bank statements for all bank accounts operated by the Company within the last 7 years; and
(e) All documents associated with any security agreements that the Company has been party to within in the last 7 years; and
(f) All share transfer certificates and associated documents including fair value calculations and all correspondence in relation to all shares transferred within the 2 years and 2 months preceding the date of commencement of the liquidation, the Trust Deed of the current trust holding the shares in the Company, copies of all advertising and/or other promotional material used to entice investors to purchase shares in the Company; and
(g) Any other record, book or document of the Company that may assist in the liquidation of the Company or you believe will assist you in the examination as set out in paragraph 3 and may support your answers to questions.

[39] In his notice of opposition, Mr Sutich submitted that the categories of documents that are sought are too wide. One example that he gives is that the liquidator seeks all invoices and statements for goods and services over seven years.

[40] I do not consider that an objection couched in such general terms is a valid one. What is a reasonable range of documents for a liquidator to require is a matter to be tested against a number of criteria. Some factors which will bear upon this matter are obvious.

[41] Before discussing some of the relevant considerations, it is necessary to bear in mind that the powers of the liquidators (and those of the Court acting in support of liquidators) are inquisitorial in nature: *Re North Australia Territory Co*.[12]

[42] One relevant consideration is the volume of documents overall that the director has possession of. If, for example, a director has only a box of papers numbering perhaps no more than 100, it cannot be unreasonable to require him to sort through those documents to find if they include documents of the subject within the date range that the liquidator seeks. Mr Sutich has not given any information which would assist the Court in coming to a judgment on the asserted unreasonableness of the requirement.

[43] The point is made that the liquidator is seeking all invoices covering the period of the last seven years. Whether or not such a request is oppressive cannot be decided in isolation from the factual context. If the company was one which conducted hundreds of transactions and issued invoices on them each week, then plainly requiring the company officer to locate and provide them at his own time and expense could be oppressive.

[44] It is to be noted that the company officers are not being required to reconstruct records of the company which extend back into the past. All they are being asked to do, in effect, is to produce to the liquidators copies of the company's documents which came into their possession or came under their control (and in each case remain so) during the time that they were company officers.

[45] I shall return to the question of what documents are relevant in the final section of this judgment.

Issue three – possession and control of documents

[46] Sections 261 and 266 of the Act both refer to an obligation to produce books, records et cetera of the company "in that person's possession or under that person's control".

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[12] *Re North Australia Territory Co* (1890) 45 Ch D 87 at 93.

[47] The broad submission was made for the respondents that they did not have the possession or control of the documents of the company. Therefore, it was submitted, the Court ought not to make an order which was incapable of being performed.

[48] When considering the extent of the documents, it is necessary to bear in mind that s 266(2) is concerned with documents that are "in that person's possession or under that person's control". The concepts of control and possession have frequently been traversed in cases concerned with the application of the Court's discovery rules. There is however a significant difference between the approach to be taken when ordering discovery as between litigants and the situation that applies where a company is in liquidation. The obligation which is established by the two sections is an obligation for production of documents rather than to provide discovery. The process envisaged by s 266(2) is dissimilar from the process of discovery because it is limited to documents which are currently in the director's control. There is no requirement for the company officer to disclose documents that are or have been in the party's control as there is in rule 8.7 of the High Court Rules. Nonetheless there may be some assistance to be had from considering authority in relation to discovery rules in deciding the meaning of the expressions "possession" and "control".

[49] The first point concerns the meaning of the word possession. The Oxford English Dictionary defines "possession" as "The action or fact of holding something (material or immaterial) as one's own or in one's control; the state or condition of being so held."[13] There would seem to be little doubt that this expression means exactly what it says. If the directors have any documents in their possession they have to disclose them.

[50] The meaning of the term "control" in the statutory context is a little less straightforward. Commonsense suggests that the terms are disjunctive in their operation. Control would seem to extend to documents which the officer of the, company does not have in his corporeal possession but over which he has the power amongst other things, to exert a right to possession. Control is defined as "To exercise restraint or direction upon the free action of; to hold sway over, exercise

[13] Oxford Online "possession, n." September 2013 <www.oed.com>.

power or authority over; to dominate, command."[14] It would seem to be the equivalent of the expression used in the former discovery rules when they referred to documents being in the "power" of the discovering party and extended to a right to obtain possession of a document not already in the party's corporeal possession. If the director, for example, has the documents in a storage area at his home, they may be taken to be in his possession. If he has the key to a storage area at a remote site where the documents are located, they are under his control. Documents which were left in the offices of a company which have been long abandoned would not seem to come within the statutory definition.

[51] In the circumstances of the present case, it has to be borne in mind that with effect from the commencement of the liquidation of the company, the liquidator has custody and control of the company's assets to the exclusion of the directors.[15] This would include the company's records which the liquidator is under a statutory obligation to hold pursuant to s 256.

The deposition that the respondents do not hold any documents

[52] As I have mentioned, one of the respondents, Mr Sutich, provided an affidavit which said that he and the other respondents had each provided to the liquidators such documents as they had in their possession and this was put forward as a ground for opposing the application made for an order for production of the company's documents.

[53] Mr Hucker submitted that that affidavit was not inherently improbable and that therefore the assertions contained in it ought to be accepted. I comment on that submission below.

[54] The first point is that in my view, it was undesirable that Mr Sutich provided an affidavit purporting to be on the behalf of the other respondents in addition to himself. In the circumstances the affidavit cannot be other than based upon hearsay evidence and so contravenes rule 9.76 HCR and ss 18 and 20 Evidence Act 2006. The contents of the affidavit should not therefore be available as evidence which the

[14] Oxford Online "control, v." September 2013 <www.oed.com>.
[15] Section 248 Companies Act 1993

respondents other than Mr Sutich can put forward as evidence in the proceeding. The second point is concerned with an assessment of the accuracy of the deposition. The impression that the Court is left with in this case is that a very slight body of documentation has been produced to the liquidators. I accept that it is difficult to form an accurate judgement on this question but it would be surprising if the four respondents having their various obligations including those of company directors did not, if they had carried out their functions conscientiously, accumulate quite substantial volumes of documents including board papers, financial projections and all the other typical documentation which is made available to those in charge of the governance of companies. The meagre quantity of documents might be understandable in the case of one particular company officer who may not have very effective systems for storage and retrieval of documents made available to him during the time when he was a company officer. It is surprising though that the collective volume of documents said to have been made available by all of the respondents is not greater.

[55] There is no need to comment further on this matter because of the orders that I have in mind making in this case.

Issue four – discretion to make the orders sought

[56] The parties proposed that instead of orders being made under s 266, there would be a reconsideration of production of documents under s 261. The issue that the Court needs to determine under this heading is whether it is likely that proceeding with the s 261 procedure (which involves provision of information without the Court's intervention) would be preferable, or whether it would be preferable for the Court to be involved in an examination of the officers of the company on oath and by production of documents at a Court hearing.

[57] Having regard to the difficulties that have emerged so far, I consider that it would be preferable to deal with the matter under s 266. That would enable the Court to hear from the respondents personally about matters such as the distribution of information between the officers of the company and about how the company's affairs were carried out generally. It would also be helpful for the Court to be

apprised of what steps each individual respondent took to satisfy the requirements of s 261 of the Act.

[58] A further purpose of the examination would be to enquire into the obvious question of why the company became insolvent. As well, information could be sought from the respondents about what became of assets that at one stage were apparently regarded as the property of the company but which the liquidators say had been moved out of the company - to use a neutral term - by the time that they were appointed.

[59] In regard to the last matter, Mr Hucker made the submission that to permit examination of the respondents on this last point would be to allow the examination to stray into an area which is not permitted. It was his submission that the liquidators are not entitled to use the procedure under s 266 in order to extract information from the opposite party as to litigation which the liquidators have brought. I have dealt with that point under Issue One above. I do not consider that it is a difficulty.

[60] Once the examination has been completed, then it would be possible for the Court to make more informed orders about whether further directions are to be given requiring the respondents to disclose documents. In that way the problem that Mr Hucker adverted to of the respondents being ordered to provide documents which they do not have would be avoided. In any case, the form of any order that might be made at the conclusion of the hearing would be to produce documents that were in the possession or under the control of the respondents. Should any question subsequently arise about whether the respondents had complied with the orders that the Court had made, findings of fact may have to be made but they would be made against the background of the examination under s 266, consideration of any additional documents that the respondents may have been able to locate and any further evidence that may have come to hand about the likely location of company records etc.

The Orders

[61] The liquidators have provided a detailed list of the documents which they seek to have the respondents produce at an examination pursuant to s 266. In fact, there is no necessity for the liquidator to specify the categories of documents which the affected parties are required to produce. Plainly, many of the documents which were set out in the schedule to the application which the applicant served would be documents which came within the definition contained in s 266(1)(b). However, that said, the onus is on the respondents to comply with the requirements of the section in connection with which they will no doubt receive legal advice.

[62] Section 266(2)(b) does not specify where and to whom the documents are to be produced. The legislative intention, I consider, was for the documents to be produced to the Court. Once such documents as have been provided have been considered by the liquidators, it will be open to them (either immediately following the examination or after an adjournment) to examine the respondents concerning the matters set out in subsection 2(a) which includes the "business, accounts, or affairs of the company".

[63] Therefore I order pursuant to s 266 of the Act that each of the first to third and fifth respondents are to:

a) attend before the Court at a time to be advised by the registrar to be examined on oath or affirmation by the Court or the liquidator or a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company;

b) produce any books, records, or documents relating to the business accounts, or affairs of the company in that person's possession or under that person's control.

[64] The registrar is to allocate one day for the examination. For the purposes of this order, "document" has the meaning ascribed to that term in section 2 of the Companies Act 1993.

[65] If between now and the time scheduled for hearing there are further developments so that it appears that the orders are no longer required, the parties should direct memoranda to me seeking to have the arrangements vacated or amended as required.

[66] Finally, the parties are to give consideration to progressing the matter of the protest to jurisdiction which the fourth respondent has filed. The proceeding is to be listed in the miscellaneous companies list 25th of October 2013 on the basis that it can be vacated if satisfactory arrangements are agreed to ahead of that call.

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J.P. Doogue
Associate Judge