IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-4378
[2014] NZHC 648

IN THE MATTER	of the Companies Act 1993
IN THE MATTER	of the liquidation of Pakiri Investments Limited (in Liquidation)
BETWEEN	LARRIE WILLIAM NEWMAN Applicant
AND	MARK NORRIE AS LIQUIDATOR OF PAKIRI INVESTMENTS LIMITED Respondent

Hearing: 17 December 2013

Appearances: R B Hucker/A P Prasad for applicant
B G Frowein/M C Kilham for respondent

Judgment: 2 April 2014

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on Wednesday 2 April 2014 at 4 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Hucker & Associates Ltd, Auckland
Lowndes Associates, Auckland

[1] The applicant, Mr Newman, is a director of Pakiri Investments Ltd (in liquidation) (Pakiri). The respondent, Mr Norrie, was appointed liquidator of Pakiri by this Court on 15 February 2013.

[2] Mr Newman has applied for removal of Mr Norrie as liquidator on the grounds that he was not qualified for appointment because he was effectively in control of, and his firm had continuing business relationship with, one of Pakiri's secured creditors, Ablaze Ltd. In the alternative, Mr Newman says that Mr Norrie is in breach of an obligation to call a creditor's meeting of Pakiri, and seeks an order directing him to do so.

[3] Mr Norrie disputes that he was not qualified to accept appointment, but says that in any event the Court has a discretion in the matter, and should exercise that discretion in favour of confirming his appointment and against calling a meeting, in the circumstances of this case.

[4] For the reasons I will give in this judgment, I decline Mr Newman's application and find that Mr Norrie can continue to act.

Background

[5] The application needs to be considered in the context of matters leading up to Pakiri's liquidation, particularly relating to Pakiri's relationship with Ablaze, and steps taken in the liquidation.

The relationship between Pakiri and Ablaze

[6] Pakiri was in the business of software development, either in its own right or through a number of related companies, operating under the general name Pakiri Group. A Mr Evan Read appears to have had a controlling interest in Pakiri through a family trust. Mr Read was a director of Pakiri at certain material times, but is now bankrupt.

[7] Ablaze is the owner of warehouse management and other software which it markets through resellers. Mr Norrie is, and at all material times was, a director of Ablaze.

[8] In 2009 entities within the Pakiri Group were engaged in developing software for a customer. Mr Read approached Ablaze about using its software in conjunction with or as part of the product that the Pakiri Group was developing. There appears to have been a difference between the parties as to how that was to occur, but it now seems to be common ground that they entered into an agreement under which Ablaze gave Pakiri the right to resell licences for Ablaze's software (called the reseller agreement):

(a) Mr Norrie says that one of the Pakiri Group, ESP Software Ltd., entered into a reseller agreement with Ablaze (commencing on 15 October 2009) under which Ablaze gave ESP the right to re-sell licenses for its software, and that subsequently (in late November 2009) Pakiri was substituted for ESP in that agreement after ESP defaulted, to allow Pakiri to continue to resell Ablaze's software.

(b) Mr Read has said in June 2010 (in an affidavit sworn in support of an application by Pakiri to set aside a statutory demand issued by Ablaze) that although ESP and Ablaze discussed a reseller agreement, the terms were never agreed and they came to a separate arrangement in relation to the use of Ablaze's software, and that there was never an agreement between Pakiri and Ablaze. Ablaze accepted that there was a dispute on the point, and withdrew its demand.

(c) It may be inferred however, from Pakiri's argument in this case that Ablaze is a secured creditor of Pakiri by reason of terms in the reseller agreement, that Pakiri now accepts that it did enter into the reseller agreement.

[9] Mr Norrie says that Ablaze terminated the arrangement when Pakiri defaulted, in early 2010. He says that this was on about 1 February 2010, but in any

event the relationship ended on 16 February 2010 when Pakiri commenced a claim against Ablaze in the District Court, and Ablaze counterclaimed. Ablaze eventually was successful in defending Pakiri's claim and in prosecuting its counterclaim. It obtained judgment on its counterclaim on 4 July 2011 for $130,410.10.

[10] Ablaze and Pakiri then negotiated terms for settlement, under which Pakiri agreed to pay Ablaze $27,000 by 20 August 2011. The payment was made and the proceeding between them, and a related proceeding between Ablaze and ESP, were discontinued on or about 22 August 2011.

[11] The reseller agreement contained two clauses of particular relevance to the present application:

(a) Under clause 8.6(a) Pakiri gave Ablaze security over software and other materials provided by Ablaze under the agreement:

> (a) The Reseller grants Ablaze a security interest in the Software and materials supplied under this Agreement and any proceeds of the licensing and on-supply of the Software as security for costs for all the Reseller's obligations to Ablaze pursuant to this Agreement. Ablaze may register a financing statement on the PPSR to perform its security interest in the Software and materials, delivered or to be delivered to the Reseller, in accordance with the provisions of the PPSA.

(b) Clause 14.3 set out the consequences of termination, including that Ablaze obtained the rights to Pakiri's database and clients acquiring its software under the agreement, together with any goodwill in relation to them, and provided that certain obligations, including the provision of security and the entitlement to the customer database, continued to apply notwithstanding termination;

> 14.3 On termination of this agreement
>
> …
>
> (c) The reseller's obligations under clauses 8, 10, 11 and 13 will survive termination

…

(g) The Reseller's customers will become Ablaze's Customers and all licence fees received in advance by the Reseller from Customers will become payable without deduction by the Reseller to Ablaze and all future revenue from the Reseller's Customers will belong to Ablaze.

…

(j) Ablaze will not be liable for any payments relating to goodwill.

[12] On the evidence before the Court, it seems that Ablaze had security over the software and other materials provided under the agreement (including Ablaze's intellectual property) and the revenue from the sales of new software, but not for the judgment obtained in July 2011. Mr Norrie also says that he waived any security when Pakiri ceased to be a reseller, saying that he made this clear in an e-mail sent to the solicitors for the creditor on whose application Pakiri was liquidated (Adroit People Ltd) when asked to act as liquidator.[1]

The relationship between Mr Norrie and Ablaze

[13] Mr Norrie acknowledges that he was a director of Ablaze at all material times. He says, however, that he was a non-executive director only (he attended board meetings and undertook specific administrative tasks as requested), and never had any involvement in the day to day running of Ablaze. He was never employed by Ablaze. He also said that he became a shareholder in Ablaze in August 2012, but says that was at the same time he became a director of CAM Trust Management Ltd, a corporate trustee company representing two family trusts that were the ultimate equal shareholders of Ablaze.

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[1] Mr Norrie states in that e-mail that security lapsed when Pakiri ceased to be a reseller in August 2010. I suspect that that date is an error, and that Mr Norrie was thinking about the date of the final settlement of issues under the reseller agreement, which was in August 2011.

[14] Mr Norrie also acknowledges that his firm (Norrie and Daughters) is Ablaze's tax agent.

The claim leading to liquidation

[15] As previously mentioned, Pakiri was put into liquidation by the Court on the application of Adroit. Adroit obtained a judgment against Pakiri in November 2012 for $75,682.60. It filed its application for liquidation on 14 December 2012, after Pakiri failed to comply with a statutory demand for payment of the judgment sum. The application was listed for hearing on 15 February 2013.

[16] On 31 January 2013, Pakiri's directors effected a restructuring of companies in the Pakiri Group, under which assets (primarily intellectual property), were transferred from Pakiri to Time 3 Global Ltd, and shareholdings in Pakiri were transferred to the Read Family Trust, with other former shareholders in Pakiri being given shares in Time 3 Global Ltd or another related company (One Global Ltd).

[17] In early February 2013, Adroit's solicitors asked Mr Norrie if he would act as liquidator. Mr Norrie wrote to the solicitors setting out his association with Ablaze and the prior relationship between Ablaze and Pakiri. He expressed the view that there was no continuing business relationship between the parties saying that all dealings had ceased with the determination of the reseller agreement, and Ablaze was not contending that it had any ongoing security interest under the agreement.[2] By that time, of course, the litigation between Pakiri and Ablaze had been discontinued and payment due under settlement of that litigation had been made.

[18] Pakiri did not oppose Adroit's application for liquidation. The Court made an order on 15 February 2013 putting Pakiri into liquidation and appointing Mr Norrie and his partner, Patricia van der Wende, as liquidators.

Steps in the liquidation

[19] The liquidators acted promptly following their appointment. They gave public notice of their appointment and of their decision not to hold a creditors'

[2] Refer n1

meeting unless requested to do so by a creditor. They called for creditors to file proofs of debt by 20 March 2013. They also issued notices to Pakiri's directors and key personnel, requiring them to produce Pakiri's records and provide information. They attempted to take possession of computers storing Pakiri's financial records and other documents, but were told by the directors that the computers did not belong to Pakiri, but to a subsidiary company, Pakiri Properties Ltd. They used their position as its shareholder to place that company into liquidation, but were still denied physical access to the computers. It appears that the Read Family Trust had taken possession of them, claiming to have security interest in them. No doubt as a consequence of their inability to obtain records directly, a short while later they issued similar notices to all known shareholders.

[20] The liquidators issued their first statutory report on 25 March 2013, which included a statement of affairs stating that six parties had submitted claims as secured creditors, and that Pakiri had no available assets and a substantial deficit. The report contained advice of the liquidator's decision to dispense with a meeting of creditors, and again gave notice of creditors' rights to request a meeting of creditors, by written notice to be provided within ten working days.

[21] Mr Norrie has said that no known creditors requested a meeting, but one of Pakiri's directors, Mr Igor Sutich has provided evidence that he submitted a proof of debt through his solicitors, on 9 April 2013, claiming substantial arrears of salary under an employment agreement dated 24 February 2012 (appointing him chief executive officer from 1 March 2012 at a gross salary of $250,000 per annum), together with director's fees and unpaid expenses.

[22] I infer that Mr Norrie said that no known creditor had requested a meeting because the liquidators responded to Mr Sutich's claim by requesting advice as to the execution of the employment agreement (the capacity in which Mr Newman had signed on behalf of Pakiri). In their second report[3] the liquidators acknowledged that claims had been filed by Pakiri's directors (totalling $277,635.53), and stated that the directors had been asked for further supporting documentation which had not been

[3] As at 15 August 2013.

forthcoming, and that the claims had not been determined as a consequence. Counsel for Mr Norrie says that the claims have recently been rejected.

[23] At the same time as submitting his claim in the liquidation, Mr Sutich requested that a creditors' meeting be convened for the purpose of:

> … a resolution to be passed that liquidators other than those appointed by the Court be appointed in place of those originally appointed liquidators and that under s 234(7) of the Companies Act 1993 that the current liquidators made application to the High Court for their replacement.

[24] In his evidence, Mr Newman has produced a copy of a proof of debt that he says he intends to submit in the liquidation, but held back pending notification of a date for a creditors' meeting. He has produced an e-mail from his solicitor sent to the liquidators on 30 April 2013 noting that he had not had confirmation of the creditors' meeting requested and asking them to advise a date. This evidence was given in an affidavit in reply. Mr Norrie has not had an opportunity to respond to it.

[25] Mr Newman's intended claim is also for both director's fees and for wages (allegedly due to him as chief operating officer of Pakiri from October 2010 to March 2013). In support of the latter claim he has produced an unsigned employment agreement carrying a typewritten date of 1 October 2010 (Mr Newman was not appointed a director until 1 March 2012).

[26] The liquidators say that they have not been supplied with Pakiri's records and financial information. They have obtained some information in response to their notice to shareholders, but have otherwise had to reconstruct the history of the company's affairs from its bank statements. In particular, they say that Mr Newman and other directors have not provided records that the company is required to keep or other financial information they would expect it to hold and that they have requested. Accordingly, on 21 May 2013, they applied to this Court for orders requiring Mr Newman and the other directors (including Mr Read as a former director but now residing overseas) to produce documents and attend the Court to be examined as to Pakiri's affairs. Orders were made against all respondents other than Mr Read (who protested the Court's jurisdiction) on 24 September 2013.

[27] Mr Norrie says that in addition to taking the above steps to obtain the records of Pakiri, and financial information about its affairs, the liquidators have taken the following steps:

(a) They have identified and issued notices to set aside several voidable transactions (one of which was the payment made to Ablaze in August 2011). They have recovered payments in respect of three of those claims, and have commenced proceedings against current and former directors of Pakiri, as well as the chief financial officer, to recover payments made to them. These claims include one against Mr Newman for the sum of $21,250;

(b) They have set aside[4] the transfer of assets from Pakiri to Time 3 Global Ltd that occurred on or about 31 January 2013, and have filed an application[5] for Time 3 Global to pay to them the estimated value of those assets (which this Court has noted as apparently having "had vast earning potential to be measured in the tens of millions of dollars").[6] That application has yet to be heard;

(c) They obtained the order for the directors (and a former director) and the chief financial officer to produce books, records and documents to the Court and to attend and be examined as to Pakiri's financial affairs. That examination has been deferred pending the determination of this application;

(d) They have obtained various records and documents of Pakiri from its lawyers, staff and former shareholders, but have not yet obtained records required to be kept by Pakiri under ss 189 and 194 of the Companies Act 1993 (the Act).

[4] Companies Act 1993 s 294.
[5] Section 295.
[6] *Norrie v Sutich* [2013] NZHC 2495 at [5].

Ancillary matters

[28] Before returning to the essential disputes, as to whether Mr Norrie should be removed or confirmed as liquidator, or whether the Court should order him to convene a creditors' meeting, I will deal with some ancillary matters:

(a) The application names only Mr Norrie as respondent. It is not in dispute that he has been the primary conductor of the liquidation. His co-liquidator, Ms van der Wende, resigned for reasons of ill health on 18 November 2013. Mr Newman had sought the appointment of replacement liquidators, and to that extent Ms van der Wende would have been affected by the application, but for her resignation. To the extent that the present application could be said to be against her also, Mr Newman has sought leave to discontinue against her. Leave was granted at the commencement of the hearing with no issue as to costs;

(b) Mr Newman has brought his application to remove Mr Norrie under both ss 286(4) and 284(1). As a director of Pakiri, Mr Newman is entitled to bring his application under s 286(4), subject to establishing the requisite notice under s 286(2).[7] (I will return to this point). However, he requires leave of the Court to bring his application under s 284(1). I made an order at the commencement of the hearing, by consent, that the application for leave be heard together with the substantive application.

(c) Counsel for Mr Newman advised at the commencement of the hearing that Mr Sutich wished to be joined as an applicant. There is no formal application to that effect. Mr Norrie opposed the joinder, on the basis he had not had time to consider the matter. The point was reserved for consideration either in the course of submissions or at the conclusion of the hearing. (I will return to this);

[7] Companies Act s 286(1).

(d) Counsel for Mr Newman took issue with the inclusion in Mr Norrie's affidavit in support of his opposition, of an affidavit sworn by Mr Evan Read in Pakiri's application in 2010 to set aside the statutory demand issued by Ablaze. He contested the admissibility of that affidavit both on the basis that leave had not been given under r 7.32, and that the affidavit was not complete (the exhibits were missing). As counsel was unclear as to how Mr Norrie intended to rely upon the affidavit, he proposed that it be left to the Court to place such reliance upon it as seemed appropriate, after hearing the parties' submissions. I allowed it to remain in the evidence on that basis. It has limited relevance to the present proceeding, but I have taken it into account to the extent that it discloses an earlier issue, raised by Mr Read as a director of Pakiri, as to whether Pakiri was a party to the reseller agreement. As I have already recorded, that is not a point taken by Mr Newman on this application.

The opposing contentions and issues for determination in relation to removal of Mr Norrie

Arguments for Mr Newman

[29] Mr Newman seeks an order for removal of Mr Norrie on the grounds that he was, and is still, not qualified to be appointed, or to act, as liquidator without permission of the Court. He advances two grounds for the lack of qualification. The first is that Mr Norrie is a creditor of Pakiri,[8] and the second is that Mr Norrie or his firm had, and have, a continuing business relationship with Pakiri (as a secured creditor):[9]

(a) Mr Newman contends that Ablaze was a secured creditor of Pakiri within two years of the commencement of the liquidation, by reason of the rights to security given under the reseller agreement (which continued to apply after termination), and was a contingent creditor first in relation to its counterclaim and then in relation to the payment

8 Companies Act s 280(1)(b).
9 Section 280(1)(cb).

of $27,000 made under the settlement agreement, by reason of the potential for that payment to be set aside, and become a creditor when the payment was set aside in November 2013.

(b) It is not in dispute that Mr Norrie was a director of Ablaze, at material times. Mr Newman contends that Mr Norrie had effective control of Ablaze and accordingly comes within the wide definition of creditor in the Act[10].

(c) Ablaze is a secured creditor of Pakiri by virtue of the provisions of clause 8.6(a) of the reseller agreement, which applies after the termination.

(d) Mr Norrie's firm (Norrie & Daughters) had and still has a continuing business relationship with Ablaze (within the two years prior to liquidation), in that it was and remains a tax agent for Ablaze, and has provided services to Ablaze within that period, including services in connection with the litigation between Ablaze and Pakiri arising out of the reseller agreement.

[30] Mr Newman also says that Mr Norrie has a potential financial interest in Ablaze as he is a discretionary beneficiary of a trust that is one of the ultimate shareholders, and that this gives rise to a conflict of interest given that Ablaze received direct financial benefits upon termination of the reseller's agreement (acquisition of Pakiri's customers and good will in relation to the software covered by the reseller's agreement), at the expense of Pakiri and ultimately its creditors, the consideration for which needs to be investigated. He also contends that there is a further conflict in that Ablaze has an interest in software being developed by the Pakiri Group, to which the liquidator will have access.

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[10] Companies Act 1993, s 240(1), expanded by the definition of secured creditor in s 2, and relying on the extension to a liquidator of a creditor in *McCloy v Titan Foundation Ltd* HC Auckland CIV 12008-404-2243, 23 April 2008, and to receivers of a creditor in *Commissioner of Inland Revenue v Wire by Design Ltd* [2012] NZHC 857 and *Re D & F Contracting Ltd.* CIV 2008-404-5443, 18 September 2008.

[31] Counsel for Mr Newman submitted that as a consequence of Mr Norrie's relationship with Ablaze and his firm's ongoing relationship, Mr Norrie has a conflict of interest and lacks the requisite degree of independence needed to carry out duties as liquidator of Pakiri[11], particularly in relation to the investigation of possible recovery of money or property from Ablaze. He said that Mr Norrie ought to have referred to his relationship with Ablaze in his consent to act.

Mr Newman asks the Court to exercise its discretion under s 286(4) to remove Mr Norrie, and in the alternative to make the same order under its general supervisory jurisdiction under s 284(1). He accepts that in the latter event he requires leave of the Court to bring the application and asks that leave be granted on the grounds that he has shown a credible factual basis for removal, and the Court is likely to make the order.[12]

[32] In the event the Court considers that Mr Norrie was and remains qualified to accept appointment and act, or decides to exercise its discretion under s 286(4) to permit Mr Norrie to accept appointment and continue to act, Mr Newman asks the Court to make an order directing Mr Norrie to call a creditors meeting, on the ground that Mr Norrie is in breach of a duty to call a meeting (having been validly requested to do so by a creditor, Mr Sutich). He relies on evidence that Mr Norrie has recognised Mr Sutich's status as a creditor by serving a notice on him to set aside a voidable transaction.

Arguments for Mr Norrie

[33] Mr Norrie contends that he was qualified for appointment (and remains so) but says that the real issue is how the Court should exercise its discretion, either under s 286(4) or under the application for leave that is required if the application is to be determined under s 284(1). In that respect, Mr Newman contends that the most significant factors to be weighed in the exercise of the discretion are:

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[11] Actual and perceived independence: *Re Anthony Stevens Holdings Ltd (in liquidation)* HC Auckland CL 3/87, 5 April 1989 at p2; *Re Trafalgar Supply Company Ltd (in liquidation)* [1991] MCLR 293 at 296; *Jacobsen Creative Surfaces Ltd v Smith City Ltd* [1994] MCLR 28 at 30 – 32.

[12] Applying the test established in *Trinity Foundation (Services No1) Ltd v Downey* NZCLC 263,917 (HC)at [21].

(a) There is little funding available in the liquidation and he has been working to date mainly on a contingency basis.

(b) There is no evidence to indicate that any alternative liquidator will be funded to undertake investigations into the claims that he has identified, and which could potentially provide significant recovery for creditors, or that the alternative liquidator is prepared to work on a similar contingency basis.

(c) On proper examination there is no evidential basis for the asserted conflicts of interest, and therefore no need for concern about any actual or perceived lack of independence such as to warrant an order for removal.

(d) The investigation work that he has undertaken to date will be lost, to the detriment of creditors, if he is removed.

[34] Mr Norrie also challenges the suggestion that he has failed to comply with his duty to call a creditors meeting. He says that Mr Newman has not requested a meeting (contrary to his early evidence) and although Mr Sutich has done so, it was reasonable for him to defer calling a meeting pending a response from Mr Sutich as for information supporting his claim to be a creditor (to which Mr Sutich has not responded). He says that it is now too late to call a meeting.

Issues for determination

[35] The issues that the Court must decide in determining this application are:

(a) Whether Mr Norrie was qualified to be appointed or act as liquidator of Pakiri. This requires consideration of two sub-issues, namely whether Mr Norrie is to be considered a creditor of Pakiri (by reason of his directorship of and relationship with Ablaze), and secondly whether Mr Norrie, or his firm, within the two years commencing on 14 December 2010 (being the start of the specified period) had a

continuing business relationship with Ablaze, as a secured creditor of Pakiri. There cannot be any realistic contention that he had a continuing business relationship with Pakiri itself, its majority shareholder or any of its directors.

(b) If Mr Norrie was not qualified to be appointed, or to continue to act, for either of these reasons, should the Court permit his appointment, and continued role as liquidator, either under the discretion that the Court has under s 286(4) or pursuant to its supervisory jurisdiction under s 284(1). In the latter case the Court will need to be satisfied that Mr Newman has met the criteria for granting him leave to bring the application, but for all practical purposes this will involve weighing the same considerations as need to be considered under s 286(4);

(c) In the event that the Court accepts that Mr Norrie qualified (and continues to qualify) for appointment, or alternatively that he did not qualify but that his appointment should be confirmed in the circumstances of the case, the Court must consider whether he has failed to comply with an obligation to convene a meeting of creditors and, if so, whether it should exercise its discretion to order him to do so.

Was Mr Norrie qualified to accept appointment?

[36] Section 280 states:

> **280 Qualifications of liquidators**
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> Unless the Court orders otherwise, none of the following persons may be appointed or act as a liquidator of a company:
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> …
>
> (b) A creditor of the company in liquidation:
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> …

> (cb) A person who has, or whose firm has, within the two years immediately before the commencement of the liquidation, had a continuing business relationship (other than through the provision of banking or financial services) with the company, its majority shareholder, any of its directors, or any of its secured creditors, unless, within 20 working days before the appointment of the liquidator, the board of the company resolves that the company will, on the appointment of the liquidator, be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration:
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> …

[37] The first issue to decide is whether Mr Norrie (in his own right), was a creditor of Pakiri at time of his appointment, or has become a creditor since. I accept that Mr Norrie was and is not a creditor in his own right, but Mr Newman contends that Ablaze was a creditor at the time of Mr Norrie's appointment as liquidator on 15 February 2013 or has become one since, and that the definition of a creditor extends to Mr Norrie by reason of his effective control of Ablaze. This argument requires a consideration of Ablaze's status at the time of Mr Norrie's appointment, the effect of the recovery of the $27,000 sum in November 2013 (in the course of the liquidation), and whether the definition of creditor can be as wide as Mr Newman claims.

[38] "Creditor" is defined in s 240(1) as a person who, in a liquidation, would be entitled to claim in accordance with s 303 of the Act. Section 303(1) states:

> **303 Admissible claims**
>
> (1) … a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation.

[39] A debt or liability that is not legally enforceable against the company at the time of liquidation is not claimable in the liquidation.[13] On the evidence before the Court, Pakiri and Ablaze had settled their differences over the reseller agreement 18 months previously. As at 15 February 2013, it could not be said that Ablaze had a legally enforceable debt against Pakiri, whether actual or contingent. Any contingency arose at earliest when the liquidators gave notice to set aside the $27,000 payment.

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[13] John Walsh and Stephen Revell *Insolvency Law and* Practice (online ed. Brookers, Wellington) at CA303.03(1).

[40] Although it may be arguable that Ablaze became a contingent creditor of Pakiri when the liquidators gave notice to Ablaze on 30 October 2013 that the payment of $27,000 was a voidable transaction, I do not have to determine that point as I accept that Ablaze became a creditor (capable of proving in the liquidation), when it repaid the $27,000 on 18 November 2013.

[41] This means I must consider the argument that Mr Norrie himself became a creditor at that point, due to his alleged effective control of Ablaze. Counsel for Mr Newman invited the Court to interpret "creditor" widely, and drew an analogy with this Court's finding in other cases that the liquidator and receivers of a creditor fell within the definition of creditor in the Act.[14] The analogy may be appropriate where the evidence clearly shows effective control (as is the case with a liquidator or the receiver of a creditor).

[42] However, in this case, Mr Norrie is one of two directors and says that he was not an executive director, but simply attended board meetings and undertook administrative tasks as requested (presumably by the board). Further, although Mr Norrie had a shareholding as trustee, it is clear he was one of several trustees, and therefore could not make independent judgments on behalf of that shareholding block. In these circumstances I am not prepared to find that this was effective control of Ablaze.

[43] For the reasons just given, I find that Mr Norrie was not disqualified from appointment, and is not disqualified from continuing to act, under s 280(1)(b).

[44] The second ground on which Mr Newman contends that Mr Norrie was, or is, disqualified is that he or his firm had a continuing business relationship with Ablaze, within the two years immediately prior to the commencement of liquidation. This argument requires consideration of the nature of the relationship between Mr Norrie (or his firm) and Ablaze, and whether Ablaze was a secured creditor at that time:

[45] Counsel for Mr Norrie focused her submissions on the absence of any business relationship between Mr Norrie (or his firm) and Pakiri, its majority

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[14] Above n 10.

shareholder or its directors, and the termination of the relationship between Pakiri and Ablaze. However, s 280(1)(cb) also applies where there is a continuing business relationship between (the proposed) liquidator and a secured creditor.

[46] Although I am not satisfied that Mr Norrie had effective control of Ablaze (so as to make him a creditor) he clearly had an on-going business relationship with Ablaze as one of its directors, and had a hand in the resolution of the dispute between Ablaze and Pakiri. Moreover, his firm has an on-going business relationship with Ablaze as its tax agent. Mr Norrie will therefore be caught by s 280(1)(cb) if Ablaze is a secured creditor.

[47] Counsel for Mr Norrie submitted that Ablaze was not a secured creditor within the two year period prior to commencement of liquidation, referring to Mr Norrie's evidence that Ablaze's right to security lapsed on termination of the reseller agreement. in February 2010, or at latest, August 2010. There are two difficulties for Mr Norrie with this argument.

(a) The reseller agreement expressly provides that the entitlement to security survives termination: and

(b) The best case for Mr Norrie is that the settlement reached between Pakiri and Ablaze in August 2011 was a settlement of all rights and obligations between them. If so, Ablaze kept its rights to security until that point, which is within the two years before commencement of liquidation.

[48] On this basis, I find that Mr Norrie was disqualified from acting at the time of his appointment because of a continuing business relationship with a secured creditor (Ablaze) in the two years immediately prior to commencement of liquidation.

[49] I turn now to consider whether the Court should permit his appointment and continuing to act, notwithstanding that he is caught by the s 280(1)(cb).

How should the Court exercise its discretion?

[50] The Court has an unfettered discretion under s 286(4), although it must, of course, be exercised having regard to the purpose of s 280(1). Given that it is an unfettered discretion, the Court can take into account any relevant factors. Without wishing to limit those factors, I consider that the Court can take guidance from the approach it takes when deciding whether to appoint a replacement liquidator, under s 243(7). In *Jacobson Creative Surfaces Ltd v Smiths City Ltd*,[15] the Court noted that the discretion given under the predecessor to s 243(7) was unfettered, but identified several factors which it considered to be relevant when considering the exercise of that discretion:[16]

> In my view, the factors that are relevant for the Court's consideration in exercising its discretion are as follows:
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> 1. Independence. There must be on the part of the liquidator the ability to make informed and unbiased decisions in the interests of all groups.
>
> 2. The resources of the liquidator.
>
> 3. The wishes of the creditors and contributories. This may include the indications given at the hearing where there has been a change of heart since the creditors' meeting. It is not a matter that of necessity requires adherence to the strict arithmetical calculation.
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> 4. The competence and experience of the liquidator. This will be his ability to carry out the task required in an efficient manner, and in complex cases will include a consideration of his commercial expertise.
>
> 5. The requisite speed with which the liquidation can be carried out.
>
> 6. On occasions, the liquidator's familiarity with the company will be of relevance.

[51] I consider the same factors to be relevant to the exercise of the discretion under s 286(4).

[52] Before turning to the factors for consideration in this case, I need to set out the purpose of s 280(1). It has been considered in several cases where persons

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[15] *Jacobson Creative Surfaces Ltd v Smiths City Ltd* [1994] MCLR 28.
[16] At 32.

seeking appointment as liquidators have sought approval ahead of appointment.[17] In *Commissioner of Inland Revenue v Wire by Design Ltd*, the purpose was stated as follows:[18]

> 22. The purpose of the limitation in s 280(contribution) excluding persons having a continuing business relationship with the company to be liquidated is to ensure there is no risk to the objectives of independence and ability to carry out the work being compromised. But it is not only about the experience or the ability of the prospective appointees. It is also about whether or not the appearance of independence will be lacking in the appointment is made.

[53] There are therefore two main and competing factors for consideration in this case:

(a) Mr Norrie's actual or perceived lack of independence, given his relationship with Ablaze; and

(b) The interests of creditors in a full and impartial investigation into Pakiri's affairs, and whether that will be undertaken if Mr Norrie is removed.

Mr Norrie's actual or perceived independence

[54] Mr Newman contends that by reason of his relationship with Ablaze, Mr Norrie lacks the independence and impartiality required of a liquidator because the relationship gives rise to a real conflict of interest. He says that there is a need to investigate the reseller agreement, and particularly whether Ablaze gave proper consideration for Pakiri's customers, and any goodwill generated by Pakiri, upon termination of the agreement. Counsel for Mr Newman submitted that this conflict gave rise to an actual lack of independence and impartiality, but in any event to a perceived lack of independence, sufficient to remove him as liquidator.

[55] I accept that a perception of lack of independence may be sufficient, but it remains for the party seeking removal to show an evidential basis for lack of

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[17] See *McCloy v Titan Foundation Ltd* n9; *D F Contracting Ltd* n9; *Commissioner of Inland Revenue v Wire by Design Ltd* n9.

[18] At 22.

independence, whether actual or perceived. This issue turns on whether there is a factual basis for the assertion, and this in turn depends on whether Mr Newman has shown any need for an investigation of the relationship with Ablaze, and how the creditors view the matter.

[56] I am not persuaded that there is anything to investigate in relation to the terms of the reseller agreement, such as to give rise to a risk of actual lack of independence for Mr Norrie in carrying out the work as liquidator. First, the agreement was entered into before the two year period prior to commencement of liquidation, and therefore is not itself a transaction that can be challenged for undervalue. Secondly, there is no evidence to support the need for investigation. Thirdly, the value of the rights given to Ablaze on termination cannot have been significant given that the parties operated under that agreement for only a very brief time (October 2009 to February 2010), and Pakiri resold the software to only one customer. Mr Norrie's evidence on this last point has not been contradicted.

[57] Counsel for Mr Newman focused on a perceived lack of independence, particularly in relation to the prospect that Ablaze had on-going rights of security. I am not persuaded that the rights of security are significant (the issue seems to be more theoretical than actual even in terms of perceived lack of independence):

(a) The rights of security were only over Ablaze's software that Pakiri was given rights to sell, and any proceeds of sale of that software;

(b) As just mentioned, Pakiri only resold to one customer in the three to four months in which the reseller agreement operated (Mr Newman had given no evidence to the contrary);

(c) Mr Newman has contended that security covered a range of on-going obligations under the reseller agreement, but he has not given evidence as to what those obligations were, or how they can still affect Pakiri (and hence the conduct of the liquidation);

(d) Mr Norrie has given evidence to the contrary, that the reseller agreement was terminated (in August 2011), at the time of settlement of Pakiri's District Court proceeding; although the full terms of settlement are not before the Court I can infer that Pakiri had opportunity to raise any issue such as this in that proceeding; Mr Newman has given no evidence that this occurred, and there is nothing to contradict Mr Norrie's statement that there are no on-going security rights (having made that statement in this proceeding, it will not be open to him to take a different position at a later date, if he remains liquidator, without a renewed application for disqualification);

(e) Although there is still an issue over the sum paid by Pakiri to Ablaze to settle the counterclaim (I will come back to this), I did not understand counsel for Mr Newman to contend that there are any continuing rights of security in respect of that sum (nor can I see how that could be argued);

(f) There is no evidence of any concern by unrelated creditors about perceived lack of independence on the part of Mr Norrie; to the contrary, the major unrelated creditor (Adroit) is clearly aware of this proceeding and has actively supported it and sought retention of Mr Norrie.

[58] It is arguable that Mr Norrie should have mentioned his relationship with Ablaze in his consent to act. I accept that he did not do so because he took the view (mistakenly it would seem) that all security rights came to an end in August 2010, outside the two year period. I also take into account that he raised the relationship with the solicitor who asked him to act. In the circumstances I do not regard the omission of reference to Ablaze as a factor necessarily counting against an order permitting him to continue to act.

[59] Mr Newman has made a very general allegation that Ablaze has an interest in software developed by the Pakiri Group. He contends that this has particular

significance as Mr Norrie has a financial interest in Ablaze (he is a beneficiary of a trust that is one of the ultimate shareholders).

[60] There is no evidence to elevate this into a basis for a perceived lack of independence (let alone any actual lack of independence). Mr Newman has not identified this software (even in a general way), nor stated who owns it or how the liquidator would come to acquire knowledge of it. I accept that if Pakiri still owns some software (and the evidence all seems to point to any intellectual property rights having been transferred away from Pakiri), it will be an asset in the liquidation and then be a matter for sale. Mr Norrie would need to consider his position in the event that Ablaze had an interest in acquiring the software, but at this point his evidence is that Ablaze does not know of any such software nor have any interest in it. Again, it is significant that the major unrelated creditor is aware of the former relationship between Ablaze and Pakiri, yet has no concern about it. This is cogent evidence against a perceived lack of independence.

[61] I also regard his position as a discretionary beneficiary in one of the trust shareholders as too remote to give concern sufficient to remove Mr Norrie.

[62] Counsel for Mr Newman raised two other matters in support of his argument of a lack of independence on the part of Mr Norrie: first, his steps to recover the payment of $27,000 only after this application was brought, and without seeking interest, and secondly, his failure to meet costs orders made against him as liquidator (an order was made against Mr Norrie in respondent of a statutory demand issued against Time 3 Global Ltd, on the grounds of exceptional circumstances).

[63] Both of these matters arise out of judgment calls made by Mr Norrie, as liquidator. Although there is reason to question those judgment calls, I do not see these matters as necessarily determinative of the question of perceived lack of independence:

(a) Mr Norrie has given evidence that he did not commence any voidable transaction claims against any creditor for transactions outside the restricted period, before this application was made (in other words, he

treated Ablaze in the same way as other creditors in the same position). He says that he took statements made in Mr Newman's affidavit as admissions on which he could infer that Pakiri was insolvent, and on that basis he considered that there was an appropriate claim against Ablaze, which he pursued. I accept that he would have been conscious of an unmet claim as a factor counting against his independence, and that that may have been a factor in seeking recovery when he did, but his willingness to take that step nevertheless bespeaks a willingness to act against the interests of Ablaze and in favour of impartiality. I accept that he was able to claim interest on that payment from the date of liquidation until the date of payment,[19] but I regard that as more likely to be a matter of oversight than conscious favouring of Ablaze.

(b) Mr Norrie has defended the criticism of his non-payment of costs on the grounds that there is an issue as to whether the costs orders are made against him personally, or are costs to be paid in due course out of recoveries in the liquidation. There may be merit in this point in respect of the costs ordered in relation to his decision not to challenge Mr Read's protest to jurisdiction on Mr Norrie's application for production and examination (the Court accepted there had been no impropriety by Mr Norrie in making the application).[20] However, I regard it as an argument of convenience rather than one with a strong factual basis in relation to the order to pay costs of $5,671.50, plus disbursements, on the statutory demand he issued (as liquidator) against Time 3 Global Ltd. The Court found that he had no legally valid ground to issue that demand and did not allow a claim to be allowed to set off the costs against any sums that might become payable to him on separate proceedings (I infer that he was meaning his intended claim against Time 3 Global to set aside the transfer of assets). Mr Norrie has not appealed that decision, nor applied for a stay. He may be able to seek indemnity from the assets of the

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19 *Westpac Banking Corporation v Nangeela Properties Ltd* [1986] 2 NZLR 1.

20 *Sutich v Norrie (Costs)* [2013] NZHC 2823 at [5]-[6].

company, but that does not absolve him of responsibility to meet the costs in the first instance.

[64] Notwithstanding that I have found that there is some basis for the matters advanced by Mr Newman, I am not persuaded that they amount to grounds for a finding of actual or perceived lack of independence. I take into account that Mr Norrie has acknowledged his position on these matters frankly, and says that he will willingly abide the decision of the Court. Apart from the failure to claim interest from the sum recovered from Ablaze (which I regard as a matter of oversight) I regard these matters as indicative of a determination to pursue recovery for the benefit of all creditors, rather than evidence of a lack of independence or impartiality by reason of his connection with Ablaze. Should he fail to pursue what appears to be a valid claim for interest against Ablaze, or to pay costs properly due (now that these matters have been canvassed), I would regard that as a ground for considering removal on the basis of lack of independence or impartiality, or a lack of objectivity and integrity in his role as liquidator, but I give these matters no great weight at this time in the light of Mr Norrie's indication that he will abide the decision of the Court on these matters.

[65] This takes me to the second major factor in relation to discretion, namely the interest of creditors in an impartial investigation into Pakiri's affairs. The Court of Appeal has recently made it clear that the Court will not lightly deny creditors the opportunity for investigation where there a limited ability to fund out of the assets of liquidation, and a liquidator is prepared to self-fund required investigation:[21]

> [48] The creditors of a failed company are ordinarily entitled to have its affairs thoroughly investigated to learn whether it has any assets, or the liquidator any rights of recourse, that might repay them. Where a creditor, or in this case the liquidator, is prepared to fund such investigation, the Court will not lightly deny them the opportunity that it represents.

[66] Counsel for Mr Newman sought to distinguish this decision on the basis that the Court in *Grant* did not have to address an issue over independence. I accept that independence was not an issue in that case but do not see that that detracts from the

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[21] *Grant & Anor v CP Asset Management Ltd* [2013] NZCA 452 at [48]. The Supreme Court dismissed an application for leave to appeal on 25 February 2014: *CP Asset Management v Grant* [2014] NZSC 11.

finding of the Court as a factor to take into account in the exercise of this Court's discretion.

[67] Mr Norrie has commenced, but not yet pursued, several potential voidable transaction claims against Pakiri's directors or former officers. If they were to succeed, there is a distinct possibility of recovery for unsecured creditors. However, those claims appear to be modest compared to a potential claim for recovery of intellectual property transferred out of Pakiri to Time 3 Global Ltd, shortly before Pakiri's liquidation. On the limited evidence before the Court there is reason to believe that there could be substantial value to these assets, at least to meet all claims by unsecured creditors (including claims by Mr Newman and Mr Sutich).

[68] Mr Norrie, supported by Adroit, has expressed concern that these claims will not be investigated or pursued if he is removed because of the lack of funds in the liquidation (Pakiri has no assets of any significance and Adroit says it is not in a position to provide the funding). The position of the other unrelated unsecured creditors is not known, but I suspect that it is unlikely that they would wish to make significant funding available, given the relatively small value of their debts. Mr Norrie says that he and his firm will fund the liquidation, and points to the lack of evidence from Mr Newman as to how any alternative liquidator will be funded, or that the liquidators he proposes are prepared to act on a similar contingency basis. I infer that Mr Norrie's commitment in this respect applies up to the point that proper investigation is completed and a proper decision can be made as to whether to pursue the various claims.

[69] Mr Newman, through counsel, produced a consent to act by reputable and experienced liquidators. However, he has produced no evidence as to the basis on which they have provided that consent, particularly as to whether they would be prepared to pursue investigations, and ultimately any claims, on a contingency basis, in the (likely) event that there will be no funds in the liquidation until recoveries are achieved. Mr Newman has known that this is one of the key issues since Mr Norrie filed his opposition to this application. Notwithstanding that, he has produced the

consent from the alternative liquidators at the very last moment without any evidence on the point.[22]

[70] On the basis of the evidence before the Court, I find that there is a likelihood that the proper investigation to which the creditors are entitled may not be pursued if Mr Norrie is removed. One of the factors that has contributed to this view, is that I consider it most unlikely that any parties related to Pakiri will fund the liquidation. In coming to that view I have taken into account the evidence that the directors have failed to keep the records required of it by law,[23] or if those records have been kept to produce them to the liquidator, the apparent lack of co-operation by the directors in producing documents and information relating to Pakiri's affairs (a view reached by this Court when ordering production of records, and for parties to present themselves for examination), and the absence of any explanation by Mr Newman or any other of his witnesses, of the transaction between Pakiri and Time 3 Global Ltd just before liquidation.

[71] I should also mention a further criticism of Mr Norrie in relation to the point about disclosure of Pakiri's records and financial information, namely that he "hacked" into computers under the control of Pakiri's directors and at that point stored at the premises used by Pakiri Group companies. As soon as Mr Norrie and Ms van der Wende were appointed, they sought to uplift records and information stored electronically. They ascertained that Pakiri was operated out of premises to which they were not given access. They met with Pakiri's directors on 18 February 2013 at those premises, and requested the computers that Pakiri had been using. They were told that they belonged to Pakiri Properties Ltd (one of Pakiri's subsidiaries). The liquidators immediately took steps to put Pakiri Properties into liquidation and, in light of the difficulties getting access to the premises from which Pakiri had operated, Mr Norrie then arranged for a suitably qualified person to attempt to obtain access remotely. I note that Mr Newman has changed his ground on this point subsequently, and has produced a document emanating from Mr Read, in which Mr Read claims that the Read family trust has security over the computers

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[22] I note that counsel for Mr Norrie also handed the Court at the hearing a consent by other alternative liquidators, without any evidence as to their willingness to act on a contingency basis.

[23] Companies Act 1993, s [189].

and (I infer) has uplifted them. He has not produced a loan agreement or security document to support this contention. In these circumstances, I see nothing in the contention that Mr Norrie has acted improperly in attempting to obtain remote access. What is significant is that the information on the computers has not been made available even though on Mr Newman's case, the information is in the hands of Pakiri's majority shareholder.

[72] The last matter which I will address briefly, is Mr Newman's contention that he wishes to have a liquidator in place who is bound by the ethical requirements of the Institute of Chartered Accountants. Although many liquidators are members of the Institute, and will be bound by those requirements, such membership is not a statutory requirement for appointment. There is no evidence before me on the point, but it is my understanding that there are many professional liquidators who are not members of the Institute. It is not a factor for disqualification and any allegation of disqualifying conduct must be advanced on a proper factual basis. I accept Mr Norrie's evidence that he has considerable experience as a liquidator, and is currently conducting 17 liquidations (I infer that he would not have received these appointments if he did not have the requisite skills and experience). I have found there is no basis for removing Mr Norrie on this ground. I also note that this is not a concern of the any of the unrelated creditors.

[73] Weighing the various factors, I consider that any perception of lack of independence cannot be supported on an objective assessment, but even if I am wrong in that, it is so slight that it is outweighed by what I regard as a significant risk that claims will not be sufficiently investigated because of the lack of funds in the liquidation. In this latter respect I make no adverse comment on the liquidators proposed by Mr Newman and who have provided a consent to act. I have come to this view on the absence of evidence as to the basis on which they are prepared to act.

[74] I have determined this aspect of the application under the Court's discretion under s 286(4) of the Act. As the application was also brought under s 284(1) I will address briefly the issue of leave under that section. For the reasons I have given I am not persuaded that there is a sufficiently credible factual basis for the orders

being sought, but in any event, I am not prepared to grant leave as I do not consider it likely that the Court would make an order for Mr Norrie's removal if leave was granted.

[75] Mr Norrie also argued that the application should be dismissed because it was brought, incorrectly, as an originating application rather than an interlocutory application in the liquidation.[24]

[76] Although I do not now need to determine this point, but comment that in the event that I felt that there were proper reasons for removal, I would not dismiss the present application purely on this procedural point. The Court has control over its procedure, and the jurisdiction to treat this application as an interlocutory matter (heard in court for chambers) if the justice of the case required it.

The alternative application – for an order to call a creditors' meeting

[77] Mr Newman has applied for an order directing Mr Norrie to call a meeting of creditors. He accepts that Mr Norrie made a decision, as liquidator, not to call a meeting, but says that a creditor (Mr Sutich) has requested a meeting, and Mr Norrie has an obligation to act on that request, which he has not complied with.

[78] The Court again has a discretion (under s 286(4)) either to order removal or to order compliance, or to make no order at all.

[79] Mr Norrie says that no order should be made both because Mr Newman has not given a required notice (and the Court has no jurisdiction), but also because that is the appropriate way to exercise the Court's discretion in the present case. The first ground requires a determination as to whether appropriate notice has been given. The second ground involves consideration of relevant factors, both those already considered and any further material to the point.

[80] The Court has jurisdiction to make an order against a liquidator on the grounds of non-compliance with a statutory obligation only if the liquidator has been

[24] *Mulholland v Levin* HC Auckland CIV-2012-404-3089, 20 July 2012 at [39]-[40].

given notice of the non-compliance and has failed to comply with it.[25] Before considering the issue as to whether notice was given, I need to address Mr Newman's standing and the application to join Mr Sutich. The question over Mr Newman's standing to bring this application arises from the fact that he has neither requested a meeting, nor given the requisite notice. Counsel for Mr Newman argues that Mr Newman can rely on notice given by Mr Sutich, but in the alternative, Mr Sutich has applied to be joined as an applicant.

[81] I do not construe s 286(3) as requiring that the party seeking the order must be the party to have given the statutory notice of non-compliance. It is sufficient that a notice has been given by a party with a relevant interest (such as a creditor). There could be good reason for that party not bringing the application. The important element is that the liquidator is given notice of non-compliance by a party with an interest in the matter, and that the party applying is affected by the non-compliance.

[82] Counsel did not refer me to any authority on this point, so I will now address the application by Mr Sutich to be added as an applicant, in the event that I am wrong in the conclusion I have just reached. Counsel for Mr Norrie opposed the application to add Mr Sutich. She said that Mr Norrie had had no opportunity to consider or address the point (the application was only made orally at the hearing, and based on a late filed affidavit by Mr Sutich). There is merit in that objection. It is an important point. I consider that Mr Norrie could be prejudiced by the lack of definition in the form of a formal application, and by the late reply evidence proffered in support of the application. I decline the application to join Mr Sutich.

[83] This takes me back to my finding on the first point that Mr Newman can rely on the request made by Mr Sutich (both have potential interest as creditors). There are significant issues over their status although I note that they have not answered Mr Norrie's requests for further supporting information and conversely that Mr Norrie has treated them as creditors by issuing notices to them to set aside transactions. However, but I accept the submission of counsel for Mr Newman that

[25] *Official Assignee v Norris* [2012] NZHC 961, [2012] NZCCLR 10 at [38]-[44], [49].

the correct approach for the liquidator is to accept them provisionally, subject to established procedure for challenge.[26]

[84] Counsel for Mr Norrie informed me from the bar that Mr Norrie has rejected the proofs of debt since filing his affidavit in opposition (a copy of the liquidator's second report mentions that the proofs have been received but were still being considered). Counsel for Mr Newman did not question that Mr Norrie has now made this decision but challenges its lateness, as well as its materiality for the present application.

[85] Mr Newman contends that the statutory requirement under s 286(3) is satisfied by an e-mail that his solicitor sent to the liquidators on 30 April 2013, the last paragraph of which reads:

> We have not had confirmation from you of the calling of the creditors meeting requested. Please advise the date of the creditors meeting.

[86] The purpose of s 286(3) is to ensure that the liquidator knows what is alleged as the failure to comply, so as to give the liquidator a clear choice whether to comply or face the consequences of non-compliance (which could include an order for removal, as well as the order now sought).

[87] Counsel for Mr Newman argued that the e-mail was sufficiently clear. I am not persuaded that it is. Both the allegation, and the consequence, of non-compliance is a serious matter for a professional liquidator. The liquidator will face many allegations by parties pursuing interests in the liquidation, some of which will have substance and some not, and some of which will be pursued and some not. It is important that any notice makes clear to the liquidator that the issue is one of substance, and that it is regarded as a matter of non-compliance, so that the liquidator can be in no doubt that consequences are likely to follow if steps are not taken.

[88] I consider that something more is required to satisfy the requirements for notice than merely tack a repeated request onto the foot of an e-mail. As there can be

[26] Companies Act 1993, Liquidation Regulations 1994, regs 19 and 20.

no question that the absence of a notice goes to jurisdiction,[27] I rule that I do not have jurisdiction on this application to order Mr Norrie to hold his creditors' meeting.

[89] Notwithstanding the finding just made, for the sake of completeness I will also consider whether an order should be made in the Court's discretion. I consider that the factors that I have addressed in relation to the application to remove Mr Norrie are also relevant to the discretion whether to order a meeting, and tend to favour a decision not to do so. However, there is a further factor to which I also give weight, namely that the intended purpose of the creditors' meeting is to allow the creditors to determine whether Mr Norrie's appointment should be confirmed, or a replacement liquidator appointed. I am not persuaded that that is an appropriate basis on which the Court should exercise its discretion to order a meeting:

(a) I have already determined the Court will exercise its discretion in relation to Mr Norrie's appointment; there is no need to put that issue back before the creditors, at least in the absence of any new grounds arising;

(b) If the issue goes back to the creditors, it seems inevitable it will lead to yet further proceedings either in relation to Mr Newman's and Mr Sutich's ability to vote at the meeting, and (in the event that Mr Norrie accepts that there is a dispute over their entitlement and that they ought to be able to vote pending resolution of that dispute), further proceedings, either in relation to Mr Newman's and Mr Sutich's entitlement to vote or in the form of an application under s 245A to rule out their votes on the basis that they are related parties. If ultimately accepted, their votes would swamp the other creditors in terms of value, notwithstanding that there are significant issues over the credibility of the claims given their late emergence, the lack of a signed agreement in the case of Mr Newman, the fact that the Inland Revenue Department has no record of Pakiri as an employer, and the stipulation in the agreement that payment was to be monthly, yet

[27] *Official Assignee v Norris* above n 25 at [49].

claims are made for at least a year's salary, but with no evidence as to how they have accumulated to this extent, no reference to any agreement as to deferral of payment, nor any other reason given for non-payment.)

(c) It is unrealistic to expect Mr Norrie to continue to pursue his investigations, so as to be able to put himself in a position to report to unsecured creditors, until such issues have been determined.

General conclusion – both aspects of the application

[90] It is apparent that there is a significant issue between creditors (divided into those that are related and those that are unrelated to Pakiri), in relation to the need for further investigation, particularly in relation to of the transfer of assets to Time 3 Global. There may be a reasonable explanation and legal justification for that transfer, but if that is so it appears to have been within the power of the related creditors (as directors of Pakiri) to put that explanation before Mr Norrie and the Court. Instead of that, the evidence before the Court points to these creditors preferring to thwart such investigation (which, if their claims are legitimate, would have to be for their benefit also).

[91] Mr Norrie has shown a willingness to carry out his obligations as liquidator assiduously, and, for the moment at least, at his own cost. No doubt that is because he believes that ultimately there will be recovery in the liquidation. If this proves to be the case, there is the prospect of some, if not a total, recovery for unsecured creditors. Mr Newman has put forward nothing to rebut the presumption in favour of investigation, and this Court has accepted that grounds for investigation exist by making orders for production and examination.[28] The need for this investigation is the determining factor in this application, as much for the application for an order to hold a meeting as for the order for Mr Norrie's removal.

[92] Counsel for Mr Newman referred to the decision of this Court in *Katavich*, as support for a reply submission that the Official Assignee should be considered as the

[28] *Norrie v Sutich*, n.6

appropriate liquidator.[29] There would have been some merit to this suggestion had I not found that there is an insufficient factual basis for the claim for a perceived lack of independence. Given that that aspect of the application really comes down to concern over Mr Norrie's failure to claim interest against Ablaze, and his resistance to payment of the costs ordered against him (which go to a general discretion rather than lack of independence), I see greater value for unsecured creditors in retaining the knowledge that Mr Norrie has built up in the liquidation to date than in appointing the Official Assignee, particularly as any lingering perception of lack of independence on Mr Norrie's part, appears not to be held by the unrelated creditors.

Decision

[93] For the reasons I have given I consider that the Court's discretion is appropriately exercised by making an order that Mr Norrie be permitted to continue to act as liquidator of Pakiri, and that he not be required to convene a meeting of creditors, at least before he has completed his recovery of Pakiri's statutory records and documents and had the opportunity to examine its directors and officers (pursuant to the orders already made by this Court), and been put in a position to report to creditors on the potential claims he has identified (or indeed any further claims that may emerge from this process).

[94] I make the following orders accordingly:

(a) Mr Newman's application to remove Mr Norrie is dismissed, but with leave reserved to Mr Newman to bring the matter back before the Court in the event that Mr Norrie does not pursue a claim against Ablaze for interest on the recovered payment of $27,000, nor pay the costs ordered by this Court against him (as liquidator), without derogation from any right to indemnity from the assets in the liquidation;

(b) Mr Norrie is permitted to continue to act as liquidator of Pakiri;

[29] *Katavich v Meltzer* [2011] NZCCLR 8 at [45].

(c) Mr Newman's alternative application for an order that Mr Norrie call a creditors' meeting is dismissed;

(d) Mr Sutich's application to be added as an applicant is dismissed;

(e) The Registrar is to schedule a date and time for the examination ordered by this Court on 24 September 2013;

(f) As the successful party, Mr Norrie is entitled to costs.

Costs

[95] As Counsel for Mr Newman sought costs on a scale 2B basis if Mr Newman succeeded. I regard that as the appropriate measure for Mr Norrie, and order accordingly.

Associate Judge Abbott