IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-003395
[2015] NZHC 1097

IN THE MATTER OF	The Companies Act 1993
AND	
IN THE MATTER OF	An application under s 295 and s 298
BETWEEN	MARK HECTOR NORRIE as liquidator of PAKIRI INVESTMENTS LIMITED (IN LIQUIDATION)` Applicant
AND	TIME3 GLOBAL LIMITED Respondent

Hearing: 18 February and 8 May 2015

Appearances: M H Norrie in person the Applicant
R B Hucker for the Respondent

Judgment: 21 May 2015

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
21.05.15 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

The proceeding

[1] The liquidator applies under ss 295 and 298 of the Companies Act 1993 (the Act) for orders to be made concerning, he says, the transfer of assets from Pakiri Investments Ltd (In liquidation) (Pakiri) to the respondent.

[2] The issue between the parties concerns the liquidator's actions to recover an asset he says was transferred from Pakiri to the respondent in the period between 14 December 2012 and 6 March 2013.

[3] Pakiri was placed into liquidation on 15 February 2013. If the liquidator is correct that a transfer did occur as he claims then that transfer took place within the restricted period of six months prior to the liquidation commencing with the appointment of the liquidator.

[4] In this case there is no real dispute about there being a 'transfer' or when it occurred. As will appear from this Court's assessment of issues and arguments, what is disputed is that there was a transfer of an asset belonging to Pakiri and, whether what was transferred had any value at all.

[5] For the respondent it is submitted the evidence discloses that any property in the asset belonged to the Read Family Trust (RFT) and comprised nothing more than marketing rights which had no value at all.

[6] The liquidator says that Pakiri was a research and development company that had been developing the respondent's suite of software technology (the intellectual property) which was recorded in Pakiri's balance sheet on 31 March 2010 as having a value of $17,596,625.

[7] Hence, issues have focussed upon identifying the "asset" the liquidator says was transferred, and whether Pakiri owned that asset, and whether it had any value.

[8] More than six casebooks of evidence, some containing very lengthy affidavits, have been provided in the main by the liquidator for this Court's consideration. The most recent affidavit of the liquidator was filed on the morning

of the first day of the hearing on 18 February 2015. That affidavit indicated a further affidavit of a patent attorney was to be filed. The liquidator said the patent attorney's evidence would prove the existence of an asset that was subject to patent rights i.e. that it existed and had value.

[9] In the circumstances the Court ruled that the hearing would proceed to consider submissions on all matters except for the question of who owned the intellectual property rights that are in issue in this case. Then the hearing would be adjourned until after all other evidence was filed.

The liquidator's notices

[10] This proceeding began with the liquidator arranging service of a s 292 Companies Act 1993 (CA) Notice on the respondent. It required the transfer to the liquidator of all assets including:

> …all physical and intellectual property, and other assets associated with what the Company referred to in various communications as the 'TIME3' Project and/or 'TIME3' products, the 'EDWARDS' project, the 'ONE Bank' products, the 'FREEDOM' suite of products, plus 'ONE BANK', 'TAB^3', 'MUSIC^3', 'LEGAL^3', 'INSURANCE^3, 'ALBERT^3', 'STOX^3, 'GASP^3, 'XML^3', and 'TRAVEL^3' and other cubed branded applications, ONE Design/One EXPERIENCE that were transferred from the Company to the Respondent from 18 June 2012 onwards under a "Restructure Arrangement" outlined in a number of communications from the directors of the Company and Mr Evan Read for the Read Family Trust to shareholders in the Company and the Respondent…

[11] The notice referred to a letter dated 14 December 2012 from Mr Read of the RFT to Pakiri's shareholders informing them that Pakiri would transfer all intellectual property and ownership of the One Global Limited Group and subsidiary companies to the respondent; and that by an email dated 15 December Mr Read advised shareholders that all of Pakiri's assets were being transferred to a new entity and that shareholders would maintain the same shareholding percentage that they held in Pakiri.

[12] The notice advised that the value sought by the liquidator to recover in that property was "calculated by the liquidator from available company records of $120,000,000 USD".

[13] The notice warned the respondent that it had 20 days to file a notice of objection otherwise the transfer of the described property by Pakiri to it would be set aside.

[14] No notice of objection was filed. In the result the transaction was automatically set aside (s 294(3) CA). The liquidator's present application is made under s 295 CA. In the alternative the liquidator seeks an order under s 298.

[15] Section 295 provides, inter alia that the Court may order the transfer of property back to Pakiri that was transferred by Pakiri to the respondent or the Court may order a payment to Pakiri of an amount which fairly represents some or all of the benefits the respondent received.

[16] Section 298 enables the Court to make orders for a compensatory payment if property of Pakiri was transferred to its related company, the respondent, at undervalue.

[17] The liquidator has the onus of establishing that there was a transaction as is defined in s 292 of the Act i.e. a conveyance or transfer. This onus remains independently of whether a transaction has been set aside.

[18] The property to which a s 295 application relates must be that property identified in the notice to set aside the transaction.

[19] It is the liquidator's case that there has been a transfer and/or conveyance of property belonging to Pakiri.

[20] To prove there was a transfer the liquidator is required to establish:

(a) The property said to have been conveyed was owned by Pakiri.

(b) The precise nature of the property said to have been conveyed.

(c) The property was an asset of Pakiri and had value.

(d) The actual fact of the conveyance.

[21] In short the liquidator must establish that the transfer/conveyance was of an asset belonging to Pakiri at the time of the alleged transaction. If the liquidator cannot discharge that onus then no consideration needs to be given to the discretionary factors under s 295 as to how to formulate a remedy in order to maintain the pari passu status between creditors. The application for relief should then be dismissed. If it is established there is a transaction then attention is needed to fashion a remedy to eliminate the benefit conferred.

[22] To establish a claim under s 298 the liquidator must prove:

(a) There has been an acquisition of property by the respondent.

(b) That the value of the property received by the respondent exceeds that which was paid to Pakiri.

(c) That the respondent and Pakiri are related companies.

[23] In this case the liquidator must prove property of Pakiri was transferred at under value. The liquidator must prove there was a transaction. In the Court's view this can be done even though the timing of it is unclear. In this case little information has been provided by Pakiri, its officers or Mr Read by way of business and management records notwithstanding the directors were subject to a Court direction to produce those. Equally it is clear that a lot of the information obtained by the liquidator was provided to him anonymously by (as the liquidator describes it) disaffected shareholders.

The respondent's case

[24] It is, inter alia:

(a) That for there to have been a voidable transaction the asset in that needs to be sufficiently identified. It says that the liquidator's generic descriptions of the property concerned, are insufficient.

(b) There is no proof of ownership by Pakiri of proprietary rights, or that there was a conveyance of those to the respondent.

(c) Pakiri's evidence is that the asset contained products created by Mr Read and the RFT and that Pakiri was a Licensee of the marketing rights of those and that Pakiri utilised the copyright with the consent of the RFT.

(d) That the respondent, like Pakiri before it, was granted licence rights.

(e) The uncontested evidence of the previous director of Pakiri, Mr Judson and current director, Mr Sutich is that the concept of the respondent products was created by Mr Read and/or the RFT. Therefore it is submitted the only basis on which rights under the Copyright Act could have been transferred to Pakiri was by way of assignment because Mr Read himself was the creator of any concept to which copyright could attach.

[25] It is further submitted that the liquidator has failed to distinguish between concepts of copyright and design and the role of Pakiri as being a Licensee of marketing rights for a set up company looking to bring a concept to the market in a commercially developed manner. Mr Judson deposed that all of the funding for the marketing and development of the software came from the RFT; that the rights of Pakiri were to commercialise the technology that was being developed by the RFT; and that as an exclusive Licensee Pakiri was entitled to utilise the copyright (to the extent it existed) with the consent of the creator effectively as owner.

[26] Mr Hucker submits that under s 14 of the Copyright Act 1994 any interests in the works as a result of the marketing rights allowed an assertion of ownership by Pakiri but such an ability was subject to the terms on which the licence was granted. Those terms were in this case, he said, included in the loan agreement signed on 2 May 2012.

[27] By that agreement the RFT agreed to lend to Pakiri NZ$100M "being the agreed amount of the value of the intellectual property assigned by RFT to the company…".

[28] Clause 4 of the agreement noted:

> The business of the company is that of a research and development company in which the company conceptualizes, designs and develops unique Intellectual Property for eventual sale to a single entity.
>
> The purpose for which the company will use the loan is to fund the operations of the company to complete such business…

[29] The loan agreement also required Pakiri to provide accounting, financial and operating information on a regular basis.

[30] Under the heading Security for Loan the loan agreement provided:

> Security will be by way of a debenture over all assets of the company, whether tangible or intangible, including, but not limited to:
>
> 1. All intellectual property relating to:
>
> (a) The CAN3 Wireless technology; and
>
> (b) The TIME3 software technologies; and
>
> (c) Brands, design marks, copyrights, patents and any other form of proprietary information…

[31] Mr Hucker submits that although there is an attribution therein of ownership of intellectual property the clear evidence is that the RFT and/or Mr Read granted licence rights to promote the software and that as creator of the works to which the copyright related, the ability to licence use of the works vested with the RFT ultimately.

[32] Regarding the loan agreement and to the extent to which it is treated as recognising an absolute assignment of the intellectual property to Pakiri, Mr Hucker submits, incurred an obligation to the RFT to pay the consideration contained in the agreement for the software.

[33] Mr Hucker submits:

(a) That even if copyright in some form was absolutely assigned (which the respondent denies) the assignment of any copyright is sufficient to constitute an advance under the terms of the loan agreement; further, that the loan agreement anticipates further advances being made for the funds provided by the RFT as shareholder in Pakiri.

(b) That the security for loan provisions had the affect of creating a security interest in the present and after acquired property of Pakiri; and, that a security interest is capable of being taken over intangible property (s 16 Personal Property Securities Act 1999 (PPSA)).

[34] Section 17 of the PPSA provides that a security interest means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation.

[35] Section 41 of the PPSA provides that a security interest is perfected when the security interest has attached and either a financing statement has been registered in respect of that interest or the secured party has possession of the collateral.

[36] It is the respondent's case that:

(a) There has been attachment as value has been given and rights in the collateral have arisen and although there has not been any perfection of that attachment the RFT was entitled to exercise its rights under the terms of the loan agreement and s 109 of the PPSA to seize any property of Pakiri in any event.

(b) The liquidator has not shown that there has been an effective transfer of any property of Pakiri to the respondent; rather that the evidence confirms the secured creditor, RFT, has reclaimed any copyright in any work that was in the possession of Pakiri, in RFT's capacity as the original creator and/or in terms of the loan agreement which RFT says was in default.

(c) The liquidator has failed to establish the identity of any right, or that there was a legally enforceable interest in any such right retained by Pakiri and/or that there was a transfer of any property to the respondent from Pakiri.

[37] Mr Sutich (a director of Pakiri and the respondent) deposed that there was no transfer of an asset to the respondent.

[38] Mr Hucker submits the liquidator has not established by independent valuation or otherwise the value of what are said to be the benefits conveyed to the respondent. To the extent the liquidator purports to give valuation evidence Mr Hucker submits such is unreliable because any assessment of value is about the benefit lost to creditors of the liquidated company. The Court, under the Companies Act 1993 he says is concerned with concepts of market value.

[39] The liquidator appears to have used accounting standards which Mr Hucker says are in the circumstances of the case speculative. Mr Hucker submits the correct approach to assessing relief under s 295 is outlined by the Court in *Reynolds v HSE Holdings Limited*[1]. In that case the learned Judge said:

> [24] This case is different from *Trans Otway Ltd v Shephard* [2005] 3 NZLR 678. In this case, there was a simple transfer of assets, medical equipment, for an agreed value which reduced the indebtedness of Southern. A transfer of physical assets is not a payment. This is apparent from the decision of the Court of Appeal. At [27], it quoted a footnote from *Mann on the Legal Aspect of Money* (6th ed) 205 at para 7.04:
>
> > Thus, if the parties agree that the debtor shall hand over his car in discharge or a debt of £10,000, the car does not thereby become "money" nor does the act of delivery amount to "payment", for the parties have varied the original contract by discharging the monetary obligation *without* payment. …
>
> [25] The Court of Appeal made the same point at [37] – [38] in distinguishing the Trans Otway transaction from that in *Moller Johnson Motors (Hawera) Ltd v R D & S M Taplin Contracting Ltd (in liq)* HC New Plymouth M54/97, 13 March 1998. In that case, a creditor accepted a stockpile of logs in partial satisfaction of a debt. In *Trans Otway* the Court of Appeal clearly accepted that the transfer of a stockpile of logs was not a payment, and on that point distinguished that case from its own.

[1] CIV 2009-488-738, Bell AJ, Whangarei.

> [26] For the liquidator's argument to apply, there would need to be an agreement for Southern to sell the equipment to HSE for $16,624.33 and there would be a term of the agreement that payment of the price was to be by HSE acknowledging that Southern had paid $16,624.33 off the debt due to it. There is no evidence that there was such an agreement. The liquidator relied on a journal entry of Southern on 9 February 2009. It is headed "Memo:transfur of asserts to chsl and removal of franchise".(sic) The journal entry is consistent with a bare transfer of assets and is not evidence of the sort of agreement required for the liquidator's argument to succeed.
>
> [27] There was no payment to be set aside. What is set aside is the transfer of medical equipment to HSE, and the reduction of Southern's indebtedness by $16,624.33.

[40] Until therefore a proper assessment has been made it will be impossible to identify with any degree of specificity the property, rights and/or interests the liquidator maintains were transferred.

The liquidator's case

Pakiri's failure to provide information required

[41] It is that if there is any perceived deficiency of information regarding Pakiri's affairs that such deficiency was the responsibility of Pakiri's officers including Mr Sutich who was a director of both Pakiri and the respondent at the time of the transfer of assets from Pakiri to the respondent, and Mr Ravikulan who was a director of Pakiri and its chief financial officer at all relevant times. Those two together with Mr Newman, a previous director, the liquidator says, are the persons who had possession or control of Pakiri's books, records and documents at the time Pakiri went into liquidation.

[42] Section 261 Notices were served on those persons and subsequently the Court made orders for their examination and for all relevant records to be produced. The liquidator says that none of the records required to be kept by ss 189 and 194 of the Act were delivered.

[43] In the circumstances and as the Court of Appeal stated in *Levin v Rastkir*[2], it would not be appropriate to impose upon a liquidator in an unduly onerous standard of proof. In that case the Court held:

> Liquidators will frequently be faced with situations wherein solvent companies have not maintained proper accounting records to enable a clear trace of relevant transactions. However, there are means available to a liquidator to undertake further investigations, including the ability to interview those persons for the running of the company under oath and to require production of documents, under s 261 of the Act.

[44] As earlier noted the liquidator complains that no relevant records at all were provided by the directors pursuant to the Court's order for examination.

Mr Read's role

[45] Regarding Mr Read the liquidator notes he is an undischarged bankrupt who had removed himself from New Zealand without the permission of the Official Assignee. After five years Mr Read remains a bankrupt. He apparently lives in Moscow.

[46] It was Mr Read who was responsible for many communications to shareholders. The liquidator notes that the existence of the RFT has not been proved as no copy of a trust deed has been provided.

[47] The liquidator has obtained and the Court has sighted a number of statements from Mr Read sent to shareholders actively discouraging them from providing documents to the liquidator.

[48] When company officers were examined it was disclosed by them that Mr Read authorised any payments made to or by Pakiri.

Whether Pakiri owned the Intellectual Property

[49] It is the liquidator's position that Pakiri was the owner of the respondent's suite of products as set out in the notice to set aside voidable transactions. Support

[2] [2011] NZCA 2010 (at [10]).

for this statement he says is found in numerous documents. One of those is a deposition statement of Mr Read recording that:

> Pakiri is a technology start-up company and carries out research and development of a specific computer application software product, which is hoped will revolutionise the way in which the internet is accessed.

[50] Pakiri, the liquidator notes, raised money by selling shares to the public and in order to raise funds Pakiri produced two undated documents titled "company profile" and the "business investment memorandum".

[51] In the former it was stated "Pakiri… is a New Zealand registered company that has developed and owns the intellectual property and proprietary rights (IP) to the Total Information Management Environment (TIME3)". In the latter it was stated "the opportunity exists to invest in Pakiri…, being the exclusive IP owner in the respondent software; various other parcels of IP; and our interest in the respondent Incorporated".

[52] On 31 March 2010 Pakiri produced a balance sheet showing the value of the suite of software technology in its current assets at $17,596,625.00.

[53] On 14 July 2011 Pakiri entered into a written contract with a company called Globalnet Limited (Globalnet). The liquidator says and indeed it is clear the contract was for the formation of a development entity and its operations; that the operations included Globalnet obtaining from Pakiri the global Licensing and marketing rights for the sum of USD1.1B. By Section 8 of the contract headed "Protection of Intellectual Property" it is stated "[Globalnet] and the company acknowledge that [Pakiri] is the sole owner of all rights (including intellectual property rights) in the technology. In the same agreement and under Section 10 headed Warranties and Undertakings, Pakiri warrants in Schedule 4, Part 3 "That [Globalnet]… will have no rights to [Pakiri's] intellectual property including any rights to… technology belonging to [Pakiri]".

[54] That contract was executed by all parties including Pakiri and Mr Read for RFT.

[55] By an agreement dated 24 May 2012 Pakiri agreed with Hellix Corporation Pty Limited for the formation of One Global Limited in which it is stated that Pakiri is the sole owner of all rights (including intellectual property rights) in the respondent technology and in a schedule to that agreement it is noted "That [Helix] and the company will have no rights to [Pakiri] intellectual property including any rights to… technology belonging to [Pakiri]".

[56] The liquidator has evidence that on 18 June 2010 and on 20 June 2011 and again on 15 June 2012 that Pipers Patent Attorneys filed patent applications with the patent office listing Pakiri as the applicant for "an internet operating system".

[57] In a newsletter emailed to Pakiri shareholders dated 10 October 2012, the shareholders were told that the Pakiri share price would go towards AUD500.00 based on IP value.

Pakiri's financial connection with the respondent

[58] On 6 October 2011 the respondent deposited $130,500 into Pakiri's bank account. The respondent was not indebted to Pakiri at that time. The liquidator submits that available evidence supports the proposition that the respondent advanced those funds to Pakiri as a loan and therefore that Pakiri owed that sum to the respondent.

[59] Regarding RFT's position that it held a security interest over the Time3 technology the liquidator notes that the loan agreement records a loan of $100M being the agreed value of the intellectual property assigned by the RFT. The liquidator submits that if there was an assignment of intellectual property then title and rights of ownership of the property assigned passed to Pakiri.

[60] The liquidator refers to s 17(1)(a) of the PPSR wherein he says it is clear the economic substance of a transaction ought to be examined to determine if a security interest exists. It is apparent from s 17(1)(a) that an in-substance security interest will exist if three requirements are satisfied:

(a) There is a proprietary interest in personal property.

(b) It was created or provided for by a transaction.

(c) That in substance it secured the performance of an obligation.

[61] The liquidator says the RFT did not advance any money to Pakiri under the loan agreement. Further that if the Court did determine a security interest was created by the loan agreement then no attachment occurred because the RFT did not provide value and it did not register a financing statement on the Personal Property Securities Register and that therefore the security interest was of no value and the RFT had no rights to the respondent technology and Pakiri was insolvent at the time it granted the security interest.

[62] The liquidator records that by s 129(1)(2) CA a company is prohibited from entering into a major transaction unless it is approved, or it is conditional on approval by special resolution. A "major transaction" is an acquisition or disposition of assets or a transaction which has or is likely to have the effect of a company incurring obligations or liabilities, including contingent liabilities or requiring rights or interest, greater than 50 per cent of the value of the company's assets. Any loan or other agreement to provide financial accommodation which exceeds the 50 per cent threshold will be a major transaction even if the borrower is not obliged to fully draw the loan.

[63] The liquidator submits that by entering into the loan agreement for $100M Pakiri was incurring an obligation that upon the respondent's own arguments in opposition exceeded 50 per cent of the value of Pakiri but there was no special resolution authorising the transaction.

[64] The liquidator notes that Mr Sutich provided in his evidence a document purporting to be an assignment from Mr Read in person to the RFT dated 2 July 2013 and assigning ownership of the technology to the respondent. Regarding this the liquidator submits that if the RFT took possession of all assets of Pakiri pursuant to the loan agreement and if there had been a security interest prior to or at the time

of the liquidation of Pakiri on 15 February 2013 then there would have been no requirement for Mr Read's assignment dated 2 July 2013.

[65] The liquidator notes that whilst Mr Sutich has provided this evidence in the present proceeding, it was not, as it should have been, made available for the s 266 examination.

[66] In respect of the s 298 application the liquidator claims that the disposition of the Time3 technology from Pakiri to the respondent occurred between 14 December 2012 and 31 January 2013 when Mr Sutich was one of two directors of Pakiri and the sole director of the respondent.

The value of property transferred

[67] The liquidator submits that the value of the respondent technology is either:

(a) $562,472.91 as valued in accordance with NZ IAS 38, or

(b) $100M as per the loan agreement.

Considerations

Was there a transfer transaction?

[68] There is no doubt that Pakiri and the respondent were related companies.

[69] Pakiri received no consideration for the Time3 technology transfer.

[70] At face value this case has all the characteristics of a voidable action claim perpetrated and manipulated by Mr Read and, if it exists, the Read Family Trust. Pakiri is just another of Mr Read's failed investment companies which attracted investors with grand promises containing little detail concerning the development and marketing of an "internet operating system". The liquidator says the property in that internet operating system was transferred from Pakiri to the respondent when it should not have been.

[71] The liquidator says that that which was transferred contained value, that the worth of that "is very much in the eye of the beholder" and that although the loan agreement between Pakiri and the RFT referred to the value being worth $100M, the liquidator conceded it could be worth only "a dime".

[72] The liquidator concedes the evidential difficulty of proving there was a transfer.

[73] In addition to issues about whether Pakiri had transferred something to the respondent there was argument concerning a sum of $130,500 which is paid into Pakiri's bank account on 6 October 2011. Pakiri's bank statement noted that sum came from the respondent. The timing of the payment brought it within the two year specified period (as described by s 292(5)).

[74] The liquidator submitted the payment came from the respondent because it was indebted to Pakiri – that a creditor debtor relationship existed. In separate proceedings the liquidator has apparently pursued recovery of that sum by the issue of a statutory demand, but his efforts failed and in the outcome of those costs were awarded against the liquidator.

[75] The payment of that sum occurred at a time when Mr Judson was a director of Pakiri and before that time when Mr Sutich became a director of Pakiri. Mr Sutich's evidence is that by letter dated 15 April 2013 he advised the liquidator he would investigate the deposit to see whether there was substance for a claim by the respondent to make in the liquidation of Pakiri; that in the outcome of his investigation he advised no claim could be made by the respondent because the sum of $130,500 was not an advance to Pakiri but represented a reimbursement of costs incurred by Pakiri on behalf of the respondent related mainly to an abortive Globalnet attempt made in Russia to engage a marketing development commitment there.

[76] The evidence is that the payment in question was organised/directed by Mr Read.

[77] There is no evidence that the respondent was a debtor of Pakiri's at the time. Mr Norrie's position is that if it was not a debtor then it was a creditor. The Court does not agree and it follows that if there was not that form of a relationship between the parties then the payment in question is not subject to the voidable transaction provisions or considerations.

[78] Mr Norrie is understandably somewhat disdainful regarding statements made by or on behalf of Pakiri's directors and its chief financial officer. He blames them for a lack of compliance with the court examination process that he had arranged in an effort to recover Pakiri's financial records. Virtually nothing had been provided by the company or its officers to the company's liquidator. Mr Norrie believes they have conspired with Mr Read to prevent access to the company records. The directors and officers concerned deny preventing access to the documents and claim they have given all that they had. The Court has little reason to consider the claims of those persons to be false. They too, it seems, appear to be objects of Mr Read's manoeuvrings.

[79] Pakiri was placed into liquidation upon the application of a creditor by the name of Adroit, a company with which the liquidator has connection and an interest.

[80] Prior to liquidation and very likely in anticipation that liquidation would occur Mr Read arranged for the transfer of Pakiri shareholder interests to the respondent.

The loan agreement

[81] By a loan agreement signed on 2 May 2012 the RFT agreed to lend Pakiri NZ$100M "being the agreed amount of the value of the intellectual property" assigned by RFT to Pakiri.

[82] The clear evidence is that all payments made to Pakiri were provided by the RFT from funds RFT obtained from the sale of shares in Pakiri.

[83] One hundred and eighty shareholders paid nearly $1M to the RFT, some of which provided the funding for Pakiri's development purposes.

[84] All of Pakiri's assets were secured by the RFT loan agreement.

[85] A consistent refrain from Pakiri's directors and officers asserts that Pakiri never owned any intellectual property but that that property was owned by the RFT subject to the terms and conditions of the aforesaid loan agreement. Mr Sutich confirms that the respondent also does not own any assets and that the property which it utilises for the same development purposes as did Pakiri, was paid for and is owned by the RFT.

Conclusions

Did a debtor/creditor relationship exist?

[86] The Court accepts there is no sufficient proof that the payment of $130,500 to Pakiri was for any purpose other than as the respondent claims i.e. to reimburse costs Pakiri incurred in its failed marketing project with the Russian interests associated with Globalnet.

Who owned the assets?

[87] The primary question for consideration is who owned the intellectual property that was formerly part of Pakiri's marketing package but which now clearly forms part of that same marketing package by which the respondent promotes itself.

[88] Mr Hucker's submissions regarding a lack of evidence to prove a transfer of property from Pakiri to the respondent are forceful. There is no documentary evidence of a transfer by Pakiri of intellectual property. There is no evidence that the respondent received the intellectual property as a transferee by any document of record. Obviously such documents were not needed because Mr Read was in charge of both entities through his family trust. It was he who alerted shareholders of Pakiri to the process by which their shareholdings would be transferred to the respondent.

That transfer occurred immediately prior to Pakiri being placed into liquidation because of the inevitability of its failed challenge to a creditor's claim.

[89] Pakiri was that vehicle by which it promoted itself as the owner of intellectual property rights for the purpose of attracting purchasers of shareholding interests. The clear evidence is that Pakiri proclaimed it was the owner of those rights.

[90] In June 2010 Mr Read approached Mr Piper of Pipers Patent Attorneys. Mr Piper deposes he was told by Mr Read that he was a director of Pakiri. Mr Read denies this.

[91] Mr Piper says Mr Read asked him to file a patent application in the name of Pakiri. Mr Read told Mr Piper that he was in the inventor of the intellectual property for which the patent was to be applied. Mr Piper mentioned that in those circumstances an assignment in writing was required between the inventor and the patent applicant. His office prepared the standard form of assignment and Mr Read signed that form provided by Mr Piper for that purpose.

[92] Patent applications in the name of Pakiri followed.

[93] Those applications have now expired. Mr Piper reports that on 24 July 2013 further applications were lodged in connection with the same intellectual property. At that time in July 2013 i.e. after that date the Court is critically concerned with, Mr Read requested applications for patents be filed in his name as trustee for his family trust. In response Mr Piper explained that since the rights to the invention had previously been assigned to Pakiri it would be necessary to obtain an assignment from Pakiri to the family trust. In that context Mr Piper recalls Mr Read mentioning a loan agreement.

[94] Mr Piper then indicated that in the absence of any assignment from Pakiri he would prepare a patent application form by assignment from Mr Read as inventor to Mr Read as trustee. Mr Piper provided a form of assignment which Mr Read completed.

[95] It is Mr Piper's understanding, which Mr Read denies, that at the time of lodging a patent application on 24 July 2013 Mr Read was a director of Pakiri. In fact a review of company records confirms that Mr Read was not.

[96] The liquidator has endeavoured to locate relevant background records of Pakiri's operations. Company officers including Mr Sutich have said they have provided all they can. The Court has no reason to doubt that but only because it accepts all relevant accounting records are controlled by Mr Read who it appears has made it his purpose to frustrate access to those.

Was there a transfer?

[97] Pakiri's direction was always in the hands of Mr Read. Pakiri never filed tax returns nor profit and loss, revenue or balance sheet records. Unsurprisingly directors and the chief financial officer could not provide hard copies of those and if an electronic record was available then that clearly was in the control of Mr Read.

[98] It was immediately before the day of liquidation that Mr Read purported to take possession of Pakiri's assets. His later email dated 15 April 2013 reminded all shareholders that all of Pakiri's assets were secured to his family trust.

[99] No evidence has been produced describing the process by which Mr Read or his family trust retrieved the asset which the evidence discloses was clearly assigned to Pakiri. There was no notice to Pakiri of the inevitability of this action. The evidence suggests the clear purpose of Mr Read's actions was to avoid issues arising in the outcome of Pakiri's inevitable liquidation. There was no consultation with Pakiri's shareholders about their shareholdings being transferred to the respondent.

[100] Mr Read has purported to act pursuant to the terms of the loan agreement. An analysis of available records suggests otherwise. Central to Mr Read's purpose is his claim that his family trust retained ownership of the relevant intellectual property. Heavy reliance is placed upon the terms of the loan agreement. The constant refrain is that although patent rights were assigned to Pakiri, as clearly they were, Mr Read and his family trust retained control of those; that the terms of the trust's

arrangement with Pakiri permitted Pakiri to promote itself as owner of those rights even though it was not the owner.

[101] Mr Read and his trust rely upon the provisions of the PPSA to entrench claims of ownership in circumstances where clearly Pakiri was permitted to project its ownership of those as a lure to contracting the saleability of the product involved. Available evidence suggests that until July 2013 patentable ownership of intellectual property rights was retained by Pakiri.

[102] RFT's claims of ownership are questionable. Apparently they rely upon the loan agreement with Pakiri, as they do the provisions of the PPSA. The RFT maintains that the loan agreement preserved the right of ownership to them and an ability to retrieve that. They say the PPSA recognises that right of ownership when a debtor is in default or if the creditor's collateral is at risk.

[103] It is the case of the RFT that Pakiri was set up to market the rights assigned to them until the product involved reached the stage of commercialisation; that this involved bringing the concept to a stage when it could be marketed.

[104] It is the evidence on behalf of the respondent that during Pakiri's tenure the stage of commercialisation had not been reached; but that when that did occur the RFT would assign the intellectual property rights in consideration of payment of the loan amount provided in the loan agreement - $100M for Pakiri (and $1.1B for the respondent).

[105] Until then it is argued on behalf of the RFT that the product had no value.

Summary

[106] In this case Pakiri was liquidated because of a dispute regarding a debt claim of about $92,000. If the claim was disputed that dispute was not advanced. The decision to liquidate appears to have been in the control of Mr Read. Behind that decision is the confidence in claims that all Pakiri owned in relation to the intellectual property was the right to market it.

[107] It follows submits Mr Hucker that what was sold to shareholders was an asset which comprised market rights only to a product that may or may not materialise once various prototypes were developed to the stage of commercialisation.

[108] Other evidence suggests that Pakiri acted as the owner of the intellectual property rights involved in connection with a Globalnet product – ultimately an unsuccessful project with Russian interests. Mr Read and his trust suggest they always remained in control of that product which clearly was documented as belonging to Pakiri.

[109] At the core of the RFT claims, albeit advanced on behalf of the respondent, is that their ownership interests are clearly recognised by the loan agreement with the RFT.

[110] That loan agreement records it being effective from 1 April 2012 and by which Pakiri agreed to borrow $100M being the agreed value of the intellectual property and in respect of any further funds provided by the RFT.

[111] Clauses 11.1 and 11.2 provided for the creation of a shareholder's account in favour of the RFT and for any funds paid to the trust to be credited to the shareholder's account.

[112] Clause 12 of the agreement recorded that the obligations of Pakiri under the loan agreement were to be secured pursuant to the provisions of the loan agreement.

[113] The loan records it is secured by way of a debenture over all of Pakiri's assets including all intellectual property relating to the Time3 software technologies and that in default by Pakiri of its obligations under the loan agreement the RFT became entitled to exercise its rights as security holder.

[114] This is what the RFT says it did. This is what happened when Mr Read notified shareholders in December 2012 when he said the RFT transferred the shareholding in Pakiri to the respondent. It is by this process that it is urged upon the

Court that the RFT did then retrieve that asset which was the subject of the trust's loan agreement with Pakiri.

[115] Of course there is no documentary evidence recording this event nor is there any declaration of retrieval of an asset having been secured by a loan, or of reasons why it was expressed that the security arrangement was in default.

[116] Mr Hucker submits there is an absence of records of a transfer from Pakiri to the respondent. Indeed that appears so but that does not necessarily mean the transfer did not occur. Mr Read and his trust now proclaim they retrieved Pakiri's intellectual property assignment rights (for there is no dispute but that they existed) and transferred those to a company established for the purpose of receipt of those.

[117] Mr Read and his family trust, albeit from a significant distance, have continued to promote themselves as the owners of something which is valuable until they decide to transfer that property elsewhere.

[118] The liquidator is correct when he suggests that in the manner that Pakiri promoted itself it let investors believe it owned the intellectual property. Nevertheless Mr Read and his family trust have always claimed ownership was theirs and that any rights were merely assigned for just as long as Mr Read saw fit.

[119] It does not appear that Mr Read or his family trust disclosed to prospective shareholders the security interest in the assets.

[120] Mr Read never forewarned Pakiri shareholdings that the intellectual property would be transferred to the respondent, much less with any explanation of why.

[121] The value of the interests the subject of this dispute is uncertain. The Court's impression is that it has minimal value to anyone except the RFT. The liquidator concedes it may have little value at all i.e. for his purposes of resale for the benefit of creditors. On the other hand the asset has apparently significant value for the RFT whose purpose has been to promote its potential as an enduring technological possibility. For the Court's present purposes it is prepared to accept there is

sufficient value if the Court was prepared to make orders under ss 295 and 298 of the Act.

[122] The RFT says that that which it assigned to Pakiri is now licenced to the respondent. There is no evidence of this transaction but that is what the RFT says has occurred and to allay the concerns of Pakiri shareholders, they have been assured that their shareholding interests have been 'transferred' to the respondent. There is no clear evidence about how this occurred. But it did happen and it is clear that Mr Read arranged it. The evidence suggests shareholders investments were utilised by the RFT to fund Pakiri's operations. By the transfer of shares, the credit for those contributions has now clearly benefitted the respondent.

[123] The loan agreement provided security for advances to an amount of $100M. The evidence indicates that almost all advances by the RFT have been provided by the proceeds of sale of shares in Pakiri. The sum of $130,500 apart there seems little evidence of contributions other than those provided by shareholding investments.

[124] The respondent says it relies upon Pakiri's loan agreement for its actions in permitting the RFT to recover that asset it provided as security for its lending. Those provisions permit pre-emptive action in the event of default. The act of default is not clear, nor was it subject of any notice. Rather the arrangements for transfer of rights to the respondent appear predicated upon a decision, made by Mr Read, not to oppose a liquidation application.

[125] Plainly, perceptions of the value of the intellectual property are uncertain. In the Court's view the value of those, except to the RFT, is minimal. But, for the reason it might have value at all is sufficient for the Court to accept it may, if there is sufficient proof of ownership available, direct a transfer of that property back to the prior owner if insufficient value for its transfer has been given. In this case the respondent paid nothing at all for what it received.

[126] The RFT's security arrangement relies upon its attachment as security in respect of a loan of up to $100M. That value serves no purpose except to preserve its claim of an interest if the intellectual property product is successfully developed

and marketed. There is no suggestion the loan amount will be advanced. Therefore the loan sum only promotes a claim of a priority interest.

[127] The evidence is that the RFT only provided funds paid by shareholder investors. This was the extent of their loan in this case to an amount $1M and is well short of $100M.

[128] The RFT did not challenge the claim of a creditor, Adroit, for an amount of about $92,000. That decision was clearly made by Mr Read and led directly to Pakiri's liquidation. There is no element of loan agreement default involved. There was no demand for payment of debt. Obviously the only funds advanced were from shareholders investments. There was no basis for initiating recovery or claiming rights of security pursuant to the loan advance. Claims of entitlement to do so pursuant to the provisions of the PPSA are, in the circumstances, misplaced.

[129] It has always been the case of Pakiri that product development had not got to the stage of commercialisation such that any repayment was due to the RFT upon its promise of a $100M loan.

[130] In the background of these matters the Court notes a lack of evidence regarding any advances made under the RFT's loan agreement. Also share register details are minimal. There is a lack of s 194 CA account details. Issues arise regarding the execution of the loan agreement for there is no reference to witnessing names or signatures. The loan agreement refers to security documents but there are no separate documents. There was nothing clearly indicating an ability to recover that which is said to have been assigned to Pakiri.

[131] Section 295 provides for the transfer back of property transferred from the liquidated company or for a payment of an equivalent amount.

[132] It is the case for the respondent that it has not been proved there was as transfer or that any transfer was for less than the consideration provided. Mr Hucker submits the liquidator cannot establish the value of the intellectual property but that

the best the liquidator can do is to claim $1 the sum evidenced by the proposed Piper assignment arrangement.

[133] In the Court's view the transfer was for value and although that value cannot be identified that should not preclude a transfer back of that intellectual property because it is clear that no consideration at all was provided by the RFT for the transfer from Pakiri.

[134] Therefore it is open to the Court to order a transfer back to Pakiri of that intellectual property transferred to the respondent and identified by the liquidator's notice as detailed in paragraph [10] herein.

[135] Regarding claims of an entitlement by the RFT to a transfer back to it of the assets secured by the loan agreement, there is no evidence of a default of that agreement but rather what occurred happened in response to a creditor's claim and then by a conscious decision to transfer Pakiri's interests in that 'asset'.

[136] In the cause of the respondent, it is claimed that the RFT was entitled to recover that property for which security was provided by the loan agreement. It is not clear for what purpose that recovery was effected or by what action it was proclaimed. There is no notice provided which assists. Mr Read's email to shareholders effectively pronounces that it had been done.

[137] The evidence sufficiently proves Pakiri had a proprietary interest in the intellectual property assigned to it for the purpose of developing and marketing a product for sale. There is no evidence that shareholders purchased shares on any other basis. Should the evidence of company officers suggest otherwise then there is good reason to discredit that evidence. Those officers were required to produce routinely available evidence which, it is to be inferred they did not because they suggested such was only available through Mr Read. The respondent's claim is that if it cannot be proved there was an advance by Pakiri to the respondent then there is no proof of an advance and therefore no attachment can occur and without that then no right to repossess is available.

[138] In the Court's view there has been a transfer of that interest held by Pakiri and it has been received by the respondent and there was value in the transfer although in an amount indeterminate. The respondent paid nothing for that which Pakiri had.

[139] The Court is of the view that there are significant issues affecting claims by the RFT of a security interest capable of being enforced.

[140] The loan agreement does not refer to the names of witnessing signatures. There is no description in it of that property over which security is provided. Arguably there is no security agreement at all in relation to the trust advances to Pakiri. In the background is Mr Read, a bankrupt who lives outside the jurisdiction of the Official Assignee. However, he remains very active in the controlling affairs of Pakiri and the respondent. He has contrived that process by which his family trust retains control of that 'asset' shareholders have invested in.

[141] It is the respondent's case that on available evidence the RFT has executed rights under its loan agreement entitling it access to the security collateral. In answer to the liquidator's position that the loan agreement permitted to Pakiri to remain the owner of the intellectual property, it is argued for the respondent that the deed of assignment effectively conveyed Pakiri's interest to the trust.

[142] In the Court's view the loan agreement did not do this. The evidence strongly suggests Pakiri was created for the purpose of developing the intellectual property and for which the rights of ownership were assigned as indeed an abundance of documents clearly suggests.

[143] The loan agreement provided promises of loans in consideration for which a sum far in excess of those advances was promised for repayment. It was a scheme by which Mr Read maintained control over any potential for success of the investment. However, and clearly he projected Pakiri and then later the respondent as an owner of intellectual property for the purpose of promoting that property as development potential.

[144] It is not clear by what purpose or authority the RFT recovered that interest it transferred to Pakiri, or for what reason that occurred. Before then Pakiri's proprietary rights were the subject of patent applications, and the sale of development opportunities to other companies including Globalnet and Hellix.

[145] In that background of matters claims by Mr Read and his trust to have recovered the property in those needs to be considered by reference to the evidence of Mr Piper and his dealings with Pakiri, in the circumstances where Pakiri claimed proprietary rights to the intellectual property.

Result

[146] There is clear evidence of a transfer by Mr Read in the name of his trust of property belonging to Pakiri to the respondent and that the property in question had value.

[147] This is an appropriate case for the Court to order pursuant to s 295(b) of the Act that the respondent transfer back to Pakiri that property it received from Pakiri.

Judgment

[148] The application for the transfer back to Pakiri of that property taken from it is granted.

[149] Costs will be fixed on application to the Court.

Associate Judge Christiansen