IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-005014
[2012] NZHC 3488

UNDER	sections 243(7) and 245A of the Companies Act 1993 and Part 19 of the High Court Rules
IN THE MATTER OF	the liquidation of NZ Properties Holding Limited (in Liquidation)
BETWEEN	DAMIEN GRANT AND STEVEN KHOV AS LIQUIDATORS OF NZ PROPERTIES HOLDING LIMITED (IN LIQUIDATION) Applicant
AND	CP ASSET MANAGEMENT LIMITED First Respondent
AND	ASIA PACIFIC HOTEL INVESTMENTS LIMITED Second Respondent
AND	C P RETAIL HOLDINGS LIMITED Third Respondent
AND	RAISONS PACIFIC INVESTMENTS LIMITED Fourth Respondent
AND	SOUTH ISLAND HOTEL INVESTMENTS LIMITED Fifth Respondents
AND	YEIL C & M LIMITED Sixth Respondents
AND	BRIAN AND BRIDGIT LAWRENCE Seventh Respondents

Hearing: 6 December 2012

Appearances: B J Norling for Applicants
R B Hucker and D Lang Siu for First to Sixth Respondents
G A Keene for Seventh Respondents

Judgment: 18 December 2012

JUDGMENT OF VENNING J

This judgment was delivered by me on 18 December 2012 at 2.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors:	Waterstone Insolvency, Auckland
	Hucker & Associates, Auckland
	Pidgeon Law, Solicitors, Auckland
Copy to:	G A Keene, Auckland

Introduction

[1] The applicants are the current liquidators (the current liquidators) of NZ Properties Holding Limited (in liquidation) (NZ Properties). They apply to this Court for the following orders:

(a) that the creditors' resolution passed on 15 August 2012 that they be replaced as liquidators be set aside; and, in the alternative

(b) that Aaron Heath and Michael Lamacraft (the proposed liquidators) be appointed as replacement liquidators of NZ Properties.

[2] The application that the resolution be set aside is opposed by the first to sixth respondents. It is supported by the seventh respondents. Similarly, the first to sixth respondents support the appointment of the proposed liquidators. The seventh respondents oppose that application.

Background

[3] NZ Properties was known as CP Holdings Limited until 9 November 2011. It was placed into liquidation by order of this Court on 23 March 2012. The current liquidators were appointed.

[4] Prior to its liquidation NZ Properties was part of a group of companies operated by the CP Group. Charles and Prakash Pandey are the key persons behind the CP or "Pandey" Group.

[5] NZ Properties was put into liquidation on the application of the seventh respondents Mr and Mrs Lawrence. Lawrence Riverside Limited, a company controlled by Mr and Mrs Lawrence, formerly leased a motel in Rotorua from NZ Properties. Lawrence Riverside and the Lawrences took proceedings against NZ Properties and Capital Hospitality Holdings Ltd (Capital Hospitality). Mr and Mrs Lawrence ultimately obtained judgment against NZ Properties for $1,040,662

together with interest and costs. They also obtained judgment against Capital Hospitality for a lesser sum.

[6] Following the liquidation of NZ Properties the current liquidators held a meeting pursuant to s 243(1)(b) of the Companies Act 1993 (the Act) for the purpose of resolving whether to confirm the appointment of the current liquidators or to make application to the Court for the appointment of alternative liquidators.

[7] The meeting was held on 15 August 2012. The creditors who had submitted proofs of debt were:

- CP Asset Management Limited (CP Asset) – $199,654.08;
- Asia Pacific Hotel Investments (Asia Pacific) Limited – $17,612.51;
- CP Retail Holdings Limited (CP Retail) – $8,458.37;
- Raisons Pacific Investments Limited (Raisons Pacific) – $1,614,082.06;
- South Island Hotel Investments Ltd (South Island Hotel) – $192,271.75;
- Yeil C & M Limited (Yeil) – $250,000;
- Hussey and Associates Limited – $20,761.73; and
- Mr and Mrs Lawrence – $1,040,662.00 together with costs and interest.

[8] Mr Hucker held proxies for the first to sixth respondents. Hussey and Associates Limited did not attend the meeting. Nor did they provide a proxy.

[9] Mr Hucker put a resolution on behalf of CP Asset that the current liquidators be replaced by the proposed liquidators. The resolution was carried, against Mr and Mrs Lawrence's opposition.

[10] For present purposes it is conceded that CP Asset, Asia Pacific, CP Retail, Raisons Pacific and South Island Hotel are related entities for the purposes of s 245A of the Act. If the votes of those related entities were disregarded then the resolution would not have been passed. The sixth respondents' vote in favour would have been cancelled out by the Lawrences' vote against.

[11] Following the meeting, the current liquidators, supported by the seventh respondents, applied for an order under s 245A of the Act setting aside the resolution. In the alternative, and in accordance with the requirement of s 243(7) of the Act, the current liquidators apply for an order for the appointment of the proposed liquidators.

The parties' positions

The current liquidators' position

[12] The current liquidators consider the passing of the resolution was contrary to the interests of the third party creditors, Mr and Mrs Lawrence, as well as Hussey and Associates Limited. However, Hussey and Associates Limited have taken no steps. Their position in relation to the application is unknown.

[13] Mr Grant makes the point that if he and Mr Khov were replaced as liquidators the replacement liquidators would have to start from the beginning which would increase liquidation costs. Further, in Mr Grant's opinion, if the CP Group were successful in replacing him and Mr Khov as liquidators it would "deny access to justice to Mr and Mrs Lawrence". He says:

> It would appear that the Related Companies are run by the CP Group. Accordingly, if the Related Companies are successful in replacing Mr Khov and I as liquidators this is reasonably likely to prejudice Mr and Mrs Lawrence.

[14] Mr Grant makes the point that he has spent a significant amount of time in the liquidation already. He has requested documents from 31 different entities. The requests have largely not been complied with. Mr Grant intends to seek orders

pursuant to s 266 of the Act. He has spent a total of 237.7 hours working on the liquidation. As yet he has taken no fees and there have been no recoveries.

[15] If the preliminary investigation reveals recovery actions are justified, the current liquidators are willing to support any proceedings without seeking funding from creditors. Mr Grant has said:

> If I can identify any recovery actions I would pursue recovery action. However, I do reserve my right to not initiate proceedings if I consider the litigation risk is too high given that NZ Properties is an assetless company.

The position of the first to sixth respondents

[16] The first to sixth respondents consider that the current liquidators are effectively approaching the liquidation as a debt recovery exercise for the seventh respondents without proper regard to their obligations, as liquidators, to all creditors. They criticise Mr Grant's actions, particularly in how he has dealt with the media. They say that the current liquidators have acted under a misapprehension as to their powers under s 261 in seeking to require documents from third parties. They also consider the current liquidators have not focused their preliminary inquiries but have instead made oppressive demands for documents from members of the CP Group.

[17] The first to sixth respondents say that, by contrast, the proposed liquidators are independent, and are from a respected firm. The first to fifth respondents have agreed to ensure the proposed liquidators will have sufficient funding available to them to carry out an appropriate investigation into NZ Properties' affairs.

The seventh respondents' position

[18] The seventh respondents are strongly supportive of the current liquidators. They are suspicious of the motives and objectives of Mr Pandey and his related entities. Mr and Mrs Lawrence are particularly concerned that, even if a recovery action is justified, the proposed liquidators will not progress a claim in the absence of funding, which the seventh respondents cannot provide.

Decision

[19] It is convenient to first consider the application to set aside the resolution under s 245A(2) of the Act. If the resolution is set aside there is no need to consider the second application, which only arises if the resolution stands.

[20] Section 245A gives the Court the power to intervene where the outcome of voting at a meeting of creditors is determined by the vote or votes of related entities of the company in liquidation. It reads as follows:

> **245A Power of Court where outcome of voting at meeting of creditors determined by related entity**
>
> (1) This section applies if the Court is satisfied that—
>
> (a) a resolution at a meeting of creditors was passed, defeated, or required to be decided by a casting vote; and
>
> (b) the resolution would not have been passed, defeated, or required to be decided by a casting vote if the vote or votes cast by a particular related creditor or particular related creditors were disregarded; and
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> (c) the passing of the resolution, or the failure to pass it,—
>
> (i) is contrary to the interests of the creditors, or a class of creditors, as a whole; and
>
> (ii) has prejudiced, or is reasonably likely to prejudice, the interest of the creditor who voted against the resolution, or for it, as the case may be, to an extent that is unreasonable having regard to—
>
> (A) the benefits accruing to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the resolution; and
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> (B) the nature of the relationship between the related creditor and the company, or between the related creditors and the company; and
>
> (C) any other related matter.
>
> (2) The Court may, on the application of the liquidator or a creditor,—
>
> (a) order that the resolution be set aside:

(b) order that a new meeting be held to consider and vote on the resolution:

(c) order that a specified related creditor or creditors must not vote on the resolution or on a resolution to vary or amend it:

(d) make any other orders that the Court thinks necessary.

[21] The purpose of s 245A is to prevent related creditors from exercising undue influence over the outcome of voting at a creditors' meeting to the detriment of non-related creditors.[1] There are a number of pre-conditions in s 245A(1) that must be satisfied before the Court has jurisdiction to make the orders under s 245A(2). The first two are satisfied in this case, namely the resolution to replace the current liquidators was passed at a meeting of creditors and would not have been passed if the votes cast by the related entity creditors were disregarded. As noted, it is not in issue that the first to fifth respondents are related entities for the purposes of s 245A.

[22] The real focus in the present case is upon the requirements of s 245A(1)(c). They are:

- the passing of the resolution must be contrary to the interests of a class of creditors; and

- it must prejudice or be reasonably likely to prejudice the creditor voting against the resolution, to an extent that is unreasonable;

- when evaluating whether it is unreasonable, the Court must consider the benefits to the "related" creditors and the nature of their relationship with the company together with any other relevant matter.

[23] The seventh respondents submit the primary objective of the Pandey interests is to prevent the current liquidators continuing a vigorous investigation into the affairs of the company in liquidation. The most decisive factor relied on by the current liquidators and the seventh respondents is that the existing liquidators would

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1 *Brookers Insolvency Law and Practice* (online looseleaf ed, Thompson Reuters) at [CA245A.01].

continue the investigation and pursue action without requiring funding from creditors if the action was otherwise warranted.

[24] There is a similar provision in Australia: s 600A of the Commonwealth Corporations Act 2001. In *Ravenswood Resort Pty Ltd (in liquidation) v Kammal* the Court of Appeal of the Supreme Court of Western Australia discussed the construction and application of s 600A.[2] A meeting of creditors had voted on a proposal for litigation funding to prosecute a claim against Rustic Haven SDN BHD (Rustic Haven) for a voidable transaction and to defend a claim by Rustic Haven that it was a secured creditor having a purchaser's lien over certain property.

[25] The meeting passed the resolution. Mr Kammal had voted against it. He applied to set aside the resolution on the basis that it caused, or was likely to cause, unreasonable prejudice to him. The Judge at first instance set aside the resolution.

[26] The Court of Appeal of the Supreme Court of Western Australia allowed the appeal, finding the Judge at first instance had erred by focusing only on the first step of the process, namely, the identification of sources of prejudice. He had failed to go on to evaluate the nature or significance of the prejudice for the purpose of determining whether it was unreasonable. The Court of Appeal held:[3]

(a) the mere identification of prejudice, or the likelihood of prejudice flowing from the resolution will not, of itself, satisfy the pre-condition for the making of an order under the section;

(b) the question which the Court must address is the question of whether the identified prejudice is unreasonable;

(c) the Court must address that question having regard to specified factors, namely the benefits resulting to the related creditor or creditors, and the nature of the relationship between the related creditor or creditors and the company;

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2 *Ravenswood Resort Pty Ltd (in liq) v Kammal* [2006] WASCA 217; (2006) 60 ACSR 507.

3 At [27]-[28].

(d) in addition the Court must, before exercising the powers conferred by the section, conclude that the prejudice is unreasonable.

In relation to the determination of whether the prejudice is unreasonable, the Court held:[4]

> [the] evaluation of prejudice, to be undertaken by the court, is a qualitative process in which the nature, degree and extent of the prejudice is to be weighed and its significance assessed by the court. The second conclusion and which is related to the first, is that the process of qualitative evaluation ... will also require the court to take into account any other matter that is relevant to the qualitative evaluation of whether or not the prejudice is unreasonable. This will require the court to identify the consequences which the passage of the resolution would have on parties or interests other than those of the related creditor or creditors and the creditor voting against the proposed resolution, including creditors generally, the liquidator, and the public interest, and then to qualitatively weigh and evaluate those interests and to assess the extent to which consideration of those other interests might ameliorate or negate the conclusion that the prejudice which has been or is likely to be suffered by the opposing creditor is properly characterised as unreasonable.
>
> ... Thus, the character of the inquiry to be undertaken by the court is one of identification of the various consequences likely to flow from the passage of the resolution, followed by the qualitative evaluation of those various consequences, undertaken for the purpose of arriving at a conclusion as to whether or not any prejudice that has been identified as flowing to the interests of the opposing creditor or creditors is properly characterised as unreasonable.

[27] I respectfully adopt that analysis as the correct approach to apply to the current application under s 245A.

[28] I return to the present case. The first issue is whether the passing of the resolution to appoint the replacement liquidators is contrary to the interests of a class of creditors as a whole. Mr Norling submitted that the class of creditors to be considered in this context must be creditors other than related entities. The creditors falling into that category are the sixth respondent, the seventh respondent and Hussey and Co. While the sixth respondent has aligned itself with the first to fifth respondents, who are related entities, for present purposes Mr Norling accepted that the sixth respondent was not itself a related entity.

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4 At [28]-[29].

[29] The first point to note is that, of the class of creditors as defined by Mr Norling, namely creditors that are not related entities, one voted in favour of the resolution (Yeil), one voted against it (the Lawrences), and one did not take the trouble of attending the meeting or providing a proxy (Hussey and Co). That rather mixed response does not provide particularly strong support for the submission that passing the resolution was against the interests of that particular class of creditors.

[30] The practical effect of the passing of the resolution is that on the application under s 243(7) the Court may, in the exercise of its discretion, appoint the proposed liquidators as replacement liquidators. The proposed liquidators have made their position clear in a letter to Mr Hucker's firm. They say they will undertake a limited investigation of the company's affairs in order to identify possible areas of recovery for the benefit of all creditors. The proposed liquidators go on to say that if possible areas of recovery are identified and legal advice confirms a positive cost benefit analysis then, most likely, the company's creditors or a third party funder would be asked for their views on funding. The inference is that, without such funding, the proposed liquidators would not pursue potential recovery action.

[31] On the other hand Mr Grant has confirmed that, subject to reserving their position if the litigation risk was too high, the current liquidators would be prepared to pursue potential recovery action without requiring the creditors to fund the action or without the need to seek assistance from a third party funder.

[32] At a very broad level it could be said to be contrary to the interests of all creditors, particularly the creditors other than the related parties, if a potential recovery action (perhaps against the related entities) that otherwise has merits was not pursued. That, however, is by no means the necessary or certain result of the resolution. First, the Court would have to appoint the proposed liquidators. Next, the liquidators would have to identify a potential recovery action. The recovery action would have to be warranted on a cost/benefit analysis and there would need to be no funding available to pursue the action, either from creditors or third party funders. Finally, the liquidators would have to decide not to pursue the action in the absence of funding so that an otherwise meritorious proceeding was not pursued.

[33] Even accepting that, for present purposes, the passing of the resolution could, on that analysis, be said to be contrary to the interests of creditors, it is next necessary to determine whether the passing of the resolution is reasonably likely to prejudice the interests of the Lawrences as the creditors who voted against it, to the extent that it is unreasonable having regard to the benefits accruing to the related creditors and the nature of the relationship between the related creditors and the company. That is the evaluative exercise required by s 245A(1)(c) as supported by the approach taken in *Ravenswood Resort Pty Ltd (in liq) v Kammal*.

[34] The potential benefit to the related creditors, the first to fifth creditors in particular, identified by the current liquidators (and supported by the Lawrences) is that the related entities would be able to appoint their own liquidators. Mr Norling submitted generally that if the proposed liquidators were appointed it would be likely to prejudice the interests of third party creditors. But there is nothing inherently wrong or prejudicial in one group of creditors nominating and/or appointing the liquidators. That is effectively what the seventh respondents did in nominating the current liquidators.

[35] The only possible benefit to a related creditor from the resolution would be that, if the Court appointed the proposed liquidators, they might ultimately choose not to take a potential recovery action against the related entities because of a lack of funding. However, the reality is that if, on the liquidators' investigation, a claim is identified against the related parties then the liquidators could seek third party funding. There is also the possibility of an application to the Court for Court supervision of the liquidation under s 284 of the Act. Further, if a claim was identified against either Charles or Prakash Pandey as directors or managers, the seventh respondents could seek leave to themselves bring an action under s 301 of the Act. Legal aid may be available for such a claim.

[36] It is important to record that there is no evidence to suggest the proposed liquidators will not properly carry out their duties and responsibilities under the Act in relation to the initial investigation. Although the first to fifth respondents have agreed to pay the costs of the investigation, the replacement liquidators, as officers of the Court, would be required to act independently. Mr Norling conceded that the

proposed liquidators are respected accounting practitioners and experienced liquidators. They are also members of the Institute of Chartered Accountants, and subject to the Institute's Code of Ethics, which Mr Grant is not.

[37] It is difficult to see that any prejudice to the seventh respondents (which at this stage is largely hypothetical and speculative) as a result of the appointment of the proposed liquidators would be unreasonable, having regard to the perceived speculative benefits that may or may not accrue to the related entities in this case.

[38] I conclude that the current liquidators are not able to satisfy the test under s 245A(1)(c). There is no jurisdiction for the Court to make orders setting aside the resolution under s 245A(2).

The application under s 243(7)

[39] I turn to consider the application for the appointment of the proposed liquidators in place of the current liquidators.

[40] In *Jacobsen Creative Surfaces Ltd v Smith City Limited* Hansen J identified the factors to take into account in exercising the discretion under s 243(7) as:[5]

> "1. Independence. There must be on the part of the liquidator the ability to make informed and unbiased decisions in the interest of all groups.
>
> "2. The resources of the liquidator.
>
> "3. The wishes of the creditors and contributories. ...
>
> "4. The competence and experience of the liquidator. ...
>
> "5. The requisite speed with which the liquidator can be carried out.
>
> "6. On occasions, the liquidator's familiarity with the company will be of relevance."

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5 *Jacobsen Creative Surfaces Ltd v Smith City Limited* [1994] 1 NZLR 128 (HC).

Independence

[41] Independence is regarded as the prime consideration. As noted, Mr Norling conceded there is no suggestion the proposed liquidators are not professional and independent. On the other hand, the first to fifth respondents criticise the current liquidators and their independence. They submit the current liquidators are too closely aligned with the seventh respondents. The current liquidators were nominated by the seventh respondents and the first to sixth respondents submit they are treating the liquidation process as a debt recovery action for and on behalf of the seventh respondents.

[42] The criticism of the current liquidators may be overstated. It is unnecessary to resolve that issue. I accept that both the current liquidators and the proposed replacement liquidators are, or can be, regarded as sufficiently independent of the parties nominating them.

[43] In this context I note the first to sixth respondents' suggestion of the Official Assignee as an alternative. Even assuming, without deciding, that there is jurisdiction to appoint the Official Assignee on an application such as this, I do not consider that to be necessary where there can be no proper suggestion that the proposed liquidators would be anything other than independent in the present case.[6] Further, the Official Assignee has the ability to decline to act in the absence of funding: s 254. The real choice is between the current liquidators and the proposed liquidators.

The resources of the liquidator

[44] As a term of the application to the Court the first to fifth respondents have agreed to fund the proposed replacement liquidators, to the extent of the proposed liquidators' estimate of the costs required to carry out the initial investigation.

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6 See *McPherson v Westpac Ltd* HC Rotorua M47/02, 16 April 2003.

[45] Both the current liquidators and proposed liquidators have the appropriate resources to discharge their obligations as liquidators. The only remaining issue is the funding of any viable recovery action.

The wishes of creditors and contributories

[46] The parties' positions are as set out above. Only the seventh respondents support the retention of the current liquidators.

Competence and experience of the liquidator

[47] Both the current liquidators and the proposed liquidators are experienced liquidators. As noted, the proposed liquidators have the additional advantage of being subject to the code of ethics of the Institute of Chartered Accountants.

The speed of the liquidation

[48] NZ Properties was placed into liquidation nine months ago. The current liquidators submit their progress in the liquidation has been frustrated by the members of the Pandey Group. The Pandey Group, however, say they have been entitled to oppose the very general and wide-ranging applications for documentation made by the current liquidators, which have been oppressive.

[49] The markedly different views as to the steps taken by the current liquidators have already led to proceedings in the course of this liquidation. CP Asset sought orders reversing two decisions by the liquidators, the first to reject its proof of debt and the second, not to hold a meeting of creditors.

[50] CP Asset ultimately discontinued the proceedings because the current liquidators agreed to call the creditors' meeting and also provisionally accepted CP Asset's proof of debt. In fixing costs in favour of CP Asset on the applications Lang J held that the current liquidators could easily have avoided the prospect of an adverse order for costs by deferring acceptance of the proof of debt until such time

as the applicant provided sufficient supporting material.[7] It was not necessary for the current liquidators to reject the proof of debt on the first working day after they had asked CP Asset to provide further material in support of the proof. The Judge considered the current liquidators should not have acted so quickly once they sought further information and should have given CP Asset a reasonable opportunity to provide the information. Next, he considered the current liquidators could have rescinded or suspended their decision to reject the proof of debt once the further information had been provided. Instead, while the current liquidators sought further information, they also confirmed their stance in relation to the rejection. The Judge considered CP Asset justified in issuing the proceeding once the liquidators took that step. For those reasons he directed that the current liquidators should be required to meet the award for costs.

[51] While it is unnecessary to resolve exactly where the blame for the lack of progress in the liquidation lies, it seems that the current liquidators may, at the least, have contributed to the delays in progressing the liquidation by the confrontational approach they have taken. This seems to have been acknowledged by Lang J in his costs judgment.

[52] By contrast, there is no reason to suggest the proposed liquidators would not be able to promptly take over the liquidation and carry out whatever preliminary investigations may be necessary to satisfy their obligations under the Act.

The liquidators' familiarity with the company

[53] Neither the current nor the proposed liquidators have any prior involvement with NZ Properties.

[54] During the course of submissions in reply Mr Norling suggested that perhaps a further reason for declining the application was the fact that Capital Hospitality, a related company, was also in liquidation and the current liquidators are the liquidators of that company. That submission was not part of his initial submissions.

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7 *CP Asset Management Ltd v Grant and Khov* [2012] NZHC 2228.

I do not consider it to be a major factor. Further, there may be a conflict between the two entities. It is too early to make such an assessment.

Conclusion – application to appoint the proposed liquidators

[55] I conclude that, balancing the above factors, it is appropriate to appoint the proposed liquidators in place of the current liquidators. The proposed liquidators are supported by the majority of creditors, including the sixth respondent. They are independent, experienced and professional liquidators. They can be funded to carry out an initial investigation of the companies' affairs. Against that, the current liquidators appear to have adopted an, at times unnecessarily confrontational approach to the Pandey interests which, even if undertaken with the interests of the seventh respondents at heart, has been counter-productive and costly.

Result/orders

[56] The application to set aside the resolution under s 245A(2) is dismissed.

[57] There will be an order in terms of s 243(7) appointing Aaron Heath and Michael Lamacraft as liquidators of the NZ Properties.

[58] The first to fifth respondents are to provide sufficient funds to the replacement liquidators (estimated at up to $25,000 excluding GST) to enable them to carry out a preliminary investigation.

[59] I reserve leave (if necessary) for Messrs Heath and Lamacraft to seek further direction/orders in that regard if necessary.

Costs

[60] I reserve the issue of costs for further submission if the parties are unable to agree. Any memorandum by the first to sixth respondents seeking costs is to be filed and served by 25 January 2013. Any memoranda in reply by the current liquidators

and/or seventh respondents to be filed and served by 8 February 2013. I will then fix costs on the papers.

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Venning J