IN THE COURT OF APPEAL OF NEW ZEALAND

CA387/2017
[2017] NZCA 488

BETWEEN		PERI MICAELA FINNIGAN AND BORIS VAN DELDEN AS LIQUIDATORS OF WENZTRO CO-OPERATION LIMITED Appellants
AND		BRIAN ROBERT ELLIS Respondent

Hearing: 31 August 2017

Court: Harrison, Duffy and Williams JJ

Counsel: K J Crossland and W D Buckham for Appellants
R B Hucker and R F Selby for Respondent

Judgment: 30 October 2017 at 12 pm

JUDGMENT OF THE COURT

A The application for leave to adduce new evidence is declined.

B The appeal is dismissed.

C The appellants are ordered to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Duffy J)

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Introduction

[1] The appellants are the liquidators of Wenztro Co-operation Ltd, formerly called Trojan Foods (NZ) Ltd. The respondent Brian Ellis is a former director of Wenztro. The liquidators have commenced legal proceedings against the respondent and other former directors of Wenztro alleging various breaches of their duties as directors. These proceedings are the sole remaining asset of the company.

[2] Before they incur further litigation costs the liquidators want to ascertain the prospects of recovering any money judgment they may obtain against the former directors. Mr Ellis refused to provide the liquidators with information about his financial means. The liquidators applied to the High Court seeking orders for this disclosure. Mr Ellis successfully opposed the making of those orders.[1]

[3] The key questions on appeal are whether the High Court has jurisdiction under the Companies Act 1993 to order Mr Ellis to disclose privately-held personal financial information about his means (private financial information) for the purpose of establishing his judgment worthiness; and if so, whether the Court should exercise that power here. The issues these questions raise are novel. They have not been addressed in New Zealand before.

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1 *Finnigan v Ellis* [2017] NZHC 1397 [HC judgment].

Background

[4] On 9 October 2012 Wenztro went into voluntary liquidation. On 4 February 2016 the present liquidators were appointed. In July 2016 the liquidators joined forces with WH Trading Ltd, a creditor of Wenztro, to commence a civil claim against Mr Ellis and the other former directors seeking recovery of approximately $773,000 or such other sum as the High Court thinks just.

[5] The liquidators are concerned that Mr Ellis may have taken or will yet take steps to dissipate his assets so that any judgment they obtain against him will not bear fruit. Hence their attempt to obtain information on his financial means. First they sought to obtain information from him and to examine him themselves pursuant to s 261 of the Companies Act. He objected on the ground they were exceeding their statutory authority.

[6] This prompted the liquidators to seek the High Court's assistance. Section 266 of the Companies Act gives the High Court authority to obtain information from and to examine a specified class of persons, which under s 261(2)(a) includes Mr Ellis as a former director of Wenztro. But Associate Judge Sargisson declined to make the order sought by the liquidators.[2] In so doing she assumed the Court had jurisdiction to make such orders under s 266.[3]

[7] In appealing against the Associate Judge's determination, the liquidators have applied for leave to adduce updating evidence to the effect that since the High Court hearing Mr Ellis has transferred shareholdings, ceased directorships and incorporated new companies. We accept this is fresh evidence but, for the reasons that follow, we are not satisfied it could have a material bearing on the result of the appeal.

Jurisdiction

[8] The liquidators seek orders directing Mr Ellis to provide specified information and then, if the liquidators consider it necessary, for Mr Ellis to attend

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2 At [26].
3 At [15] and [32]–[49].

court for examination on any matter relating to his financial position. The specified information includes:

(a) personal tax returns from 2012 to 2016;

(b) copies of personal bank statements from any account worldwide for the period from 1 January 2015 to 24 November 2016;

(c) documents evidencing his assets (including but not limited to real estate, investments and shareholdings) owned over the value of $10,000, not taking into account monies owing in respect of the same during the relevant period;

(d) documents evidencing personal liabilities over the value of $10,000 and in particular loan agreements, credit card statements and financial facility agreements; and

(e) names of any trusts of which he is a beneficiary, a trustee or holds the power to appoint trustees or beneficiaries.

[9] The usual information-gathering powers available to litigants (discovery and interrogatories) would not allow access to an opposing party's private financial information unless it was relevant to proof of an issue raised in the litigation. Tax information is protected by pt 4 of the Tax Administration Act 1994, which imposes obligations on officers of the Inland Revenue Department to maintain the secrecy of taxpayer information save for specified exceptions. Some of the desired information is also protected by the Privacy Act 1993, which covers private information relevant to trusts, banking records and other information held about a client or customer. However, information about real estate holdings will be available from Land Information New Zealand, shareholdings will be available from the New Zealand Companies Register, any securities Mr Ellis holds will be available from the Personal Property Securities Register, and credit rating agencies may be able to provide some impression of Mr Ellis's credit performance.

[10] Without the agreement of Mr Ellis, therefore, much of the specified information cannot be obtained by means other than s 266. Moreover, it is clear that the application of s 266 sought by the liquidators would be a serious intrusion upon Mr Ellis' privacy and perhaps that of his personal and commercial associates.

Statutory provisions

[11] The Companies Act relevantly provides:

> **266 Powers of court**
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> (1) The court may, on the application of the liquidator, order a person who has failed to comply with a requirement of the liquidator under section 261 to comply with that requirement.
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> (2) The court may, on the application of the liquidator, order a person to whom section 261 applies to—
>
> (a) attend before the court and be examined on oath or affirmation by the court or the liquidator or a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:
>
> (b) *produce any books, records, or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.*
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> …
>
> (Our emphasis.)

[12] Therefore s 261 is also relevant; it identifies the persons to whom s 266 applies, and it provides for a separate examination procedure before the liquidator:

> **261 Power to obtain documents and information**
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> …
>
> (2) A liquidator may, from time to time, by notice in writing require—
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> (a) a director or former director of the company; or
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> (b) a shareholder of the company; or
>
> (c) a person who was involved in the promotion or formation of the company; or
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> (d) a person who is, or has been, an employee of the company; or

(e) a receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or

(f) a person who is acting or who has at any time acted as a solicitor for the company—

to do any of the things specified in subsection (3).

(3) A person referred to in subsection (2) may be required—

(a) to attend on the liquidator at such reasonable time or times and at such place as may be specified in the notice:

(b) to provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests:

(c) to be examined on oath or affirmation by the liquidator or by a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:

(d) to assist in the liquidation to the best of the person's ability.

(3A) Without limiting subsection (3)(a), a person may be required to attend on the liquidator under that subsection at a meeting of creditors of the company.

…

(6A) A person who fails to comply with a notice given under this section commits an offence and is liable on conviction to the penalty set out in section 373(3).

Legislative history

[13] The s 266 powers of examination have long been a feature of New Zealand company law. They were present as ss 252, 262 and 262A of the Companies Act 1955, s 214 of the Companies Act 1933, ss 210 and 211 of the Companies Act 1908, ss 210 and 211 of the Companies Act 1903 and ss 177 and 178 of the Companies Act 1882. While the language used in earlier statutes differed slightly, the effect was substantively much the same. However, the present scope of the liquidators' powers under s 261 is the product of steady extension through legislative intervention.

[14] When first enacted the 1955 Act empowered only the Supreme Court to order the production of documents for the benefit of the liquidator:

252 Delivery of property to liquidator

The Court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is *prima facie* entitled.

…

262 Power to summon persons suspected of having property of company

(1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company.

…

(3) The Court may require him to produce any books and papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

…

[15] Section 262A was later added to the 1955 Act by the Companies Amendment Act 1980, which conferred unilateral powers of examination only on the Official Assignee acting as liquidator:

262A Powers of liquidator to examine persons

(1) Where the Official Assignee is acting for the purposes of section 232 of this Act or is the provisional liquidator or liquidator of a company, he may, except to the extent that the Court, on the application of any person, otherwise orders,—

(a) Summon before him and examine any person who could be summoned before the Court pursuant to section 262(1) of this Act; and

…

(c) Require the person to produce all accounting records, deeds, instruments, and other documents or papers relating to the company that are in his custody or power.

Under s 262A(2) of the 1955 Act these powers were also available to a liquidator other than the Official Assignee but only with the permission of the Court.

[16] The apparent purpose of these provisions, as evidenced by long-standing practice, was to facilitate a liquidator's access to property and information directly relevant to the operative affairs of the company. We do not read them as providing a gateway into private financial information which might be relevant to the realisable value of a potential cause of action. In explaining its proposed transition from the 1955 Act to what would become the current regime, the Law Commission did not recommend any major changes to the examinable subject matter available to liquidators:[4]

> 676 … The liquidator is empowered to require the delivery of books, records or documents of the company. This section is drawn from section 252 of the 1955 Act, but omits the need for a court order. … The liquidator may also require specified people to provide information.

[17] The purpose of the new provisions was simply to improve the efficiency of the procedural rules governing corporate insolvency: "The procedures relating to liquidation … have been simplified, reducing the involvement of the Courts."[5] In the absence of express language or necessary implication, the allowance for light-handed judicial oversight of liquidators' powers must weigh against an expansionary reading beyond the settled boundaries.

[18] Powers of examination and to order the production of documents are now conferred on all liquidators without the prior direction of the High Court. Section 261(3A) permits the liquidator to require the person specified to attend a meeting of creditors of the company. In theory, therefore, if examination under s 261(3)(a) extends to the private financial information of the examinee, disclosure of this information could be given before the company's creditors. Failure to comply with a requirement of the liquidator under s 261 is an offence punishable by fine or imprisonment.[6] This factor is relevant when considering the breadth of those

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4 Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at 159.

5 Report of the Justice and Law Reform Committee on the Companies Bill [1991–1993] XXIII AJHR I8A at 3.

6 Companies Act 1993, ss 261(6A) and 373(3).

powers, given that the controls of the courtroom will not be present when a liquidator exercises his or her s 261 powers.

New Zealand case law

[19] It does not appear that a liquidator has on any occasion before now used these information-gathering powers to obtain the private financial information of prospective defendants to ascertain their judgment worthiness. Nor were we referred to any case in which the High Court has made such an order under s 266 or its predecessors.

[20] However, ss 261 and 266 and their former equivalents have been used to gather information relevant to proof of the elements of a civil claim against the examinee. In *Carrow Holdings Ltd v Sadiq* Heath J found the liquidator could obtain information under s 261 to ascertain information about the evidential strength of the claim brought against Mr Sadiq.[7] The fact this litigation was extant was no bar to the section's use.[8] McGechan J took much the same approach in *Re Northrop Instruments & Systems Ltd* in relation to s 262A of the Companies Act 1955, although in that case a civil claim against the examinee was merely contemplated.[9] This is as far as New Zealand courts have taken the use of ss 261 and 266 when it comes to gathering information relevant to such civil litigation from examinees. In reaching their respective conclusions each of the Judges carefully considered existing New Zealand law and English law on this subject, focusing primarily on the factors relevant to the exercise of discretion rather than the jurisdictional question now under consideration.[10]

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7 *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008 at [29]–[33].

8 Earlier the courts distinguished between use of the information-gathering powers before a civil claim commenced (which was permissible) and after the claim's commencement (which was not permissible): *Re Hartley and Riley Consolidated Gold-dredging Co Ltd* [1931] NZLR 977 (SC).

9 *Re Northrop Instruments & Systems Ltd* [1992] 2 NZLR 361 (HC) [*Re Northrop*].

10 *Laing v KPMG Peat Marwick* (1989) 4 NZCLC 65,180 (HC); *ANZ Banking Group (New Zealand) v Official Assignee* (1988) 4 NZCLC 64,151 (HC); *Cloverbay Ltd v Bank of Credit and Commerce International SA* [1991] Ch 90 (CA) [*Cloverbay*]; and *Re British and Commonwealth Holdings Plc (Nos 1 and 2)* [1993] AC 426 (HL) [*Re British*].

Australian case law

[21] Mr Crossland for the liquidators submits that we should follow Australian case law. Because s 266 involves commercial insolvency, an interpretation that aligns this provision with Australian law is to be pursued so far as it is reasonably practicable.[11]

[22] In Australia, liquidators have been able to obtain orders under the equivalent legislation requiring specified persons (including former directors) to provide information and attend court for examination on matters that reveal those persons' private financial information.[12] Australian legislation does not expressly stipulate for those outcomes. Section 596B of the Corporations Act 2001 (Cth) authorises examinations about a corporation's "examinable affairs".[13] Section 597(9) authorises liquidators to require production of material that is relevant to matters to which the examination will relate. It is the Australian courts' broad interpretation of the words "examinable affairs of the company" in s 596B that has led to their allowing examinations as to judgment worthiness. Information about an examinee's financial worth is seen to be relevant to: (a) assessing whether it is prudent to pursue litigation against him or her; and (b) allowing the liquidators to place a value on the prospective cause of action, which is a chose in action and therefore a company asset.[14]

[23] In *Grosvenor Hill (Qld) Pty Ltd v Barber* (*Grosvenor*), the leading Australian authority, the Full Court of the Federal Court identified the competing elements of the inquiry in this way:[15]

> This question is whether the court is limited by the section to ordering an examination the purpose of which is to go no wider than to determine whether or not there are reasonable grounds, including evidence, to litigate a case to a successful judgment, or whether the court has the power to order an examination, the purpose of which is to ascertain the likelihood of any judgment being satisfied; that is, whether it is a permitted purpose to inquire

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11 *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA) at 36.

12 *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 (FCAFC) [*Grosvenor*]; *Tolric Pty Ltd v Taylor* [2015] FCA 1051; *Jagelman v Sheahan* [2002] NSWSC 419, (2002) 41 ASCR 487; *Re Bosun Pty Ltd (in liq)* [2000] SASC 180, (2000) 34 ACSR 597; and *Re Hugh J Roberts Pty Ltd (in liq)* (1970) 91 WN (NSW) 537 (SC).

13 See also the definition of "examinable affairs" in ss 9 and 53 of the Corporations Act 2011 (Cth).

14 *Grosvenor*, above n 12, at 305–307.

15 At 307.

> as to the worth of a potential defendant so as to be able to make a practical assessment as to the likelihood of a return to the company of the fruits of any favourable judgment and the necessary legal costs expended in obtaining it. Is the court empowered under the section to order an examination in the winding up receiving a tangible benefit from the satisfaction of any judgment obtained and to enable the liquidator to determine whether it is prudent to commence or maintain litigation with knowledge as to the real likelihood of obtaining any tangible benefit beyond a mere judgment, including judgment for costs at the conclusion of the litigation?

[24] In determining that the Court has such a broad power — said to be "a power of long standing"[16] — *Grosvenor* cited early English case law on the general purposes underlying the examination powers (none of which goes so far as to permit examination on a prospective defendant's judgment worthiness) as a springboard for finding that the scope of those powers is broad enough to allow a liquidator to obtain information from a defendant or potential defendant as to their judgment worthiness.[17] The Full Court was satisfied the approach of the old English cases was no different from the Australian decision, which emphasised the breadth of authority given by statute to liquidators.[18] While recognising that in principle the exercise of the discretion might go either way, the Full Court concluded disclosure should be ordered in that case.[19]

[25] Since *Grosvenor* Australian courts have accepted they have jurisdiction to order examination and production of information relevant to judgment worthiness and they have usually exercised the discretion in favour of liquidators. The courts have allowed liquidators to seek personal tax returns, copies of personal bank statements, and statements of assets and liabilities.[20] In at least one case, however, it has been acknowledged that a liquidator's request for information about a defendant's judgment worthiness can be drafted so widely as to be oppressive.[21]

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16 At 307.

17 At 308–309 citing *Massey v Allen* (1878) 9 Ch D 164 at 168 and *Re Greys Brewery Co* (1883) 25 Ch D 400 at 403–404.

18 At 309 citing *Re Hugh J Roberts Pty Ltd (in liq)*, above n 12, at 540.

19 At 312.

20 See for example *Morton v Joynson* [1999] FCA 530, (1999) 31 ACSR 76; *Re McEachern* [2014] FCA 1364; and *Tolric Pty Ltd v Taylor*, above n 12.

21 *Re Bernsteen Pty Ltd (in liq) (No 2)* [2005] FCA 48, (2007) 25 ACLC 129 at [27].

English case law

[26] The New Zealand provisions were originally derived from United Kingdom legislation: ss 177 and 178 of the Companies Act 1882 were in materially identical terms to ss 115 and 117 of the Companies Act 1862 (UK). English decisions on their equivalent legislation feature regularly as persuasive authority in the relevant New Zealand case law. As was the case in New Zealand, powers of examination by the courts came long before examination by liquidator.[22]

[27] Section 236 of the Insolvency Act 1986 (UK), which currently regulates both personal and company insolvency, contains provisions essentially similar to ss 261 and 266 under New Zealand's statutory regime. Sir George Jessel MR commented on the purpose and benefit of these provisions in *Re Gold Co*.[23] The case involved s 115 of the Companies Act 1862 (UK) which made reference to obtaining information from specified persons including former company officers "deem[ed] capable of giving information concerning the trade dealings, estate, or effects of the company".[24]

[28] The Master of the Rolls observed that:[25]

> … the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees who are now called trustees, in bankruptcy to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed.

[29] The same sentiments were expressed almost a century later by Buckley LJ in *Re Rolls Razor Ltd*:[26]

> The powers conferred by s 268 [of the Companies Act 1948 (UK)] are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible and with as much expedition as possible, to complete his function as

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22 See [13]–[18] of this judgment.
23 *Re Gold Co* (1879) 12 Ch D 77 (CA).
24 At 85 per Baggallay LJ.
25 At 85 per Jessell MR.
26 *Re Rolls Razor Ltd* [1968] 3 All ER 698 (Ch) at 700.

> liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation.
>
> It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company or some other person who is, in some way, concerned with the company's affairs to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim.

[30] These authoritative statements of English law have been cited in New Zealand cases with approval.[27]

[31] Unlike the Australian courts, however, the English courts have not extended the interpretation of the relevant statutory provisions to permit examination of a prospective defendant on his or her ability to meet a money judgment. The furthest matters against a prospective defendant have been taken was to permit examination of a prospective defendant on facts relevant to proof of the prospective case against him or her.[28] This was allowed on the basis that the liquidators were strangers to the company's affairs, and so they may not know of information relevant to proof of the company's claim.[29]

[32] For a time, English practice was that examination of a former director or other persons with the necessary connection to the insolvent company could not take place while litigation against the examinee was live, although examination before and after the completion of such litigation was available.[30] Those restrictions were subsequently substituted with another test which restricted the scope of the information to be obtained from an examinee to knowledge the company would have held during its lifetime.[31] However, this test was later abandoned as a result of the House of Lords decision in *Re British and Commonwealth Holdings Plc (Nos 1 and 2)* that the test was not as restrictive as was once thought.[32]

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27 *Re The Coachman Tavern (1985) Ltd (in liq)* (1990) 5 NZCLC 66,320 (HC); and *Re Northrop*, above n 9.
28 *Re British*, above n 10.
29 At 438–439.
30 *Re Castle New Homes Ltd* [1979] 1 WLR 1075 (Ch).
31 *Cloverbay*, above n 10.
32 *Re British*, above n 10, at 439.

[33] Since then, despite recognising the scope of the statutory power, the English courts remain reluctant to compel the disclosure of information which is solely related to proof of claims the liquidators are bringing against the examinee.[33] The English approach to s 236 of the Insolvency Act treats the statutory power as a broad and unfettered discretion and then regulates its use through the application of judge-made principles. Each case is considered on its own facts with the court conducting a balancing exercise between the interests of the liquidator in obtaining information and the interests of the examinee.

[34] That can be contrasted with the Australian approach. In *Re JN Taylor Finance Pty Ltd* Evans-Lombe J described the divergence between Australian and English practice to be:[34]

> … best illustrated by the fact that there is no reported Australian case where an order for examination under s 596B [of the Corporations Act] has been refused on the grounds the individual or corporation to be examined is currently being proceeded against by the office holder in respect of a claim forming part of the subject matter which it is the intention of the proposed examination to inquire into. By contrast with the possible exception of the decision of Hoffmann J in *Re JT Rhodes Ltd* [1987] BCLC 77, a case arising from unusual facts, there is no reported case in the English courts where an examination has been allowed to proceed after the liquidator has commenced such proceedings against a proposed examinee.

[35] The underlying tensions between advancing the interests of liquidators in gathering relevant information, and protecting examinees from unfair, vexatious and oppressive examination have been well recognised. Chitty J referred to the English examination provision as the "Star Chamber" clause,[35] apparently alluding to its potential for abuse by liquidators and injustice toward examinees. In *Laing v KPMG Peat Marwick*, after reviewing relevant English cases, Greig J said the following of s 266's equivalent under the 1955 Act:[36]

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33 At 439. See also *Re JN Taylor Finance Pty Ltd* [1999] 2 BCLC 256 (Ch) at 272–273; *England v Smith* [2001] Ch 419 (CA) at [14]–[15]; and Andrew R Keay *McPherson's Law of Company Liquidation* (3rd ed, Sweet & Maxwell, London, 2013) at [15–052].

34 *Re JN Taylor Finance Pty Ltd*, above n 33, at 271.

35 *Re Greys Brewery Co*, above n 17, at 408.

36 *Laing v KPMG Peat Marwick*, above n 10, at 65,182 citing *Re North Australian Territory Co* (1890) 45 Ch D 87 (CA) at 93, *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 591, and *Re Harland Developments Ltd (in liq)* (1986) 3 NZCLC 99,540 (HC). See also *Grosvenor*, above n 12, at 306.

> This has been said on many occasions to be an extraordinary section given [sic] extraordinary power of an inquisitorial nature which enables a liquidator, as a stranger to the affairs of a company, to enquire into and obtain the information he may need to carry out his duties on behalf of the general body of creditors and contributories. Because of the very wide scope of the powers exercisable under the section the Courts have been concerned to ensure that they are not used oppressively, vexatiously or unfairly. As an aspect of this latter concern the Courts are watchful that the liquidator does not use these powers to obtain any unfair or improper advantage in the course of or for the purpose of litigation.

[36] However, such tensions have not led to the same level of restraint in Australia as there has been in England and in New Zealand. In Australia the gathering of private financial information from an examinee in order to assess judgment worthiness is now unremarkable and commonplace.[37]

Analysis

[37] Mr Crossland submits that we should interpret ss 261 and 266 by adopting the reasoning in the Australian cases. We reject his argument for a number of reasons.

(a) Statutory interpretation

[38] First, as a matter of statutory interpretation, in terms of the scheme and purpose of pt 16 of the Companies Act, we consider the phrase "any matter relating to the … affairs of the company" is limited to information about the company's management, accounts, and the handling of its business affairs including its assets and liabilities. This would include information regarding the mismanagement or mishandling of the company's affairs. Section 261(2) identifies six classes of persons who might have that information, all of whom were associated with the company's activities before liquidation and may be expected to have relevant knowledge of its activities.

[39] Nowhere in either s 266 or s 261 is there specific mention of a power to examine on or otherwise obtain private financial information from a prospective defendant who falls within the category of persons nominated in s 261(2). If such power exists it is to be found in the generally-worded requirements for gathering

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[37] See [22] of this judgment.

information on "any matter relating to the … affairs of the company". In setting out these express words Parliament must have intended to limit jurisdictional boundaries as to what can constitute the affairs of the company.

[40] It is trite that a company is a legal entity in its own right separate from its directors, shareholders and employees.[38] There is no logical necessity why the private financial affairs of the latter should be assumed to relate to the affairs of the former. Rather, an individual's personal wealth and assets are generally seen to be the affairs of that person. Moreover, the long title to the Companies Act includes as its purposes "to define the relationships between companies and their directors, shareholders, and creditors" and "to provide straightforward and fair procedures for realising and distributing the assets of insolvent companies". We would therefore expect a clear indication from the legislature in order for "books, records, or documents relating to the business, accounts, or affairs of the company" to be understood to permit liquidators to gather private financial information from prospective defendants whose books, records and documents would ordinarily remain wholly distinct from the affairs of the company.

[41] We are not satisfied that information about a former director's financial position can be construed as "any matter relating to" the company's "affairs". While information about a director's acts or omissions when acting in his or her former office falls into that category, information about his or her judgment worthiness does not. The plain purpose of the examination powers is to enable the liquidator to determine whether there is a sufficient evidential basis for a claim to recover assets of the company from a third party or parties. In our judgement, express words would be required before the provisions could be read as extending to the financial worth of a defendant. Despite the desirability of uniformity with Australian law in commercial matters, we are not persuaded that the language of ss 261 and 266 can support the broad and liberal approach that has been adopted in Australia. The fact that Parliament intended for the current regime "to progress the harmonisation of [New Zealand] business and commercial law"[39] with that of Australia is of no

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38 Companies Act, s 15.

39 (23 February 1993) 533 NZPD 13361.

moment when the relevant statutory drafting predates the unique Australian approach to liquidators' powers heralded by the *Grosvenor* decision.

(b) Australian approach

[42] Secondly, we question the principled basis for the Australian decisions. The Full Court in *Grosvenor* anchored its reasoning on the earlier English authorities, in particular *Massey v Allen* and *Re Greys Brewery Co*.[40] We do not read those cases as supporting a right of cross-examination on a prospective defendant's judgment worthiness: the former involved an inquiry into the existence of an assigned right of indemnity, and the latter simply affirms that the legislature intended liquidators to have broad powers of discovery subject to the limits of justice. These cases do not at all address the jurisdictional question of whether such powers permit an inquiry into private financial information so as to ascertain judgment worthiness.

[43] Moreover, in *Grosvenor* the Full Court ordered valuers to produce professional indemnity insurance policies which would apply in the event that they were found liable on a claim for negligence. This information was of low financial sensitivity to the valuers and did not impinge unduly on their private interests. The nature and scope of the documents sought by the liquidators in this case are in a different league. While these factors would of course be relevant to the exercise of discretion, in *Grosvenor* they appeared to weigh unduly in the Court's liberal interpretation of a broad and generous jurisdiction.

(c) Privacy issues

[44] Thirdly, and aligned to the points we have just made, whatever argument might be made for parity with Australia is displaced by countervailing privacy concerns, which are perhaps given greater recognition by New Zealand law. As Mr Hucker observed, personal privacy is secured to various degrees by the Privacy Act and the protection from unreasonable search and seizure under s 21 of

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[40] *Massey v Allen*, above n 17; and *Re Greys Brewery Co*, above n 17.

the New Zealand Bill of Rights Act 1990 (NZBORA). Moreover, the law of tort has developed in recent years to protect from certain invasions of privacy.[41]

[45] Particular care is required here because the extended meaning the liquidators want us to adopt would be applicable to both ss 261 and 266, permitting liquidators in principle to examine prospective defendants about their private financial information, including at creditors' meetings. Liquidators and creditors should not be equipped with such coercive powers of investigation into the details of private financial information without any logical or necessary relationship to the affairs of the company. In Australia, since *Grosvenor*, the discretion is seemingly always exercised in favour of liquidators.[42] We cannot read the Companies Act as allowing liquidators such broad discretionary powers in contravention of the privacy interests of directors, shareholders, employees and other persons related to an insolvent company.

[46] In our judgement the gravity of an unprecedented intrusion into a director's personal financial affairs by liquidators must weigh in our jurisdictional assessment by reference to New Zealand's developing privacy jurisprudence. This is especially so where Parliament has elsewhere affirmed the reasonable expectation to privacy in the financial information requested by the liquidators,[43] and privacy values are said to underpin several of the explicit rights contained in NZBORA.[44] Accordingly, we are not persuaded that further extension of ss 261 and 266 along the lines of the Australian approach is a permissible interpretation of parliamentary intent.

(d) Jurisdiction and discretion

[47] Fourthly, we note that both Australia and England have proceeded on the basis that the relevant statutory power is broad, and subject only to the exercise of

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41 *Hosking v Runting* [2005] 1 NZLR 1 (CA); and *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

42 See [25] of this judgment.

43 See [9] of this judgment.

44 Section 21, for example, is "essentially a measure for the protection of privacy rights": *KA No 4 Trustee Ltd v Financial Markets Authority* [2012] NZCA 370, (2012) 3 NZTR ¶22-020 at [22] citing *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10]–[11] per Elias CJ and [161] and [163] per Blanchard J. See generally Stephen Penk "Thinking About Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) 1 at 20.

the discretion. Despite the legislation of both countries being essentially similar, the exercise of the discretion in each has been remarkably different. We prefer an approach which first determines whether our law authorises the examination that is sought here, and so we have approached the matter as a question of jurisdiction. We are satisfied that this approach provides greater legal and commercial certainty and is consistent with the way we read statutes in New Zealand.

Conclusion

[48] It follows we are satisfied s 266 does not authorise the obtaining of Mr Ellis' private financial information for the purpose of ascertaining whether he can meet any money judgment Wenztro may obtain against him.

[49] The liquidators' application in this case has caused our consideration of the examination powers in ss 261 and 266 to focus solely on circumstances where liquidators want to ascertain the likelihood of recovering monetary remedies against prospective defendants who come within the categories of persons identified in s 261(2). We are not required to determine — and so leave open for further consideration — the question as to whether in the context of equitable tracing the personal financial affairs of persons within s 261(2) may be examined. In this context the objective of the examination would be to follow or trace funds or assets of the company that have allegedly been unlawfully placed within the financial wealth of the prospective defendant.[45] Accordingly, such examination may be recognised to relate to the affairs of the company.

[50] Because the result of this appeal turns on the question of jurisdiction, we are satisfied that the fresh evidence of the appellants does not affect the result. The liquidators are entitled to apply under the High Court Rules 2016 for a charging order or a freezing order if they have concerns about Mr Ellis dissipating his assets.

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[45] See *Foskett v McKeown* [2001] 1 AC 102 (HL).

Discretion

[51] The decision we have made on jurisdiction means there is no need to deal with how the discretion in s 266 might be exercised. However, had we found there was jurisdiction, we are satisfied the privacy concerns we have identified would have weighed against granting the liquidators the orders they seek.

Result

[52] The application for leave to adduce new evidence is declined.

[53] The appeal is dismissed.

[54] The liquidators are ordered to pay costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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Hucker & Associates, Auckland for Respondent