**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2011-404-7665**
**[2012] NZHC 3037**

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|---|---|
| UNDER | Sections 284 and 286 of the Companies Act 1993 |
| IN THE MATTER OF | EX CED FOODS (FORMERLY CEDENCO FOODS) (IN LIQUIDATION) AND CEDENCO OHAKUNE (IN LIQUIDATION) |
| BETWEEN | ANZ NATIONAL BANK LTD<br>First Applicant |
| AND | KATE ELIZABETH DEKKER<br>Second Applicant |
| AND | JOHN SHEAHAN AND IAN RUSSELL LOCK<br>Respondents |

**CIV 2011-404-6585**

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| AND UNDER | Sections 266 and 284 of the Companies Act 1993 |
| IN THE MATTER OF | EX CED FOODS (FORMERLY CEDENCO FOODS) (IN LIQUIDATION) AND CEDENCO OHAKUNE (IN LIQUIDATION) |
| BETWEEN | JOHN SHEAHAN AND IAN RUSSELL LOCK<br>Applicants |
| AND | ANZ NATIONAL BANK LTD AND KATE ELIZABETH DEKKER<br>Respondents |

**CIV 2011-404-1623**
**CIV 2011-404-1626**
**CIV 2011-404-1619**

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| AND UNDER | the Insolvency (Cross Border) Act 2006 |
| IN THE MATTER OF | THE LIQUIDATIONS OF SS FARMS AUSTRALIA PTY LTD, CEDENCO JV AUSTRALIA PTY LTD AND SK FOODS AUSTRALIA PTY LTD |
| BETWEEN | JOHN SHEAHAN AND IAN RUSSELL LOCK<br>Applicants |
| AND | ANZ NATIONAL BANK LTD AND KATE ELIZABETH DEKKER<br>Respondents |

Hearing: 9 and 10 August 2012

Counsel: D Chisholm and K R Phelan for Messrs Sheahan and Lock
M J Tingey and D J Friar for ANZ National Bank Ltd and Ms Dekker

Judgment: 15 November 2012

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**JUDGMENT OF HEATH J**

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*This judgment was delivered by me on 15 November 2012 at 3.00pm pursuant to Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

Solicitors:
LeeSalmonLong, PO Box 2026, Shortland Street, Auckland
Bell Gully, PO Box 4199, Auckland

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## Introduction

[1] Ex Ced Foods (formerly Cedenco Foods) and Cedenco Ohakune are both unlimited New Zealand companies, presently in liquidation. The liquidators are two Australian insolvency practitioners, Messrs Sheahan and Lock. They are based in Adelaide. Each company was put into liquidation by special resolution of the companies' shareholders on 6 May 2010. At that time, both were in receivership.

[2] Cedenco JV Australia Pty Ltd, SK Foods Australia Pty Ltd and SS Farms Australia Pty Ltd are Australian companies, of which Mr Sheahan and Mr Lock are also liquidators. Those companies were put into liquidation by resolution of creditors who attended a meeting convened on 11 August 2010, under the Australian

voluntary administration legislation.[1] At the time of that meeting, both companies were in receivership.

[3] On 20 May 2011, this Court recognised the three Australian liquidations as "foreign main proceedings".[2] On 17 June 2011, orders were made by the Federal Court of Australia recognising the two New Zealand liquidations as "foreign main proceedings" in Australia.[3] Both applications were made on a without notice basis.

[4] Unfortunately, the evidence suggests an occasional tendency, on the part of the liquidators and their advisers, to conflate their discrete roles as liquidators of the Australian and New Zealand companies, respectively. As will become apparent, it is important to differentiate between the capacities in which Messrs Lock and Sheahan acted at particular times. To avoid any confusion, I refer to them as the New Zealand liquidators and the Australian liquidators, respectively.

[5] The applications with which I am dealing are brought, respectively, by Messrs Sheahan and Lock (as liquidators of the New Zealand and Australian companies), ANZ National Bank Ltd (ANZ NZ) (the New Zealand companies' banker) and a bank officer employed by ANZ NZ, Ms Dekker. They are:

(a) An application by the New Zealand liquidators[4] to compel ANZ NZ and Ms Dekker to provide specified documents and to attend an examination before them at which all questions relating to the business, accounts or affairs of the New Zealand companies must be answered. In the alternative, orders are sought requiring the scheduled documents[5] to be delivered to the New Zealand liquidators and for Ms Dekker to attend before the Court for examination. Directions are also sought from the Court as to the costs to which

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1 Corporations Act 2000, ss 439C(c) and 446A (Cth). Previously, on 6 May 2012, Messrs Sheahan and Lock had been appointed as administrators of the three Australian companies.

2 *Re Sheahan and Lock* HC Auckland CIV-2011-404-1623, 20 May 2011 (Courtney J). This order was made under the Insolvency (Cross-border) Act 2006, which is based on the UNCITRAL Model Law on Cross-Border Insolvency. For a discussion of the recognition process generally, see *Williams v Simpson* [2011] 2 NZLR 380 (HC) at paras [21]–[34].

3 *Sheahan v Ex Ced Foods* [2011] FCA 692 (Besanko J). The order was made under the Cross-Border Insolvency Act 2008 (Cth). The Australian legislation is also based on the Model Law.

4 CIV-2011-404-6585.

5 See para [21] below.

ANZ NZ and Ms Dekker are entitled in complying with obligations imposed under either s 261 or s 266 of the Companies Act 1993 (the 1993 Act).

(b) An application by the Australian liquidators[6] for an order that Ms Dekker be required to attend for examination and produce documents on matters relating to the Australian companies. This application is made under the Insolvency (Cross-border) Act 2006 (the Cross-border Act). They also seek a declaration as to their entitlement to use a transcript of an earlier examination of Ms Dekker that was held before the New Zealand liquidators, under s 261(3)(c) of the 1993 Act.

(c) An application by ANZ NZ[7] for a declaration that the New Zealand liquidators are prohibited from using any documents or information obtained in the Cedenco NZ liquidations (including the transcript of Ms Dekker's examination before them) for any purpose foreign to those liquidations.[8] It also seeks orders requiring the New Zealand liquidators to pay to ANZ NZ and Ms Dekker reasonable remuneration and expenses (including legal fees, calculated on an indemnity basis) in respect of their compliance with obligations under s 261 of the 1993 Act.

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6 CIV-2011-404-1623.

7 CIV-2011-404-7665. ANZ NZ's application extends to seeking a direction on whether, in light of the fees and expenses actually charged by the New Zealand liquidators, they are entitled to rely on the indemnity to pay costs and expenses out of the liquidation fund.

8 ANZ NZ and Ms Dekker complain that the New Zealand liquidators allowed a transcript of Ms Dekker's evidence at an examination held before them, under s 261(3)(c) of the 1993 Act, to be used by them, in their capacity as Australian liquidators, by annexing it as an exhibit to an affidavit sworn by Mr Sheahan on 20 September 2011, in opposition to an application by ANZ Australia, in the Federal Court of Australia, South Australia District Registry (SAD 123 of 2011). By that application, ANZ Australia was seeking "to discharge orders for production" made on 23 June 2011. The transcript was not signed and verified by Ms Dekker until 4 October 2011: see paras [22] and [25] below.

**Background**

[6] The Australian and New Zealand companies were part of (what has been called) the Cedenco group of companies.[9] Although there are two in liquidation in New Zealand and three in Australia, the parties are agreed that, for the purposes of the present applications, no material difference in treatment arises as between the two New Zealand companies (on the one hand) and the Australian companies (on the other). For that reason, unless the context requires otherwise, I shall refer generically to the New Zealand companies as Cedenco NZ and to the Australian entities as Cedenco Australia.

[7] The Cedenco NZ companies are owned by SK Foods International Ltd. That too is a New Zealand company. There is a dispute as to ownership of shares in SK Foods International. The competing claimants are a group of companies in the United States, beneficially owned by a Mr Salyer, and the Bank of Montreal.

[8] Cedenco JV Australia is owned by SK Foods Australia. SK Foods Australia and SS Farms Australia are owned by entities in the United States. There is a dispute about ownership of the shares in those companies. The competing claimants are SK Foods LP[10] and entities associated with Mr Salyer.

[9] Cedenco NZ and Cedenco Australia carried on business as food processors and distributors. The work was seasonal in nature. The companies produced fruit and vegetable powders, purées, pastes and the like. The nature of the banking facilities extended to each of the companies reflected that. The major sources of finance were ANZ NZ and ANZ Banking Group Ltd (ANZ Australia) respectively. To secure the amounts owing by Cedenco NZ to the banks, ANZ NZ took a debenture over the assets of Cedenco Foods on 24 February 2000 and a general security agreement over the undertaking of Cedenco Ohakune, on 1 November 2005.

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9 While it is convenient to refer to a "group", the companies are really no more than associated entities. There is no common shareholding that gives rise to a holding/subsidiary company relationship.

10 A limited partnership in the United States, currently subject to Chapter 11 of the US Bankruptcy Code.

[10] By 2008, it became clear that the Cedenco NZ companies were facing financial difficulties. Korda Mentha, a firm of chartered accountants in New Zealand, were appointed by Cedenco NZ as investigating accountants for that company, at the urgings of ANZ NZ. At this time, the person with carriage of the ANZ NZ's relationship with Cedenco NZ was Ms Dekker. While she is based in New Zealand, Ms Dekker was also "relationship manager" for ANZ Australia, in respect of the Cedenco Australia companies.

[11] During 2009, ANZ NZ required Cedenco NZ to arrange for Cedenco Australia to cross-guarantee their indebtedness. It is clear that, if Cedenco Australia had declined to do so, ANZ NZ would have withdrawn its financial accommodation to Cedenco NZ and called up an indisputable debt then owing. On 31 July 2009, a comprehensive Deed of Cross Guarantee was granted in favour of both ANZ NZ and ANZ Australia. Under this deed, the Cedenco NZ and Cedenco Australia companies jointly and severally guaranteed each other's obligations to the two ANZ entities.

[12] Less than three months later, on 19 October 2009, ANZ NZ gave notice to Cedenco NZ of an event of default under the loan and security documents relating to the Cedenco NZ companies. ANZ NZ alleged that the EBIT[11] forecast covenant had been breached. That was not disputed.

[13] Soon afterwards, each of the banks made demands for payment of the full amounts owing by the New Zealand and Australian companies. On 30 October 2009, ANZ NZ's New Zealand solicitors, Bell Gully, demanded payment of the Cedenco NZ's indebtedness (approximately $48 million), by 2 November 2009. On 4 November 2009, Blake Dawson, solicitors Melbourne, made demand on behalf of for ANZ Australia against Cedenco Australia, for both the Australia debt and that of Cedenco NZ that Cedenco Australia had guaranteed. The amounts claimed were something in the order of $AUD21 million and $NZ21 million, respectively. Payment was demanded by 5 pm on 4 November 2009.

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[11] Earnings before interest and tax.

[14] Neither Cedenco NZ nor Cedenco Australia could comply with the demands. On 9 November 2009, ANZ NZ appointed receivers over Cedenco NZ. ANZ Australia did likewise, in respect of Cedenco Australia.

[15] On 23 June 2010, the Australian receivers sold the business and assets of Cedenco Australia to a Japanese company, Kargomi Ltd, for approximately $AUD93 million. Following payment of all its creditors, Cedenco Australia was left with a significant surplus.

[16] Around the same time, the business and assets of the New Zealand companies were sold by the New Zealand receivers to another Japanese company, Imanaka Ltd, for approximately $NZ29.5 million. It was unclear, at that time, whether that would be sufficient to meet Cedenco NZ's indebtedness to secured and unsecured creditors. However, the most recent liquidators' report indicates that, unless any unforeseen creditors emerge, there is a surplus available for distribution to the shareholders of Cedenco NZ.[12]

[17] Although ANZ Australia has been repaid in full from the proceeds of sale of the Australian businesses, the Australian receivers have declined to resign and still hold significant funds. In New Zealand, the position is different. There was a surplus of approximately $67,000, which the receivers declined to hold. Instead, they paid that sum into the trust account of the New Zealand based solicitors for the New Zealand liquidators, pending resolution of any disputes between the liquidators and ANZ NZ as to entitlement to it. The New Zealand receivers have since resigned.

**Examination and production of documents**

*(a) The applications*

[18] Ms Dekker was examined by the New Zealand liquidators on 11 July 2011. The New Zealand liquidators contend that she failed to produce all documents to

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[12] Filed under s 255 of the Companies Act 1993, and dated 14 August 2012. This was produced after the hearing concluded on 10 August 2012, following a direction to that effect.

which they were entitled and did not fully answer questions put to her that fell, they say, within the scope of s 261(3)(c) of the 1993 Act.

[19] As indicated earlier,[13] the New Zealand liquidators seek orders requiring ANZ NZ to deliver documents to them and compelling Ms Dekker to attend for a second examination to provide information they say was improperly withheld. There are cross applications by the New Zealand liquidators and ANZ NZ/Ms Dekker in relation to the costs of compliance with demands to deliver documents and attend examinations that have been (or will be) incurred by either of them.[14]

[20] The New Zealand liquidators seek alternative orders under s 266(1) and (2). The application states:

> (a) Under s 266(1) of the Companies Act 1993 (Act), that:
>
> (i) [ANZ NZ and Ms Dekker] comply with the notices issued under s 261(3) of the on 26 May 2011 by [the New Zealand Liquidators] by:
>
> - The [ANZ NZ] delivering to the Liquidators the documents set out in the schedule to this application;
> - [Ms Dekker] attending upon the Liquidators and being examined on oath and answer questions and providing information about the business, accounts, or affairs of the company;
> - [Ms Dekker] in that examination answering all enquiries fully where they have been made by the Liquidators acting reasonably and for the purposes of discharging their duties and for the purposes of discharging their duties and/or the information sought is necessary to give the Liquidators the same knowledge as the directors of the companies at the date of liquidation;
>
> (b) Alternatively, under s 266(2) of the Act:
>
> (i) That the [ANZ NZ] deliver to the liquidators the documents set out in the schedule to this application (s 266(2)(b)));
>
> (ii) That [Ms Dekker] attend before the Court and be examined on oath on any matter relating to the business, accounts, or affairs of the companies;

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13 See para [5](a) above.

14 The New Zealand liquidators apply for directions under s 284(1) of the 1993 Act, while ANZ NZ and Ms Dekker seek to invoke the inherent jurisdiction of this Court.

[21] The documents to which the application refers are set out in its Schedule states:

> Documents not already provided and relating to:
>
> (a) [ANZ NZ's] reasons for promoting and/or requiring the appointment or removal of directors of the [Ex-Ced Foods and Cedenco Ohakune] during 2009 and all related actions contemplated or taken by or on behalf of [ANZ NZ];
>
> (b) The nature of any defaults or purported or anticipated defaults by [Ex-Ced Foods and Cedenco Ohakune] under their [ANZ NZ] facilities in 2009;
>
> (c) In this respect, any relationship between NZ and AU lending and any cross defaults or purported or anticipated cross defaults;
>
> (d) Full details of all notices or advice of any defaults, purported or anticipated defaults given to [Ex-Ced Foods and Cedenco Ohakune] in 2009;
>
> (e) The content and timing of any proposals or discussions about remedying defaults or purported or anticipated defaults under the [Ex-Ced Foods and Cedenco Ohakune] [ANZ NZ] facilities, or to repay, refinance or vary those facilities in 2009, including any information as to [ANZ NZ's] consideration of the Imanaka proposal in October/November 2009;
>
> (f) Full details of [ANZ NZ's] consideration of any such matters and its reasons for rejecting or failing to act on or respond to any proposals;
>
> (g) [ANZ NZ's] decision to appoint receivers to [Ex-Ced Foods and Cedenco Ohakune] and the reasons for that decision, including any advice given or considerations suggested to [ANZ NZ] by the receivers relating to any of the matters referred to above whether prior to or after appointment;
>
> (h) The scope, nature, timing and contents of discussions and correspondence with the directors of [Ex-Ced Foods and Cedenco Ohakune] (or their agents or representatives) and the [ANZ NZ] (or its agents or representatives) in any way relating to the matters in (a) to (g) above; and
>
> (i) The scope, nature, timing and contents of discussions and correspondence with the agents or representatives of the owners of [Ex-Ced Foods and Cedenco Ohakune] and the [ANZ NZ] (or its agents or representatives) in any way relating to the matters in (a) to (g) above.

*(b) Ms Dekker's July 2011 examination*

[22] Ms Dekker's examination by the New Zealand liquidators on 11 July 2011 was convened under s 261(3)(c) of the 1993 Act.[15] Questions were put to her by a South Australian Silk, instructed by the New Zealand liquidators, who is admitted to practise in New Zealand. A transcript of the examination was made. The transcript was not signed and verified by Ms Dekker until 4 October 2011.

[23] In attendance at the examination were Mr Sheahan, his Australian solicitor, Ms Yorston, his New Zealand solicitor, Mr Long, and Mr Whittington QC. Mr Tingey and Mr Friar attended as counsel for Ms Dekker.

[24] During the course of the examination, it became clear that, while Ms Dekker would answer questions relating to the businesses of Cedenco NZ, she would not (on legal advice) provide documents or information in relation to the internal workings of the banks; for example, the banks' reasons for decisions involving the cross-guarantees and enforcement of the security documents.[16] Having taken that position, Ms Dekker was not pressed to provide the information. At the conclusion of the examination, counsel for Ms Dekker sought copies of the transcript and the documents produced. Mr Tingey expressly stated that Ms Dekker wanted to provide a copy of the transcript to her employer, ANZ NZ.

[25] On 30 August 2011, the New Zealand solicitors for the New Zealand liquidators wrote to the solicitors for ANZ NZ stating their view "that Ms Dekker [had] no right to a copy of the transcript" notwithstanding arguments that had been advanced based on the New Zealand Bill of Rights Act 1990 and the principles of natural justice.[17] Nevertheless, the solicitors indicated that "a copy of the electronic recording and written transcript, and the bundle of documents, can be provided if Ms Dekker agrees that she will sign and return a copy of the written transcript once satisfied it is an accurate record". Following confirmation that she would do so, the

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15 Set out at para [32] below.

16 This is the category into which most of the documents listed in the Schedule to the application fall: see para [21] above.

17 In the letter, reference was made to a "well-settled" principle that liquidators' examinations are private, citing *Re Hardy (A Bankrupt) ex parte Official Assignee* [1922] NZLR 108 (SC) and *Re Greys Brewery Co* (1883) 25 ChD 400.

documents and the electronic recording were provided to the solicitors for Ms Dekker and ANZ NZ, on 5 September 2011. Ms Dekker perused and corrected the transcript. It was signed and returned to the New Zealand liquidators on 4 October 2011.

*(c) Competing submissions*

[26] Mr Tingey, for ANZ NZ, submits that the New Zealand liquidators are acting for an improper purpose in seeking to examine Ms Dekker for a second time.[18] He contends that the New Zealand liquidators have not laid a foundation to demonstrate that the proposed examination is a "genuine investigative step" in the New Zealand liquidations, as opposed to being "part of an extensive fishing expedition",[19] for the benefit of Cedenco Australia. Mr Tingey points out that the furthest that Mr Sheahan goes is to say that the New Zealand liquidators are investigating "the circumstances, reasons, and ultimate propriety of [the 2009 cross guarantees] and ... the consequential appointment of receivers in both" Australia and New Zealand. He also queries whether it is appropriate to order an examination in circumstances where it is almost certain that all creditors of Cedenco NZ will be paid in full from existing realised assets.[20]

[27] Mr Tingey submits that Mr Sheahan's evidence demonstrates an intention (on the part of the New Zealand liquidators) to use the New Zealand examination process for the purpose of assisting the Australian liquidators to determine whether to issue proceedings in Australia. He submits that, because ANZ NZ was entitled to call up the debt owing by Cedenco NZ on the basis of a default in compliance with the EBIT condition of the existing facility agreement, execution of the 2009 cross guarantees has no relevance to the liquidation of Cedenco NZ.

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18 Reliance is placed on *Re Hartley and Riley Consolidated Gold-Dredging Co Ltd* [1931] NZLR 977 (SC) at 983, *Re Northrop Instruments and Systems Ltd* [1992] 2 NZLR 361 (HC) and *Petterson v Gothard (No 3)* [2012] NZHC 666, at para [61].

19 *Re Northrop Instruments and Systems Ltd* [1992] 2 NZLR 361 (HC) at 364, *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008 at para [30] and *Petterson v Gothard (No 3)* [2012] NZHC 666, at para [63].

20 See para [16] above.

[28] Mr Tingey points to the use of the transcript of Ms Dekker's first examination in the Australian Court proceedings, for the purposes of Cedenco Australia, to underscore his submission that the New Zealand liquidators are acting for an improper purpose.[21] This, he submits, is an intended use of information gathered by the New Zealand liquidators for "purposes collateral to the [New Zealand] liquidation".[22]

[29] Mr Chisholm, for the New Zealand liquidators, submits that there is no reason why the New Zealand liquidators should not examine, notwithstanding the likely surplus. Further, he contends that the statutory examination process is not limited to obtaining information that merely reconstitutes the knowledge of the company in liquidation. Mr Chisholm submits that the only appellate decision that has purported to confine the examination process to reconstituted knowledge, *Cloverbay Ltd v Bank of Credit and Commerce International SA*,[23] was subsequently discredited by the House of Lords[24] and, in this country, has been held to be only part of the range of information that a liquidator may seek.[25]

[30] Mr Chisholm acknowledges that the New Zealand liquidators are investigating whether claims may exist against parties, including ANZ NZ. He accepts that may be a factor that is determinative of an application to examine, in some cases, but asserts that in the present case, it is not.

[31] Mr Chisholm disputes the proposition that a solvent company in liquidation ought to be required to undertake litigation in the usual way, without an ability to examine a potential witness or opponent, because, he submits, it is the status of the entity, as a company in liquidation, that gives rise to the power; not its state of insolvency at any particular time.

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21 See para [5](b) and (c) above and fn 8.
22 *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385 at 391 (ChD) (Millett J).
23 *Cloverbay Ltd v Bank of Credit and Commerce International SA* [1991] 1 All ER 894 (CA).
24 *British and Commonwealth Holdings Plc v Spicer and Oppenheim* [1993] AC 426 (HL).
25 *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008.

*(d) Analysis*

*(i) The statutory scheme*

[32] Powers to require delivery (or production) of documents and the attendance of a person for examination are conferred discretely on liquidators and the Court. A liquidator's power to require a person to deliver documents and to attend for examination is set out in s 261 of the 1993 Act. On the other hand, the Court's powers spring from s 266. Relevantly, those provisions state:

> **261 Power to obtain documents and information**
>
> (1) A liquidator may, from time to time, by notice in writing, require a director or shareholder of the company or any other person *to deliver to the liquidator such books, records, or documents of the company* in that person's possession or under that person's control as the liquidator requires.
>
> (2) A liquidator may, from time to time, by notice in writing require—
>
> ...
>
> (e) A receiver, accountant, auditor, *bank officer*, or other person having knowledge of the affairs of the company; or
>
> (3) A person referred to in subsection (2) of this section 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) Assist in the liquidation to the best of the person's ability.
>
> ...
>
> **266 Powers of Court**
>
> (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 of this Act to comply with that requirement.

> (2) *The Court may*, on the application of the liquidator, *order a person to whom section 261 of this Act 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*.
>
> (3) Where a person is examined under subsection (2)(a) of this section,—
>
> > (a) The examination must be recorded in writing; and
> >
> > (b) The person examined must sign the record.
>
> ....
>
> (emphasis added)

[33] The power to require the provision (to use a neutral word) of documents is expressed differently, depending upon whether it is exercised by the liquidator or the Court. A liquidator may only require delivery of documents "of the company",[26] while the Court may order production of documents "relating to the business, accounts, or affairs of the company".[27] This distinction was noted in *Official Assignee v Grant Thornton*.[28] Associate Judge Abbott said:

> [19] ... If Parliament had intended liquidators to be able to exercise the same power by notice under s 261(3)(b), the wording of that subsection could be expected to mirror that in s 266(2)(b). Further, s 266(2)(b) would then be unnecessary, as a liquidator could apply for compliance under s 266(1).

[34] Under s 261, a liquidator may require one or more members of specified classes of persons[29] to be examined on oath on any matter relating to the business, accounts, or affairs of the company in liquidation.[30] Bank officers are a class of persons who may be summoned for examination.[31] The examination process is commenced by service of a notice in writing on a specified person to attend on the

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26 Ibid, ss 261(1) and (3)(b).
27 Ibid, s 266(2)(b).
28 *Official Assignee v Grant Thornton* [2012] NZHC 2145 at para [19].
29 Companies Act 1993, s 261(2).
30 Ibid, s 261(3)(c).
31 Ibid, s 261(2)(e).

liquidator, or a barrister or solicitor acting on his or her behalf, to be examined "on any matter relating to the business, accounts, or affairs of the company".[32] Further rules apply to the tendering of reasonable travelling and other expenses in connection with an examination and a proposed examinee's ability to apply to the Court to receive reasonable remuneration for his or her attendances.[33]

[35] Section 266 is the means by which the High Court may order that a qualifying person be examined. Two distinct bases exist to make such an order. First, the Court may order a person who has failed to comply with a requirement of a liquidator under s 261, to comply with it. On that basis, the Court could require Ms Dekker to be examined further by the liquidators,[34] on any matters on which she withheld evidence at the first examination, if a relevant default were proved.[35]

[36] Alternatively, the Court, without proof of failure to comply with an earlier requirement of a liquidator, may order that a qualifying person attend before the Court, to be examined "on any matter relating to the business, accounts or affairs of the company" and to "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".[36] While an examination before the Court must be recorded in writing and signed by the examinee,[37] the 1993 Act is silent on that point when the examination is before a liquidator.

*(ii) Production of documents – s 266(1)*

[37] I deal first with the application under s 266(1) for provision of documents requested pursuant to the s 261(1) notice. The documents to which the Schedule to the application refers[38] are internal documents of ANZ NZ which, while "relating to"[39] the affairs of Cedenco NZ, are not documents "of"[40] Cedenco NZ. That being

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32 Ibid, s 261(2) and (3)(c).
33 Ibid, s 261(4), (5) and (6). These are discussed at paras [69]–[82] below.
34 Ibid, s 261(3)(c).
35 Ibid, s 266(1).
36 Ibid, s 266(2).
37 Ibid, s 266(3).
38 See para [21] above.
39 Companies Act 1993, s 266(2)(b).
40 Ibid, s 261(1).

so, it was never open to the New Zealand liquidators to compel, by s 261(1) notice, delivery of such documents to them. No relevant default has been proved to trigger the s 266(1) jurisdiction to require documents to be produced to the New Zealand liquidators. That being so, the issue must be determined by reference to the Court's powers under s 266(2)(b).[41]

[38] I emphasise that "delivery" of documents "of the company" under s 261(1) is different conceptually from the "production" of documents by a third party, to which s 266(2)(b) refers. Documents[42] of a company are *delivered* to a liquidator because they belong to the company and should be in his or her custody. Documents that are generated by third parties must be *produced* because a liquidator has no right to retain them. There is no doubt that once such documents are produced to a liquidator, he or she has the ability to copy them for use in the administration of the liquidation.

*(iii) Examination – s 266(1)*

[39] The next question is whether there was any failure, by Ms Dekker, to provide relevant evidence at the 11 July 2011 examination. The issue is whether, by refusing to provide oral evidence about (for example) reasons for requiring cross-guarantees she failed to comply with the s 261(3)(c) examination requirements.

[40] The case for the New Zealand liquidators is that Ms Dekker's refusal to supply information or documents from ANZ NZ's internal records that relate to Cedenco NZ is a relevant failure. As indicated previously,[43] there is no qualifying failure to comply in respect of the provision of documents, as ANZ NZ's internal records do not fall either within the scope of s 261(1) or (3)(b). But, Ms Dekker also declined to provide the liquidator with information about the way in which ANZ NZ made its decisions. The question is whether, by declining to answer such questions,

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41 See para [68] below.

42 The term "document" is defined by s 2(1) of the 1993 Act to mean "a document in any form"; including: (a) Any writing on any material; and (b) Information recorded or stored by means of a tape-recorder, computer, or other device; and material subsequently derived from information so recorded or stored; and (c) A book, graph, or drawing; and (d) A photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced:

43 See paras [37] and [38] above.

Ms Dekker failed to comply with the liquidator's requirement to do so, under s 261(3)(b).

[41] Section 261(3)(b) places an obligation on an examinee to answer questions "on any matter relating to the business, accounts, or affairs of the company". The same formulation is found in the Court's power to order an examination in cases where no prior default can be proved.[44] Therefore, if Ms Dekker did not provide evidence falling within the scope of that requirement, the Court would have jurisdiction to order a further examination before the New Zealand liquidators to compel compliance.

[42] I prefer to assume jurisdiction to make an order for a further examination under s 266(1) but to deal with the application on discretionary grounds, by reference to s 266(2)(a). I do that because, if a further examination were ordered, problems are likely to arise about the proper scope of the liquidators' inquiries of the witness and whether information sought from the examinee falls within s 261(3)(c). In those circumstances, if an examination order were appropriate, I would make it on terms requiring it to be conducted before an Associate Judge who would have the ability to compel answers to be given to questions falling within the scope of the order and to direct that the examinee not answer questions falling outside of it.

*(iv) Examination – s 266(2)(a)*

[43] The broad powers of examination of third parties in New Zealand have been inherited from English legislation, going back as far as s 115 of the Companies Act 1862 (UK). That provision enabled the Court to summon an officer or other person supposed to be capable of giving information concerning a transaction and trade dealings of a company. It was not until much later that the power to require a person to be examined on oath could be exercised administratively by a liquidator.

[44] Until enactment of the 1993 Act, a distinction was drawn between private and public examinations.[45] Before s 19 of the Companies Amendments Act 1980 (the

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44 Companies Act 1993, s 266(2)(a).

45 For example, Companies Act 1955, ss 262 and 263.

1980 Amendment) came into force, no private examination could be held without a Court order. Even then, the ability to apply was limited to those liquidators who had been appointed by the Court. The 1980 Amendment saw Parliament grant a power to the Official Assignee, when acting as provisional liquidator, liquidator or in his or her supervisory capacity,[46] to summon persons to whom the private examination procedures applied for examination without Court approval.[47] A liquidator from the private sector did not come within the purview of this new provision. Nor was any power to examine conferred on a liquidator appointed in a voluntary liquidation.

[45] Public examination was reserved for cases in which, for varying reasons of seriousness, it was desirable to have a person associated with the company provide evidence on oath, in public and before the Court.[48] The power to examine publicly has since been repealed. The provisions of the 1993 Act that authorise examinations are more nearly analogous to the private examination processes under earlier statutes.

[46] In determining whether it is appropriate for the liquidators to examine Ms Dekker for a second time, under either s 266(1) or (2), it is first necessary to consider whether jurisdiction exists in the circumstances of this case; in particular, where it is almost certain that all creditors of Cedenco NZ will be paid in full from existing realised assets. I begin my analysis by reference to what the 1993 Act calls the "principal duty of a liquidator". Section 253 provides:[49]

> **253 Principal duty of liquidator**
>
> ..., the principal duty of a liquidator of a company is—
>
> (a) To take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and

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46 Ibid, s 232. That section deals with the circumstances in which it was necessary for an Official Assignee to report to the Court after a winding up order had been made.

47 Ibid, s 262A(1). The powers conferred by that section could be limited by the Court on a subsequent application of another person, usually the proposed examinee. Compare with s 262 of the 1955 Act, discussed further at paras [147]–[150] below

48 Ibid, s 263. There is a useful discussion of the nature and purposes of the public examination procedure in *Hamilton v Oades* (1989) 166 CLR 486 (HCA), in the context of s 541(3) of the Companies (New South Wales) Code. The purposes of the public examination procedure was discussed by Mason CJ at 498.

49 Section 253 is subject to s 254, but the latter provision is not relevant in this case.

> (b) If there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4) of this Act—
>
> in a reasonable and efficient manner.

[47] Section 253 differentiates between a liquidator's duty to creditors (on the one hand) and shareholders (on the other). To enable creditors to be repaid, the liquidator is required to take possession of, protect, realise, and distribute the assets or the proceeds of the realisation of the assets of the company to the creditors, in accordance with the statutory priorities set out in Schedule 7 to the 1993 Act.[50] In order to fulfil those functions, a liquidator must determine what assets exist, both tangible and intangible. To obtain information from those who are unwilling to provide it voluntarily, the liquidator may use his or her powers of examination.

[48] In an insolvent liquidation, the process of realisation will generally have been completed by the time distribution of surplus moneys or assets becomes an issue. The liquidator's obligation is to distribute any surplus to shareholders, in accordance with s 313(4) of the 1993 Act.[51]

> **313 Claims of other creditors and distribution of surplus assets**
>
> ...
>
> (4) Subject to section 311 of this Act, after paying the claims referred to in subsection (1) of this section, the liquidator must distribute the company's surplus assets—
>
> (a) In accordance with the provisions contained in the company's constitution; or
>
> (b) If the company's constitution does not contain provisions for the distribution of surplus assets or, if the company does not have a constitution, in accordance with this Act.

[49] In my view, the way in which s 253(a) and (b) is expressed does not necessarily oust the Court's *jurisdiction* to order an examination where there is a surplus, as long as the Court is satisfied, as a matter of *discretion*, that one is justified. There will be cases that might justify exercise of the liquidator's right to examine to obtain information, even though the company may be solvent and any

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50 See also Companies Act 1993, s 313.

51 Section 311, to which s 314(4) refers, deals with interest on claimed debts, up to the date of commencement of the liquidation. It is not relevant in this case.

distributions will be made to shareholders. Examples are cases in which a minority or equal shareholder has taken steps to put a company into liquidation, for example because of oppressive[52] conduct against the shareholder[53] or an inability for an equal shareholder to operate the business due to deadlock.[54] In those circumstances, the rationale for invoking the examination process is the same as that pertaining in an insolvent liquidation; namely, the need to obtain information about the company's affairs that might not be provided voluntarily by another shareholder, or a third party. On that analysis, I do not consider that the likely solvency of Cedenco NZ is something that removes the Court's jurisdiction to order an examination.

[50] That approach is also consistent with the availability of an examination process when a company takes advantage of the voluntary administration regime. A right for an administrator to examine is conferred by s 239AG, by reference to ss 261 and 266 of the Act. That power can be seen in the context of an administrator's duty to investigate the company's affairs and to consider possible courses of action;[55] a not dissimilar situation to that confronting any liquidator.

[51] In deciding whether, as a matter of discretion, to order an examination, the nature, scope and purpose of the power are relevant. The nature and purpose of the power have been discussed by many eminent company law Judges over the years. For present purposes, three examples will suffice:

(a) In 1879, in *Re Gold Co Ltd*, Sir George Jessel MR said:[56]

> . . . 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.

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52 I use the term "oppressive" in a sense that includes all other bases on which liquidation of a company based on prejudice to shareholders might be brought: see Companies Act 1993, s 174(1).

53 Companies Act 1993, s 174(2).

54 For example, *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (HC).

55 Companies Act 1993, s 239AE.

56 *In Re Gold Co Ltd* (1879) 12 ChD 77 (CA) at 85.

(b) In 1886, in *Re Imperial Continental Water Corporation*, Chitty J referred to the examination powers as having been "conferred upon the Court for the beneficial winding up of the company, for sometimes it happens that the liquidator is unable to obtain from unwilling persons the information which he requires".[57]

(c) In 1968, Buckley J, in *Re Rolls Razor Ltd*, said, in relation to the comparable provision in the Companies Act 1948 (UK):[58]

> The powers conferred by s 268 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 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. . . .

[52] After *Rolls Razor*, differing approaches to the scope of the power emerged. The first focussed on the need for a balance to be struck between a liquidator's need to obtain information about a company and the prevention of oppressive conduct against an examinee, or possibly his or her principal. The balancing exercise comes into focus most sharply in cases where a liquidator seeks to examine a potential litigation adversary to obtain admissions under a process that is not available in ordinary civil proceedings. This approach requires consideration of any oppressive conduct on the part of the liquidator.

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57 *In Re Imperial Continental Water Corporation* (1886) 33 ChD 314 at 316.

58 *In Re Rolls Razor Ltd* [1968] 3 All ER 698 (ChD) at 700. This passage was subsequently approved *In Re Easal (Commodities) Ltd* [1989] BCLC 59 (CA) at 64 and *In Re British and Commonwealth Holdings Plc v Spicer and Oppenheim* [1993] AC 426 (HL) at 438.

[53] A different view was articulated in 1990, in *Cloverbay Ltd v Bank of Credit and Commerce International SA.*[59] The principal judgment of the Court of Appeal in that case was delivered by Sir Nicolas Browne-Wilkinson V-C. The Vice-Chancellor, referring to the need for balance, identified the purpose of the section as enabling a liquidator to reconstitute the knowledge of the company, so as to discharge his or her duties to creditors and (possibly) shareholders.[60]

[54] In *British and Commonwealth Holdings Plc v Spicer and Oppenheim,* the House of Lords disapproved the *Cloverbay* approach.[61] Giving the leading speech, Lord Slynn of Hadley said that, if the Vice-Chancellor had intended to restrict the purpose of the legislation to "reconstituting the company's knowledge",[62] he was in error because no such limitation could be ascertained from the general words of the relevant section.

[55] In any event, the two approaches are not mutually exclusive. They represent different reasons for allowing a liquidator to gather documents and information. I adhere to the view I expressed in *Carrow Holdings Ltd v Sadiq.*[63] A liquidator will generally be permitted to examine if the information sought is a genuine investigative step to enable the liquidator to reach an informed decision on what to do, whether that involves reconstitution of knowledge or not.[64]

[56] In reality, both approaches work together. It is equally important for the liquidator to reconstitute knowledge of directors of the company as it is for him or her to make informed decisions about what steps to take for the benefit of creditors. In that context, it must be remembered that a liquidator usually has limited funds with which to work and it is in the public interest that he or she obtains relevant information with as little expense as possible and in the most expeditious manner.

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59 *Cloverbay Ltd v Bank of Credit and Commerce International SA* [1991] Ch 90 (CA).

60 Ibid, at 101–102. The word used in "contributories", a term used in pre-1993 Act legislation to refer to the shareholders of a company in liquidation.

61 *British and Commonwealth Holdings Plc v Spicer and Oppenheim* [1992] 4 All ER 876 (HL).

62 Ibid, at 437.

63 *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008 at paras [27]–[32].

64 Ibid, at para [30].

[57] Evidence in support of the application has been given by one of the New Zealand liquidators, Mr Sheahan. He does not identify a specific reason for the New Zealand liquidators' belief that it is necessary for them to examine Ms Dekker for a second time. The furthest Mr Sheahan goes is in his affidavit of 18 October 2011, in which he deposes:

> **Basis for seeking information**
>
> 20. The circumstances of the receiverships of the [New Zealand] Companies are highly unusual. The Companies were part of a number operating in the Cedenco Foods group. The Companies were profitable, and the Cedenco companies across Australia and New Zealand were together highly profitable. The assets of the Companies were sold at a value that has resulted in a surplus.
>
> 21. There are live questions over issues such as why the Companies ended up in a position where there was a forced sale of their assets, and whether the Companies have any claims against any person in relation to the events that have led to that forced sale. I have duties as liquidator of the Companies to investigate those matters.

[58] The New Zealand liquidators have been able (from the first examination of Ms Dekker and other inquiries) to reconstitute the knowledge of the company at relevant times; in particular, around July 2009 when the cross-guarantees were negotiated and executed. It is most unlikely that the New Zealand liquidators could bring a claim against ANZ NZ in respect of entry into the cross-guarantees because ANZ NZ already held enforceable securities over the assets of the Cedenco NZ companies.[65] No foundation has been laid for a reasonable belief that such a cause of action may exist.

[59] Generally speaking, as long as a liquidator is not seeking to bring pressure to bear on a potential litigation adversary for some "ulterior purpose" he or she will be allowed to examine. In such a case, as McGechan J observed in *Re Northrop Instruments and Systems Ltd*:[66]

> The liquidator's intentions obviously are intensely unwelcome – such is usual – but such is not unfairness.

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65 See para [11] above.

66 *Re Northrop Instruments and Systems Ltd* [1992] 2 NZLR 361 (HC) at 365.

[60] Similarly, while acknowledging that there was a public interest involved in the need to facilitate inquiry into company collapses, McGechan J observed that there was "a countervailing concern to restrain liquidators from excess, however well intentioned".[67] In the particular case before him, McGechan J took the view that "the public interest favours early ascertainment of fact, as opposed to the alternative vexation of procedure on suspicion". In the case before him, the Judge concluded that "no excess [was] involved".[68]

[61] A useful summary of principles applicable when determining whether a proposed examination is or is not an abuse of process can be found in the judgment of the Full Court of the Federal Court of Australia, in *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England*.[69] In summary:

(a) Whether there is an abuse of process will depend on the purpose of the application and the circumstances of the case.[70] Generally, for an abuse of process to be found, it is necessary that the offensive purpose be, at least, the predominant purpose.[71]

(b) If an applicant for an examination order has the purpose of obtaining a forensic advantage not otherwise available, his or her conduct is likely to amount to an abuse of process.[72]

[62] By way of illustration, the use of the power to obtain an examination summons for the principal purpose of furthering the cause of a liquidator's appointors in litigation against third parties, for a purpose foreign to that for which it was granted, will amount to an abuse of process.[73] That is because it is not being exercised for the benefit of the corporation, its contributories[74] or creditors. In *Excel*,

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67 Ibid.
68 Ibid.
69 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 (FCA) (Gummow, Hill and Cooper JJ).
70 Ibid, at 89.
71 Ibid.
72 Ibid, at 90–91.
73 *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69 (FCA) at 93.
74 The term "contributories" was widely used in earlier corporate insolvency statutes as a synonym for shareholders.

the Court took, the view that even if the benefit were indirect, the use of the examination power might still be for an improper purpose; for example an attempt to use the examination process as an "the opportunity for pre-trial depositions which would not be available"[75] in ordinary civil litigation.

[63] In *Evans v Wainter*,[76] a Full Court of the Federal Court of Australia considered whether obtaining a significant litigation advantage could amount to an abuse of process. Delivering the principal judgment of the Court, with which Ryan and Crennan JJ agreed, Lander J remarked that while the liquidator would obtain a significant advantage in conducting litigation in respect of foreshadowed proceedings against the company's previous law form for misleading or deceptive conduct in trade,[77] it did not amount to an abuse of process. In that case, the examinations would benefit the general body of creditors. Two of the proposed examinees had been directors of the company in liquidation, while the third was a partner in a firm of solicitors who had acted for the company.

[64] Our Court of Appeal considered the point in *Re Smith (A Bankrupt)*.[78] In that case, the examination procedure was considered in the context of a summons issued by the Official Assignee to obtain information from a bankrupt's wife about a transaction that was suspected to fall foul of s 47 of the Matrimonial Property Act 1976; a provision rendering void transactions between husband and wife with an intent to defeat creditors. The decision is of assistance because it considers a case in which no Court order was required to commence the examination process.[79]

[65] The wife applied to set aside the summons. Delivering the judgment of the Court of Appeal, Holland J said:[80]

> Some care must be taken in considering the English decisions both under the Companies Act and Bankruptcy Act because those statutes did not give the liquidator or official assignee the power to issue a summons. Any summons was issued by the Court presumably on the application of the Official

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75 Ibid.
76 *Evans v Wainter* (2005) 145 FCR 176 (FCA).
77 Ibid, at 218.
78 *Re Smith (A Bankrupt)* [1992] NZFLR 241 (CA).
79 The summons was issued by the Official Assignee, in respect of the bankruptcy of an individual, under s 68 of the Insolvency Act 1967.
80 *Re Smith (A Bankrupt)* [1992] NZFLR 241 (CA) at 244–245.

> Assignee or liquidator. Similarly under the New Zealand Companies Acts prior to 1980 the summons was issued by the Court. The Act was amended in 1980 to enable the Official Assignee when appointed provisional liquidator to issue a summons.
>
> The control by the Court of the exercise of the powers of the Official Assignee when he has failed to act fairly and without oppression may well be exercised on the same principles as where an application has to be made to the Court to issue the summons except, perhaps, as to the onus of proof. *Where the Court is to issue the summons the applicant must satisfy the Court that it is appropriate to do so. Where the Official Assignee has acted within his apparent lawful authority and the application is to set aside the summons the applicant must demonstrate to the Court that the issue of the summons is oppressive and not fair in the circumstances*.
>
> ...
>
> The conduct of litigation in the last decade or so has changed dramatically from what existed in the 19th and early 20th centuries. The absolute nature of the adversary system in civil litigation has not only been criticised but much modified. Orders for pre-trial disclosure of evidence have become commonplace (see Rule 438 of the High Court Rules). Trial by surprise now has few supporters. It is generally desirable that a litigant or a prospective litigant be as fully informed as possible of all relevant facts at the earliest practical time. In this way costs to litigants and waste of time in Court may be substantially lessened.
>
> Section 68 of the Insolvency Act is for the purpose of enabling the Official Assignee to obtain information, and, to be as fully informed as possible relating to the property and transactions of the bankrupt. It is in part a recognition that in many cases information as to the bankrupt's affairs and dealings will be incomplete. In so far as prospective litigation is concerned it will often be needed to equip him with the same information as would have been available to the bankrupt prior to the intervention of bankruptcy, assuming that proper records had been kept. In cases of dealings with the bankrupt where the bankrupt is not available, is suffering from lack of memory, or is being evasive or unco-operative, it may be necessary, so as to ensure that the Official Assignee is able to meet his opposing litigant on equal terms. In each case the balancing exercise will be one of degree. ...
>
> (emphasis added)

Since *Smith* was decided in 1991, the trend against trial by ambush and the need for a litigant to be as fully informed as possible of all relevant facts at the earliest practical time has continued unabated. A good example is the introduction of new discovery rules, implemented from 1 February 2012 by the High Court Amendment Rules (No. 2) 2011.[81]

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[81] Generally, see *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726 (Asher J) at paras [12] and [13].

[66] Having balanced relevant considerations in *Smith*, the Court of Appeal concluded that the examination would not give the Official Assignee a forensic advantage over the wife, as a litigant. Rather, it was to be held for the purpose of determining whether or not to continue with an existing proceeding, with the same knowledge of the facts that the wife had.[82]

[67] While I hold that there is jurisdiction to make an order for examination under s 266(2) (notwithstanding the likely solvency of Cedenco NZ), I conclude that the factors weighing against examination far exceed those in favour. In short:

(a) The New Zealand liquidators have failed to identify any subject on which Ms Dekker should be examined that would benefit Cedenco NZ, as opposed to Cedenco Australia. The Australian liquidators can (and have) sought an examination of Ms Dekker for the benefit of Cedenco Australia, under art 21(1)(d) of the First Schedule to the Insolvency (Cross-border) Act 2006. If Ms Dekker were to be examined about ANZ NZ's conduct in relation to Cedenco Australia, that is the appropriate source of jurisdiction.

(b) It would be oppressive to Ms Dekker (and, inferentially, ANZ NZ) to require her to attend an examination, when no benefit could flow to creditors of Cedenco NZ, who have been paid in full. The New Zealand liquidators' attempt to examine Ms Dekker can, in my view, fairly be characterised as being for an ulterior purpose.

(c) Ordinarily, where creditors have been paid and liquidators' costs are spiralling upwards, it would be appropriate to terminate the liquidation, with the consequential ability for the company's board to take action, if they thought fit, to recover any debt or damages they considered were payable. After the liquidation process is terminated the ability to use the "extraordinary" examination powers is spent.[83]

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82 Ibid, at 246.

83 The term "extraordinary" has been used in many cases to describe the examination process; for example, by Lord Slynn, in *Re British & Commonwealth Holdings Plc v Spicer and Oppenheim* [1993] AC 426 (HL) at 439.

*(v) Production of documents – s 266(2)(b)*

[68] I am satisfied that there is jurisdiction to make an order under s 266(2)(b) requiring Ms Dekker to produce internal bank records to the New Zealand liquidators. However, for the same reasons given in respect of my refusal to order an examination, this application should be dismissed.[84]

**Section 261 – remuneration and expenses**

*(a) The application*

[69] ANZ NZ seeks orders entitling it and Ms Dekker to reasonable remuneration and expenses (including indemnity costs in relation to fees and disbursements charged by their solicitors) for responding to the s 261 notice originally issued by the New Zealand liquidators.[85]

[70] The application is put on two bases:

(a) First, ANZ NZ's ability to recover remuneration and costs through the general conditions of its debenture over Ex-Ced and its general security agreement over the undertaking of Cedenco Ohakune. In those security documents, the two companies each promised ANZ NZ that it would pay indemnity costs in respect of all enforcement procedures undertaken by ANZ NZ.

(b) Second, under the discretion reposed in the Court under s 261(5) of the 1993 Act.[86]

[71] In its application, ANZ NZ calculates the fees and expenses incurred by the New Zealand liquidators, in the period between 6 May 2010 and 19 January 2012 as

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84 See para [67] above.

85 Similar issues are raised in the New Zealand liquidators' application for directions: see para [5] above. For convenience, I deal with the issues by reference to ANZ NZ's more expansive application.

86 Set out at para [79] below.

$2,393,719.29. It asserts that the New Zealand liquidators (personally) have charged for their services at an hourly rate of $910, plus GST. To the extent that the assets of the companies in liquidation might not be sufficient to meet any costs and/or expenses claimed or awarded, ANZ NZ seeks an order that the liquidators be personally responsible for their payment.

[72] The New Zealand liquidators dispute any obligation to meet ANZ NZ's actual costs and expenses through application of general conditions in the security documents. They also contend that the costs and expenses claimed have not been incurred *in complying* with their requirements under s 261(3), because ANZ NZ declined to provide all required documents to the New Zealand liquidators.

[73] The New Zealand liquidators also contend that the costs claimed ($66,639.89) for providing documents for the purpose of a single examination that lasted approximately two hours are not reasonable. Further, Mr Chisholm submitted that such costs are not claimable as "expenses", under s 261(5).

[74] The New Zealand liquidators also contest the proposition that the Court can exercise supervisory jurisdiction in relation to questions of costs, on the grounds that such jurisdiction extends only to Court appointed liquidators. I deal with that point later, in a different context. I hold against the New Zealand liquidators' position.[87]

*(b) The Court's powers to order remuneration and expenses*

[75] I deal with the points taken by Mr Tingey in reverse order.[88]

[76] Between 4 March 2011 and 26 May 2011 the New Zealand liquidators issued a series of notices under s 261(3) of the 1993 Act. For present purposes, the notice issued on 26 May 2011 is engaged. Ms Dekker was required to attend before the New Zealand liquidators to "provide them with information and to be examined on oath in relation to business, accounts and affairs of the [Cedenco NZ companies],

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87 See paras [122]–[138] below.
88 See para [70] above.

and to assist them with the conduct of the liquidation", to the best of her abilities. Those notices led to the first examination of Ms Dekker.

[77] I discussed the scope of the s 261 powers in *Petterson v Gothard*,[89] in the context of attempts by a New Zealand based liquidator to obtain information about the company from Australian based receivers. In the present case, it is necessary to expand on that analysis, to take account of the fact that this case deals with a bank officer summoned for examination to give evidence about her knowledge of ANZ NZ's interaction with Cedenco NZ, particularly around the time that the cross-guarantees were required and executed, and the bank's reasons for requiring the guarantees to be given.[90]

[78] The final form of the s 261 notice stated:

> TAKE NOTICE THAT:
>
> Pursuant to s 261(3) of the Companies Act 1993, the liquidators of Ex-Ced Foods and Cedenco Ohakune (both in Receivership and Liquidation) (Companies) require you to attend on them, provide them with information and be examined on oath in relation to business, accounts and affairs of the Companies, and to assist them with the conduct of the liquidation to the best of your abilities.
>
> (a) [ANZ NZ's] reasons for promoting and/or requiring the appointment or removal of directors of the Companies during 2009 and all related actions contemplated or taken by or on behalf of [ANZ NZ];
>
> (b) The nature of any defaults or purported or anticipated defaults by the companies under their [ANZ NZ] facilities in 2009;
>
> (c) In this respect, any relationship between NZ and AU lending and any cross defaults or purported or anticipated cross defaults;
>
> (d) Full details of all notices or advice of any defaults, purported or anticipated defaults given to the Companies in 2009;
>
> (e) The content and timing of any proposals or discussions about remedying defaults or purported or anticipated defaults under the Companies' [ANZ NZ] facilities, or to repay, refinance or vary those facilities in 2009, including any information as to [ANZ NZ's] consideration of the Imanaka proposal in October/November 2009;
>
> (f) Full details of [ANZ NZ's] consideration of any such matters and its reasons for rejecting or failing to act on or respond to any proposals;

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89 *Petterson v Gothard* [2012] NZHC 666.

90 See para [11] above.

(g) [ANZ NZ's] decision to appoint receivers to the Companies and the reasons for that decision, including any advice given or consideration suggested to [ANZ NZ] by the receivers relating to any of the matters referred to above whether prior to or after appointment;

(h) The scope, nature, timing and contents of discussions and correspondence with the directors of the Companies (or their agents or representatives) and the [ANZ NZ] (or its agents or representatives) in any way relating to the matters in (a) to (g) above; and

(i) the scope, nature, timing and contents of discussions and correspondence with the agents or representatives of the owners of the Companies and the [ANZ NZ] (or its agents or representatives) in any way relating to the matters in (a) to (g) above.

If any information relating to the above issues is contained in documents then you are required to bring all such documents relating to the matters above for the purpose of the examination.

...

Failure to comply with this notice is an offence under s 261(6A) of the Companies Act 1993.

[79] Section 261(4) and (5) of the Companies Act 1993 relevantly provide:[91]

**261 Power to obtain documents and information**

...

(4) Without limiting subsection (5) of this section, the liquidator may pay to a person referred to in paragraph (d) or paragraph (e) or paragraph (f) of subsection (2) of this section, not being an employee of the company, reasonable travelling and other expenses in complying with a requirement of the liquidator under subsection (3) of this section.

(5) The Court may, on the application of the liquidator or a person referred to in paragraph (d) or paragraph (e) or paragraph (f) of subsection (2) of this section, not being an employee of the company, order that that person is entitled to receive reasonable remuneration and travelling and other expenses in complying with a requirement of the liquidator under subsection (3) of this section.

....

[80] Section 261(4)–(6) outlines the circumstances in which a person might be entitled to seek reimbursement of expenses, or to receive reasonable remuneration,

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[91] I have omitted s 261(4) because it confers a discretion on the liquidator to pay expenses of the type identified. The Court's powers are derived from s 261(5) and may only be exercised on application by the liquidator or (in this case) a bank officer to whom s 261(2)(e) refers: s 261(5).

when complying with a requirement of the liquidator under s 261(3). Ms Dekker falls within the category of person who may seek reasonable remuneration and expenses. She is a "bank officer"; a person to whom s 261(2)(e) refers. However, ANZ NZ is not an entity that can seek either remuneration or expenses. It is not the proposed examinee. The words used in s 261(4), (5) and (6) all refer to "a" or "the" person who has been required to attend for examination or to provide information to the relevant liquidator. Because only natural persons may be required to do any of the things to which s 261(3) refers,[92] the remuneration and expenses provisions can only apply to the human being required to attend for examination or to provide information.[93]

[81] A liquidator's discretion to offer payment of "reasonable travelling and other expenses in complying with a requirement of the liquidator under" s 261(3) does not extend to remuneration.[94] Only this Court can determine whether a claim for remuneration should be allowed.[95] That authorisation will not usually be given until after the examination has taken place. The 1993 Act explicitly states that a proposed examinee is not entitled to refuse to comply with any requirement by reason only that an application to the Court is pending or remuneration or travelling and other expenses to which that person is entitled have not been paid in advance; or, if the liquidator has not paid for travelling or other expenses.[96]

[82] Do the authorities mandate a different approach? Mr Tingey relied on *Re Hartley and Riley Consolidated Gold-dredging Co Ltd*[97] to support his submission that ANZ NZ should be entitled to solicitor and client costs out of the assets of the company, in responding to a liquidator's summons to take copies of bank accounts and for a bank manager to appear for examination. Smith J, without giving reasons, said:[98]

> I think that the bank should have its costs of the examination as between solicitor and client out of the assets in the winding up.

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92 Companies Act 1993, s 261(2).
93 Ibid, s 261(3)(b) and (c).
94 Ibid, s 261(4).
95 Ibid, s 261(5).
96 Ibid, s 261(6).
97 *Re Hartley and Riley Consolidated Gold-dredging Co Ltd* [1931] NZLR 977 (SC).
98 Ibid, at 983.

[83] No analysis was undertaken, in *Hartley and Riley*, of the basis on which that should be so. No reference was made to security documents. Nor was there any provision akin to s 261(5) of the 1993 Act in the Companies Act 1908, with which *Hartley and Riley* was concerned. No other basis was identified for such an order to be made. I regard *Hartley and Riley* as wrongly decided. I decline to follow it.

[84] The Court's power to order payment of remuneration is new. The comparator provisions of ss 262 and 262A of the Companies Act 1955 (the 1955 Act) referred only to the need to tender a reasonable sum for the proposed examinee to come before the Court (or the Official Assignee) at the appointed time for examination.[99] While there is nothing in the Law Commission's report or Parliamentary records to indicate the reason for the change, its likely purpose is to protect a self-employed person from losing significant earnings while attending to assist the liquidator; or, perhaps, to protect from loss someone who had to take leave from his or her employment because an employer is not directly or indirectly involved in the subject matter of the examination and is not prepared to pay wages for the examinee's time involved in assisting the liquidator. I do not consider that the section was intended to reimburse an employer for remuneration paid to an employee when the employee is attending for examination to assist the liquidator in performing his or her duties under the 1993 Act. In this case, the costs incurred by ANZ NZ arose out of the collation of documents sought by the New Zealand liquidators and its desire to protect its and its employee's interests at the examination.

[85] I accept Mr Chisholm's submission that the term "travelling or other expenses" do not extend to the legal costs incurred by ANZ NZ in order for an employee to comply with a requirement to assist the liquidators. Different considerations apply where documents have been extracted and produced at an examination in circumstances where a liquidator has no power to compel delivery of the documents or production of them, without a Court order.[100] As a result of the solicitors' involvement in this case, no documents were delivered or produced which fell outside the scope of the New Zealand liquidators' powers. Nor was oral evidence given on ANZ NZ's involvement (or the extent of it) in the process leading

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[99] Companies Act 1955, ss 262(4) and 262A(4).
[100] Companies Act 1993, s 261(1) and (3)(c).

up to requirement of the cross-guarantees. In other words, the legal costs and disbursements that ANZ NZ elected to incur were for its own benefit. In terms of the statute, ANZ NZ is not entitled to be reimbursed for them.

*(c) Is the bank entitled to indemnity costs?*

[86] Mr Tingey submitted that ANZ NZ was entitled to recover all of the costs and expenses incurred in responding to the s 261 notices, by virtue of its security documents. Surprisingly, that submission was made even though the ANZ NZ has been repaid its debt in full and the 1993 Act provides detailed provisions as to the circumstances in which this Court may exercise a discretion to award remuneration or expenses to a person required to comply with a s 261 notice.[101]

[87] The short answer to this point is that, both in collating documents and in Ms Dekker attending for examination, ANZ NZ was not enforcing its security. Its employee was required to assist the liquidator as a result of the exercise of powers reposed in a liquidator appointed under the 1993 Act. They were not actions (or events of default) of a company on which the security documents could bite. While not completely analogous, the situation may reasonably be compared with what applies when a liquidator obtains payment under a voidable transaction. Because the right to bring an action of that type is conferred on a liquidator, a bank's security does not attach to any recoveries.[102]

[88] The relevant security documents provide for standard indemnities when a lender is seeking to enforce payment of moneys secured. As there is no material difference between the way in which the various security agreements are expressed, I use cl 15.1 of the debenture taken by ANZ NZ over the undertaking of (what was then) Cedenco Foods to explain my reasons for holding against Mr Tingey's submission on this point.

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101 Ibid, s 261(4) and (5).

102 The liquidators' powers to recover moneys paid under antecedent transactions are set out in ss 292–299 of the 1993 Act. As authority for the proposition that recoveries do not fall within relevant security documents, see, for example, *Re Yagerphone Ltd* [1935] Ch 392 and *N A Kratzmann Pty Ltd (in liq) v Tucker (No 2)* (1968) 123 CLR 295 (HCA), in particular at 301 per McTiernan, Taylor and Menzies JJ.

[89] Clause 15.1 provides the general indemnity:

> **15. INDEMNITIES/NO MARSHALLING**
>
> **15.1 General Indemnity:** The Company indemnifies the Bank and each receiver on demand to the fullest extent permitted by law, against any cost, loss, expense (including all legal expenses on a solicitor and own client basis), other liability (including loss of profit or of margin) and any penalty (including any fine or statutory impost) that the Bank certifies as having been sustained or incurred as a result of or in connection with:
>
> (a) the occurrence or continuance of any Event of Default;
>
> (b) anything done or omitted or purported to be done or omitted by the Bank or a receiver in the exercise or purported exercise of its rights under this Debenture or at law (and whether or not arising by reason of mistake, oversight, negligence or error of judgment);
>
> (c) a defect of the company's title to any property that is, or which appears to be, Secured Property;
>
> (d) any claim, demand, action or legal proceeding made or taken by any person (including the Company) against the Bank or a receiver that in any way relates to the whole or any part of the Secured Property (including, without limitation, the legal costs incurred by the Bank or a receiver (on a solicitor and own client basis) in defending any such claim, demand, action or legal proceeding);
>
> (e) any amount payable by the Company to the Bank not being paid when due (whether by acceleration or otherwise) or being received or recovered by the Bank other than on its due date:
>
> (f) any failure on the part of the Company to utilise any banking accommodation (in whole or in part) on the date designated for utilisation of the same;
>
> (g) any bill of exchange drawn or accepted for the accommodation of the Company, to which the Bank is party;
>
> (h) any bond, guarantee, standby letter of credit or analogous assurance or undertaking issued by the Bank at the request of the Company;
>
> (i) the Bank giving credit or performing any other service for the Company.
>
> ...

[90] In order to come within cl 15.1, on the facts of this case, the relevant costs, losses or expenses must have "been sustained or incurred as a result of or in connection with" "the occurrence or continuance of any Event of Default". None of the "Events of Default" to which cl 9.2 of the Debenture refers would trigger the ability for the liquidators to pay such costs. The contractual provisions provide no

basis for the proposition that ANZ NZ is entitled to require payment of costs or expenses in circumstances where the receivership has been completed and it is responding solely to requirements placed upon it by a liquidator under relevant statutory provisions; particularly when those powers are conferred in the public interest.[103]

[91] As a matter of policy, it would put an intolerable burden on a liquidator if a secured creditor were to insist customarily on payment of indemnity costs and disbursements to meet fees and expenses incurred by them, for their own benefit. The liquidators (on whom the powers are conferred personally) are not contracting parties. Many liquidations would simply not have sufficient funds to enable that to be done and it would simply curtail, inappropriately, the ability for the liquidator to undertake his or her tasks, putting at risk the liquidator's ability to perform his or her statutory functions. In my view, it would be contrary to public policy to allow a contractual term of that nature to override the statutory scheme, particularly, s 261(5), even if the documents purported to extend to cover such expenses.

[92] I rule against ANZ NZ on this point. There is no ability for ANZ NZ to seek indemnity costs and expenses through application of its own security documents, when the costs have been incurred in response to a liquidator's requirement under s 261.

*(d) Alleged misconduct by New Zealand liquidators*

[93] ANZ NZ contends that the New Zealand liquidators are disentitled from reliance on the indemnity to pay costs and expenses out of the assets of the companies in liquidation because they have engaged in misconduct. Mr Tingey cites the colourful dictum of Hammond J, in *Re Galdonost Dynamics NZ Ltd (in liq)*:[104]

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[103] See para [51] above.

[104] *Re Galdonost Dynamics Ltd (in liq)* (1994) 7 NZCLC 260,499 (HC) at 260,503.

> "Liquidations are not a bottomless well from which insolvency practitioners may drink".

The Judge went on to observe that "where there is demonstrated misconduct or incompetence on the part of a liquidator, fees may be disallowed in whole or in part".

[94] Mr Tingey submits that despite the "routine" nature of the Cedenco NZ liquidations, for a period of 21 months from 6 may 2010 to 19 January 2012, the New Zealand liquidators incurred fees and expenses of $NZ2,393,719.29, plus GST. For more than half of that time, the receivers appointed by ANZ NZ were in office, trading and selling the Cedenco NZ business. Mr Tingey contends that the hourly rate charged by the New Zealand liquidators is $NZ1,045 per hour (inclusive of GST), more than $300 per hour more than what would be expected of a liquidator based in New Zealand conducting one of the most complex of liquidations.

[95] Mr Chisholm challenges the underlying premise of Mr Tingey's submission, contending that there is no connection between remuneration charged by the New Zealand liquidators and the appropriate level of remuneration or expenses payable to a person summoned for examination under s 261(3)(c). Mr Chisholm submits that "it is officious and an abuse of process" for ANZ NZ to attempt to put improper pressure on the liquidators by suggesting that they have overcharged.

[96] The foundation for Mr Chisholm's submission seems to be that, to the extent that there is a challenge to a liquidator's remuneration, it can be undertaken by the Court on an application by a qualifying person under s 284(1)(e) of the 1993 Act:

> **284 Court supervision of liquidation**
>
> (1) On the application of the liquidator, a liquidation committee, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—
>
> ...
>
> (e) In respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances:
>
> ....

[97] Although ANZ NZ comes within none of the qualifying categories, its pre-liquidation debt having been paid in full, I am with Mr Chisholm on this point. In an extreme case, where the rights of creditors would be affected by payment of a significant sum under s 261(5) as a result of misconduct on the part of the liquidator, I consider there would be jurisdiction to exercise a discretion for the remuneration or expenses to be paid personally by a liquidator. However, in the ordinary course there is no reason why liquidators should not have recourse to their indemnity to meet expenses from the assets of the company in liquidation. Such an indemnity is explicitly provided for by s 278 of the 1993 Act:[105]

> **278 Expenses and remuneration payable out of assets of company**
>
> The expenses and remuneration of the liquidator are payable out of the assets of the company.

**The Australian liquidators' application to examine Ms Dekker**

[98] The Cross-border Act adopted, in New Zealand, the UNCITRAL Model Law on Cross-border Insolvency (the Model Law). The Model Law is directed primarily to commercial debtors (whether corporate or individual) with assets or liabilities in more than one State. Its object is to provide procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor had assets or debts in more than one State.[106]

[99] The Australian liquidators apply to examine Ms Dekker. Because, as Australian liquidators, they have no ability to invoke s 266 of the 1993 Act, they have applied under art 21(1)(d) of the First Schedule to the Cross-border Act. The Court has a discretion to order an examination under that provision because the liquidation of each Australian company has been recognised as a foreign main proceeding in New Zealand.[107]

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105 It is reinforced by cl 1(1)(a) of Schedule 7 to the 1993 Act which provides that the liquidator must pay, as a first priority, "the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator, and the remuneration of the liquidator".

106 Insolvency (Cross-border) Act 2006, s 3. In interpreting the Cross-border Act, reference may be made to the Model Law and to any document that relates to it which originated from UNCITRAL or its Working Group in preparing the Model Law: s 5.

107 See para [3] above.

[100] Article 21(1)(d) provides:

> **21 Relief that may be granted upon recognition of a foreign proceeding**
>
> (1) Upon recognition by the High Court of a foreign proceeding, whether main or non-main, *where necessary to protect the assets of the debtor or the interests of the creditors*, the Court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> ...
>
> (d) providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities;
>
> ....
>
> (emphasis added)

[101] In deciding whether to grant or deny relief sought under either art 19 or art 21, art 22(1) also comes into play:

> **22 Protection of creditors and other interested persons**
>
> (1) *In granting* or denying *relief under* article 19 or *article 21*, or in modifying or terminating relief under paragraph (3) of this article, *the High Court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected*.
>
> ....
>
> (emphasis added)

[102] There are no New Zealand decisions in which an order for examination has been made under art 21(1)(d), after full argument.[108] I was referred, however, by Mr Chisholm to a recent decision of the Chancery Division of the High Court, *Picard v FIM Advisers LLP*.[109] That proceeding arose out of an application under the Cross-Border Insolvency Regulations, the instrument by which the Model Law was given effect in England. In considering the equivalent of art 21(1)(d), Kitchen J said:[110]

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108 In *Re Omegatrend International Pty Ltd (in liq)* HC Auckland CIV-2010-404-4098, 5 October 2010, Associate Judge Faire made directions on whether an examination should be held in Court or in chambers, following unchallenged orders for examination made on 5 July 2010 recognising the Australian liquidation as a foreign main proceeding. See also, *Williams v Simpson* [2011] BPIR 938 (HCNZ) at paras [54] and [56](c) and *Williams v Simpson* HC Hamilton CIV-2010-419-1174, 21 September 2010, at para [5].

109 *Picard v FIM Advisers LLP* [2010] EWHC 1299 (ChD).

110 Ibid, at para 21.

21. Article 21 of schedule 1 to the CBIR reads:

"(1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief including-

....

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities."

22. In addition I must have regard to Article 22 which provides that in granting or denying relief the court must be satisfied that the interests of interested persons are adequately protected. Interested persons include the person against whom an order for delivery of information is sought.

23. *It is apparent that Article 21(1)(d) has both a jurisdictional and a discretionary component. The court must be satisfied that the information sought concerns the debtor's assets, affairs, rights, obligations or liabilities. If it is so satisfied then it has a discretion to order the delivery of that information. In exercising that discretion it must have regard to all relevant circumstances and ensure that the interests of the person against whom the order is sought are adequately protected*.

24. Both parties before me were also agreed that it is appropriate for the court to have regard to the principles upon which the court will exercise its powers under section 236 and section 366 of the Insolvency Act 1986. *The relevant principles for present purposes are, I think, these*.

25. First, the power is conferred to enable the office holder to discover the true facts concerning the affairs of the company so that he may be able as quickly, effectively and with as little expense as possible to complete his duties.

26. Second, even an honest person who finds himself to have been involved in a major fraud which has had a catastrophic effect for thousands of investors must be expected to cooperate with the office holder.

27. Third, nevertheless, the court must avoid making any order which is unnecessary or unreasonable or which is oppressive to the respondent.

28. Fourth, one of the factors which weighs against making an order or limiting its scope in some way is the disruption, stress and expense likely to be caused to the respondent.

29. Fifth, in assessing what order to make the court will attach considerable weight to the views of the office holder.

(emphasis added)

[103] The point of difference between this application and that of the New Zealand liquidators' application is that there may be genuine issues to be explored concerning the cross-guarantees, for the benefit of Cedenco Australia. Mr Tingey acknowledged as much. However, he submitted that this Court ought not to order an examination because the cross-border insolvency legislation is designed to provide assistance to foreign representatives to realise assets of an insolvent debtor for the benefit of its *creditors*; as opposed to a foreign representative of a solvent company.[111] Mr Tingey referred to a decision of the High Court of Australia, in *Hamilton v Oades*.[112] Mr Tingey also referred to the definition of "foreign proceeding" in art 2(a) and to its use, in art 21.[113] The definition is:

> **Article 2. Definitions**
>
> For the purposes of this Schedule:
>
> (a) foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
>
> ....

[104] With respect, Mr Tingey's submission is flawed because, while the administration of the Australian liquidations happens to have produced a surplus, it remains appropriate to characterise the regime as a "collective ... proceeding ... pursuant to a law relating to insolvency". In *Larsen v Navios International Inc*,[114] Norris J considered an application for additional relief on recognition of a foreign proceeding under the (English) Cross-Border Insolvency Regulations.[115] The Judge cited with approval a passage from Professor Ian Fletcher's text, *The Law of*

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111 The term "foreign representative" is defined in art 2(d) of the First Schedule to the Insolvency (Cross-border) Act 2006.

112 *Hamilton v Oades* (1989) 166 CLR 486 (HCA) at 496, in which Mason CJ emphasised "two important public purposes" of a liquidator's examination in Australia; one of which was to enable the liquidator to gather information to assist in the liquidation, involving protection of the *interests of creditors*.

113 See also the opening words of art 21(1), set out at para [100] above.

114 *Larsen v Navios International Inc* [2012] 1 BCLC 151 (ChD).

115 Cross-Border Insolvency Regulations 2006, Sch 1, art 21.

*Insolvency*,[116] in which the Professor emphasised that the fundamental principle on which a winding-up is based is its collective nature. The purpose is "to ensure that an orderly regime is imposed upon all interested parties so that none of them individually may enhance his position by exploiting some fortuitous circumstance which may yield an unfair advantage ..."[117]

[105] Although there are no creditors of Cedenco Australia whose interests require protection, there may be a need to make an order to protect[118] Cedenco Australia's ability to bring a civil claim against ANZ Australia, or, much more remotely, ANZ NZ. While a potential cause of action is not a perishable asset, relevant limitation periods may constrain the time available for a liquidator to apprise himself or herself fully of relevant considerations, before deciding whether to issue proceedings. In that sense, it is fair to characterise a desire to examine as an attempt to "protect", or preserve the value of an inchoate asset.

[106] The ability for the Australian liquidators to apply under art 21(1)(d) was triggered by the recognition order made by Courtney J on 20 May 2011.[119] That order remains in force. Although there is jurisdiction to terminate the order, when circumstances have changed, no application has been made by either of the ANZ companies or Ms Dekker to do so. Articles 17(5) and 22(3) of the First Schedule provide:

> **Article 17. Decision to recognise a foreign proceeding**
>
> ...
>
> (5) The provisions of articles 15, 16, 17, and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.
>
> ...
>
> **Article 22. Protection of creditors and other interested persons**
>
> ...

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116 Ian F Fletcher *The Law of Insolvency* (4th ed, Sweet & Maxwell, London, 2009).
117 *Larsen v Navios International Inc* [2012] 1 BCLC 151 (ChD), at 159–160.
118 See art 21(1) of the Cross-border Act, set out at para [100] above.
119 *Re Sheahan and Lock* HC Auckland CIV-2011-404-1623, 20 May 2011.

> (3) The Court may, at the request of the foreign representative or a person affected by relief granted under article 19 or article 21, or at its own motion, modify or terminate such relief.
>
> ...

[107] Although the Model Law has been enacted in some 19 States and territories, to date, no cases have yet come before the Court dealing squarely with this issue.[120] In my view, once a foreign proceeding has been recognised as such and the order remains extant, a foreign representative has standing to bring an application under art 21(1)(d). There is jurisdiction to make an order because the present application is directed to obtaining information about a potential asset, in the form of a cause of action.[121] Having reached that point, it is necessary to consider the (non-exhaustive) discretionary considerations to which Kitchen J referred in *Picard* before determining whether an order should be made.[122]

[108] The present application falls to be considered in the context of orders that have already been made in Australia. On 23 June 2011 the Federal Court made orders, on a without notice basis, enabling the Australian liquidators to summon two directors of Cedenco Australia to be examined about the affairs of those companies and to produce certain books and records in relation to them. In addition, ANZ Australia and their solicitors, Blake Dawson, were required to produce to the Court certain documentation relating to Cedenco Australia. ANZ Australia and Blake Dawson applied to discharge the orders made against them. The Australian liquidators used the transcript of Ms Dekker's examination in New Zealand as part of the evidence on which they relied to oppose that application.[123] As a result of a consent order made on 14 October 2011 the scope of the documents required for production was narrowed and 34 relevant documents were produced.

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120 Generally, in relation to authorities from different jurisdictions interpreting provisions adopted or adapted from the Model Law, see *UNCITRAL Model Law on Cross-Border Insolvency*: *The Judicial Perspective* (United Nations, 2012), available on the UNCITRAL website: http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

121 See also para [105] above.

122 See para [102] above.

123 See fn 8 above.

[109] The documents that were produced by ANZ Australia and Blake Dawson to comply with the consent order were those that fell within two schedules which defined the documents to be produced by each of those entities:[124]

(a) In the case of ANZ Australia they were:

> All documents created by Australia and New Zealand Banking Group Ltd (ANZ Australia)) in relation to SK Foods Australia Pty Ltd (ACN 099 245 735) (SKFA), Cedenco JV Australia Pty ltd (ACN 075 836 010) (CVJA) and SS Farms Australia Pty Ltd (ACN 107 746 716) (SSFA) (Collectively the Cedenco Australia companies, or received by ANZ (Australia) from the Cedenco Australia companies, (other than those books or records already produced to the Applicants):
>
> 1.1 **in the period 1 January 2009 to 30 November 2009 regarding or referring to** the proposed or actual granting of the guarantee dated 31 July 2009 (Guarantee) by the Cedenco Australia Companies in favour of ANZ Australia;
>
> 1.2 **in the period 1 January 2009 to 30 November 2009 regarding or referring to** the proposed or actual enforcement of the Guarantee and any mortgage or other security securing the obligations under it;
>
> 1.3 **in the period 1 January 2009 to 30 November 2009 regarding or referring to** the proposed or actual appointment of receivers or other external controller over any of the Cedenco Australia companies;
>
> 1.4 **in the period 1 July 2006 to 30 November 2009 regarding or referring to** the transfer or proposed transfer of any shares in the Cedenco Australia companies;
>
> 1.5 **in the period 1 July 2006 to 30 November 2009 regarding or referring to** the assignment or posed assignment of any debt owed by SKFA to SK Foods LP to a third party; and
>
> 1.6 **in the period 1 January 2009 to 30 November 2009 regarding or referring to** the enforcement by ANZ Australia of any security granted in its favour by any of the Cedenco Australia companies.
>
> 2. All documents created in or referring to communications or conversations between employees of the ANZ Australia or ANZ National Bank (**ANZNZ**) on the one hand and the directors of Cedenco companies on the other in the period of **1 January 2009 to 30 November 2009** regarding the proposed or actual enforcement of the Guarantee and any mortgage or other security securing obligations under it.

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[124] The term "documents" was defined by reference to s 3 of the Evidence Act 1995 (Cth).

(b) In respect of Blake Dawson, they were:

> 1. All documents in relation to SK Foods Australia Pty Ltd (ACN 099 245 735) (SKFA), Cedenco JV Australia Pty Ltd (ACN 075 836 010) (CVJA) and SS Farms Australia Pty Ltd (ACN 107 746 716) (SSFA) (collectively the Cedenco Australia companies (other than those books or records already produced to the Applicants):
>
> 1.1 **in the period 1 January 2009 to 31 December 2009 regarding or referring to** the enforcement by the Australia and New Zealand Banking Group (ANZ Australia) or any security granted in its favour by any of the Cedenco Australia companies;
>
> 1.2 **in the period 1 January 2009 to 31 December 2009 regarding or referring to** the proposed or actual appointment of receivers or other external controller over any of the Cedenco Australia companies.

[110] Although documents evidencing ANZ Australia's and ANZ NZ's approach to the application for cross-guarantees have already been procured by the Australian liquidators, under the consent order made in the Federal Court,[125] they have not had an opportunity to examine Ms Dekker on those documents, from the Australian side of the transaction. I remind myself that Ms Dekker was also the "relationship manager" in respect of ANZ Australia's dealings with Cedenco Australia, as its customer.[126]

[111] Although there are genuine issues to be addressed on an examination of Ms Dekker, I must balance that against the fact that any examination would reveal information that might not otherwise be available to Cedenco Australia were those companies to issue proceedings against ANZ Australia in that jurisdiction, or ANZ NZ in New Zealand. I do so in the absence of expert evidence of relevant Australian law in relation to the circumstances in which Australian liquidators of a solvent company might be entitled to examine Ms Dekker, under applicable Australian domestic law, if she were within the Federal Court's jurisdiction.

[112] The competing considerations are finely balanced. However, I am concerned about the absence of any evidence of foreign law to establish whether an Australian

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125 See paras [108] and [109] above.
126 See para [10] above.

Court would authorise an examination by the liquidators of Cedenco Australia, given its position of solvency. As a matter of discretion, it would appear wrong in principle to make an order under the cross-border legislation, if the Australian liquidators would not be able to obtain one if Ms Dekker were resident in Australia. To do so would provide an unnecessary and undesirable forensic advantage to the Australian liquidators.

[113] In those circumstances, I propose to adjourn the application under art 21(1)(d). I have considered the possibility of communicating directly with Besanko J, the Federal Court Judge in Australia on whose docket the Cedenco Australia liquidations appear to be. On reflection, I have decided not to do so.

[114] As I see it, there are two possibilities. The Australian liquidators may elect to file expert evidence on the point. If that were done, I could act on uncontested evidence or resolve any disputed issues (following affidavits in reply) after a further hearing. Alternatively, if appropriate under applicable Australian law, the Australian liquidators might apply to the Federal Court for directions on whether, if Ms Dekker were within the jurisdiction of that Court, it would order her examination, given the solvent position of Cedenco Australia and any other relevant discretionary considerations, such as the liquidators' conduct.[127] If the Federal Court were prepared to rule on that issue in the Australian liquidators' favour, I would be prepared to make an order that Ms Dekker be examined in New Zealand, on terms to be settled later.

**Alleged misuse of transcript of Ms Dekker's first examination**

*(a) Introductory comments*

[115] Ms Dekker contends that the New Zealand liquidators acted improperly in making available a transcript (unsigned and unverified) of her first examination to themselves, in their capacity as the Australian liquidators. Ms Dekker's concern is that the transcript was used by the Australian liquidators in proceedings they had

[127] See paras [156] and [157] below.

brought before the Federal Court for the benefit of the Cedenco Australia companies, whereas it was evidence obtained for the purpose of the Cedenco NZ liquidations.

[116] Mr Sheahan annexed the transcript to an affidavit that he swore in the Federal Court proceeding. Written submissions tendered to the Court for that hearing also referred to and relied on evidence from the transcript. Ironically, on 20 September 2011, before Mr Sheahan's affidavit was sworn, the solicitors acting for the New Zealand liquidators had, in a letter to Ms Dekker's solicitors dated 30 August 2011,[128] emphasised the private nature of the examination process in stating (after the examination) that Ms Dekker had no right to receive a copy of it.[129]

[117] Mr Tingey's contention is that this Court, exercising a supervisory jurisdiction over liquidators, is entitled to make orders to declare any inappropriate use of a transcript as improper, with any necessary and consequential directions. In so submitting, Mr Tingey asserts that a liquidator appointed in a liquidation commenced other than by Court order is, nonetheless, an officer of this Court and subject to its supervisory jurisdiction.[130]

[118] Mr Tingey contends that the examination conducted by the New Zealand liquidators under s 261(3)(a) of the 1993 Act is a private process. While that view is supported by a long line of authority,[131] it requires reconsideration in light of changes made to the examination provisions after repeal of the 1955 Act.

[119] Mr Chisholm submits that the New Zealand liquidators were entitled to provide the transcript to the Australian liquidators for their use. He submits that, because the Cedenco NZ liquidations were commenced voluntarily by the shareholders of those companies, the New Zealand liquidators are not officers of this Court and cannot be subject to a sanction that would otherwise be available to a person holding that status.[132] Further, he submits that, having regard to the changes

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128 See para [25] above.
129 Ibid.
130 Generally, see *Heath & Whale on Insolvency* (LexisNexis looseleaf) at para 22.8(f) and *Re Roslea Path Ltd (in liq)* HC Tauranga CIV-2005-470-611, 17 December 2009.
131 For example, see *Re Hardy (a bankrupt), ex parte Official Assignee* [1922] NZLR 108 (SC) and *Re Baird (a bankrupt)* [1994] 2 NZLR 463 (HC).
132 See, for example, *Re David A Hamilton & Co Ltd (in liq)* [1928] NZLR 419 (SC) at 422.

in the liquidation legislation since the 1955 Act, there is now no prohibition on the use of transcripts, with or without permission from the Court.

[120] Strangely, it is the Australian liquidators who apply for an order approving, retrospectively, their use of the transcript. Mr Tingey made the point that it was not for the Australian liquidators to defend their use of the transcript, but, rather, for the New Zealand liquidators to assert a lawful basis on which they provided it. In those circumstances, Mr Tingey submits that the application has been made by the wrong liquidators. In his submission, any application for retrospective approval ought to have been made in respect of provision of the transcript, by the New Zealand liquidators.

[121] Three issues arise:

(a) What jurisdiction does this Court have over liquidators appointed by shareholders or directors of the company?[133]

(b) Was the transcript misused?

(c) If so, should retrospective approval for use of the transcript by the Australian liquidators be given?[134]

*(b) Jurisdiction*

[122] Historically, a distinction has been drawn between liquidators appointed by the Court (who have always been regarded as officers of the Court) and those appointed through other means, who have not. However, significant changes were made to the appointment and roles of liquidators when the 1993 Act was passed. In contrast to earlier legislation, Parliament gave to the Court a general power to supervise acts or decisions made by a liquidator appointed by any available means, including an ability to review or fix his or her remuneration at a level which was

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133 The means by which a liquidator may be appointed voluntarily are set out in s 241(2)(a) and (b) of the Companies Act 1993.

134 This question includes consideration of the extent of this Court's jurisdiction over the Australian liquidators.

reasonable in the circumstances.[135] The question whether that change was intended to characterise all liquidators as officers of the Court is central to determination of the jurisdictional question. The point remains unresolved.

[123] In *Re Roslea Path Ltd (in liq)*,[136] a Full Court of this Court considered, as part of its analysis of the way in which it should determine applications to fix remuneration under the 1993 Act, the position pertaining under the 1955 Act. That part of the *Roslea Path* judgment explains the previous liquidation processes in a manner equally applicable to the point now under consideration.

[124] Based on earlier English models, there were three types of liquidation regime available under the 1955 Act, each being known by the term "winding up". The three categories were: a members' voluntary winding up, a creditor's voluntary winding up and a winding up by the Court.[137] In *Roslea Path*, this Court said:

> [22] We take a broad description of each type of winding up regime from Sutton, Creditors' Remedies in New Zealand (Butterworths Wellington, 1978) at 7-8, paras 1.51-1.52:
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> a) A members' voluntary winding up was initiated by a resolution of shareholders, coupled with a declaration by the directors that the company was solvent. If, at a later stage, it became clear that the company could not pay all of its debts, provision was made for it to be administered, thereafter, as an insolvent company.
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> b) A creditor's voluntary winding up was also commenced by a resolution of shareholders. But, it was not accompanied by a declaration of solvency. Because of the assumption of insolvency, a meeting of creditors had to be called the day after the company resolved to wind up. A liquidator was appointed by the creditors. The creditors also had the right to appoint a Committee of Inspection, which exercised (some) oversight of the liquidator's activities.
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> c) A creditor could petition the Court for an order that the company be wound up. The Court would appoint the Official Assignee as a "provisional liquidator" who would call meetings of creditors and contributories. The creditors would appoint a liquidator, to replace the provisional appointment, at their meeting.

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135 Companies Act 1993, s 284(1).
136 *Re Roslea Path Ltd (in liq)* HC Tauranga CIV-2005-470-611, 17 December 2009.
137 Ibid, at para [21].

[125] The 1993 Act discarded those three regimes and replaced them with a single liquidation process that could be commenced by resolution of either shareholders or directors, or by Court appointment.[138] That change was made in consequence of recommendations made by the Law Commission when it considered company law reform in the late 1980s.[139] An illustration of the way in which the assimilation of the prior liquidation regimes works in practice can be found in the provisions of the 1993 Act that permit this Court to fix or to review a liquidator's remuneration. In *Roslea Path*, Venning J and I said:[140]

> [38] The remuneration provisions of s 276(2) of the 1993 Act differentiate between liquidators appointed by the Court and those appointed by shareholders or directors of the company. They also differentiate between the remuneration payable to the Official Assignee and a private liquidator: s 276(1).
>
> [39] *In terms of s 276(1), private liquidators who are appointed by shareholders or directors of the company are entitled to charge reasonable remuneration. They do not need Court approval to fix the remuneration, whether or not the company is insolvent. Nevertheless, those liquidators are subject to review of their remuneration on an application under s 284(1)(e) and (f) of the 1993 Act*. Unless the Court otherwise orders, an Official Assignee or a private person appointed as a liquidator by the Court is remunerated in accordance with s 276(2).
>
> [40] In practice, that means that creditors of a company put into liquidation through the appointment of a private liquidator by either shareholders or directors must take an active stance in challenging remuneration charged under s 284(1)(e). If that were not done, unscrupulous liquidators may charge as they like.
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> (emphasis added)

[126] The Commission intended to reduce the role of the Court in liquidations (based on what it termed a "major criticism ... that a liquidator must refer matters to the Court frequently") and to treat all types of liquidations in the same way.[141] While the Commission believed that it had recommended adequate safeguards for a reduction of the liquidation process to one model, its recommendations were

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138 Ibid, at para [33].

139 Company Law Reform and Restatement (NZLC R 9, 1989).

140 *Re Roslea Path Ltd (in liq)* HC Tauranga CIV-2005-470-611, 17 December 2009 at paras [38]–[40].

141 Ibid, at paras 642, 644 and 645.

undermined, at least in one respect, by Parliament's decision not to provide explicitly that a liquidator be an experienced and independent insolvency practitioner.[142]

[127] Parliament's decision, when passing the 1993 Act, not to discriminate between liquidators appointed by the Court and otherwise, coupled with the lack of any provision entitling only experienced practitioners to act in that capacity, suggests that it intended to place greater weight on the Court's extended powers of supervision over all liquidators, for the purpose of safeguarding the interests of parties who might be affected adversely by the liquidation process.

[128] The wider powers of statutory supervision conferred by s 284(1) of the 1993 Act are stated to be "in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators".[143] This Court also has power to require a liquidator to carry out his or her duties and a concomitant ability to remove a liquidator from office if he or she were to fail to comply with any order designed to respond to such an application.[144] Those powers apply to all liquidators, however appointed.

[129] Section 284(1) also allows applications for directions to be made by liquidators, with respect to matters connected with the exercise of powers or functions of a liquidator.[145] Generally, if a liquidator complies with such a direction he or she is entitled to rely on it in defence to any claim.[146] Those powers are somewhat wider than were available under the 1955 Act. Under s 241(3) of that Act a Court appointed liquidator was entitled to apply for directions "in relation to any particular matter arising under the winding up". In *Re Securitibank Ltd (in liq)*,[147] Barker J held that the Court also had an inherent jurisdiction to give directions "to its

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142 Ibid, at para 642. See also cl 217 of the Commission's proposed statute (at p 308 of the Report) in which the term "experienced insolvency practitioner" was defined as "a person who has substantial experience in administering or advising on the insolvency of individuals, or the liquidation of companies, or receiverships".

143 Companies Act 1993, s 284(2).

144 Ibid, s 286(1), (3)(b) and (4)(a).

145 Ibid, s 284(1) and (3)(a).

146 Ibid, s 284(3) and (4).

147 *Re Securitibank Ltd (in liq)* [1978] 1 NZLR 97 (SC) at 106.

officer, the liquidator"; with that jurisdiction being distinct from that conferred by s 241(3).[148]

[130] The equivalent right of application for a liquidator appointed in a voluntary winding up was confined, by s 298(1), to seeking directions "to determine any question arising in the winding up of a company". On a voluntary liquidator's application, the Court could decline to give directions, unless satisfied that "determination of the question or the required exercise of power will be just and beneficial".[149]

[131] Mr Chisholm relied on *Re Blue Chip New Zealand Ltd (in liq)*[150] in which this Court accepted a submission that reliance on *Re Securitibank Ltd (in liq)* was misplaced because it had no ability to exercise inherent jurisdiction in a liquidation commenced by shareholders or directors. In his reasons judgment, Venning J had said:

> [9] The high point for the liquidators on this issue is the decision of Barker J in the *Securitibank Ltd* case. The directions given by the Court in *Re Securitibank Ltd* were extensive and declaratory of rights under contractual and statutory instruments. Barker J considered whether the Court had jurisdiction to make the directions and concluded that he could deal with the matter and properly give directions, both under the Court's inherent jurisdiction and under s 241(3) of the Companies Act 1955.
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> [10] In *Re Securitibank* all counsel agreed Barker J was at liberty to make orders and give directions under the inherent jurisdiction as was thought proper. While jurisdiction cannot be granted by consent, where the application is opposed, a harder look is required. There are a number of differences between the application for directions before Barker J and the current application.
>
> [11] First, the obvious one that in the present case the companies were not placed into liquidation by the Court. As the liquidators have not been appointed by the Court the basis for the inherent jurisdiction relied on by Barker J does not exist. If there is jurisdiction, it must arise from the statutory wording.

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148 See also *Re Reid Murray Holdings Ltd (in liq)* [1969] VR 315 (SC, Vic) at 318, even though Adam J, in that case, saw use of the inherent jurisdiction as a means of distinguishing the position in a Court ordered and voluntary liquidation.

149 Companies Act 1955, 298(2) (as it stood between 1 January 1957 and 30 June 1994).

150 *Re Blue Chip New Zealand Ltd (in liq)* HC Auckland CIV-2009-404-1511, 23 April 2009 (Result) and 27 April 2009 (Reasons).

[132] It is clear, from reading Venning J's reasons, that he did not have the benefit of full argument on this issue. In addition, the judgment was given some months before the decision of the Full Court (to which both Venning J and I were party) in *Roslea Path*,[151] in which the differences between the various liquidation regimes under the 1955 Act were considered in more detail.[152] In those circumstances, and with respect, I do not consider that the view expressed by Venning J in *Blue Chip* can be regarded as authoritative on the point in issue.

[133] Another authority to which I was referred by Mr Chisholm was *Re David A Hamilton and Co Ltd (in liq)*.[153] In that case, a liquidator appointed in a voluntary liquidation applied for directions on whether he was obliged to refund money to a shareholder that had been paid as interest on a call made by the liquidator. One of the issues was whether the principle that an officer of the Court should uphold the highest standards of integrity, notwithstanding legal rights, should be applied in the context of a voluntary liquidation.[154]

[134] Skerrett CJ took the view that the rule in *ex parte James* did not apply.[155] That "rule" requires the Court's officer to act with the utmost integrity and probity and not to take points that could be seen as enforcing an unjust claim.[156] The Chief Justice said:[157]

> I am of the opinion that a voluntary liquidator under the provisions of the New Zealand Companies Act, 1908, is not an officer of the Court within the line of cases which commences with *Ex parte James*. See *In re Hills Waterfall Estate and Gold-mining Co.* I cannot satisfy myself that anything contained in our New Zealand Companies Act, 1908, or in the regulations made thereunder, has the effect of creating a liquidator in a voluntary winding-up an officer of the Court in the same position as a trustee in bankruptcy.

[135] *Re Hill's Waterfall Estate and Gold Mining Co*[158] (on which Skerrett CJ relied) does not stand as authority for the proposition that a liquidator appointed

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151 *Re Roslea Path Ltd (in liq)* HC Tauranga CIV-2005-470-611, 17 December 2009.
152 See paras [122] and [125] above.
153 *Re David A Hamilton and Co Ltd (in liq)* [1928] NZLR 419 (SC).
154 *Re Condon, ex parte James* (1874) LR 9 Ch App 609 (CA).
155 Ibid.
156 See also, *Re Byers, ex parte Davies* [1965] NZLR 774 (SC) at 780–781.
157 *In re David A Hamilton and Co Ltd (in liq)* [1928] NZLR at 422 (SC).
158 *Re Hill's Waterfall Estate and Gold Mining Co* [1896] 1 Ch 947 (ChD).

other than by the Court can never be an "officer of the Court". While *Hill's Waterfall Estate* was a case involving a voluntary winding up, Stirling J's decision in that case, that the liquidator was not acting as "an officer of the Court" was one which would have come about even if the liquidation had been commenced by Court order. That is because the question before him turned on the interpretation of a section in the Companies Act 1862 and r 89 of the Companies (Winding-up) Rules 1890. Stirling J said:[159]

> Rule 89 provides: "The duties imposed on the Court by s 98 of the Companies Act, 1862, with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the liquidator as an officer of the court subject to the control of the Court"; and rule 90: "For the purpose of the discharge by the liquidator of the duties imposed by s 98 of the Companies Act, 1862, as varied by s 13 of the Companies (Winding-up) Act, 1890, and the last preceding rule, the liquidator shall for the purpose of acquiring or retaining possession of the property of the company, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly".
>
> *Therefore, even if this were a compulsory winding-up the liquidator is only put in the position of an officer of the Court when he is discharging the duties imposed by s 98; and in the present case the liquidator was not acting under that section but under s 161. ....*
>
> (emphasis added)

[136] In my view, none of the authorities dictate a response to the jurisdictional question that is at odds with the way in which the obligations and responsibilities of all liquidators have been recast in the 1993 Act.

[137] I am satisfied that the intention of the New Zealand Parliament, when the 1993 Act was enacted, was to put all liquidators on an equal footing. That means that the Court's ability to exercise its inherent jurisdiction to supervise liquidators, previously restricted to those appointed by the Court, now applies to all, however appointed. It does not matter whether Parliament intended to characterise all liquidators as "officers" of the Court. The fundamental point is that Parliament intended that this Court exercise a general supervisory and, in appropriate cases

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159 Ibid, at 954–955.

involving urgency, summary jurisdiction over them, in a manner akin to the Court's supervision of one of its "officers".

[138] This approach is also consistent with the ability of all liquidators to exercise the same powers under the 1993 Act. If all liquidators can exercise the same powers, it would be strange if Parliament had intended those appointed other than by the Court to be subject to less curial supervision than those in whom the Court, by its own order, has reposed confidence. Liquidators who are appointed at the behest of shareholders are more likely (because in many cases they are seen as the appointor's protectors) to require greater supervision, in the absence of a licensing (or similar) regime.

[139] For those reasons, I hold that the New Zealand liquidators are to be treated as if they were "officers of the Court", for the purpose of this aspect of ANZ NZ's application.

*(c) Was the transcript misused?*

[140] In determining what approach should be taken to this issue, the judgment of Millett J in *Re Barlow Clowes Gilt Managers Ltd* is instructive.[160] That case involved a company that had been wound up by order of the Court. The liquidators had conducted interviews with various people who were able to assist in their inquiries, in lieu of the need to resort to the private examination process. At relevant times, applicable English law required a liquidator to apply to the Companies Court for an order that an examination be held. There was no ability for the liquidators to convene an examination administratively.

[141] Millett J described a practice that had grown in England whereby intended examinees would agree to submit to questioning on an informal basis and without a formal order of the Court. In identifying confidentiality as a key factor in this process, he said:[161]

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160 *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385 (ChD).

161 Ibid, at 395–396. Millett J refers to r 9 of the Insolvency Rules 1986. Rule 9(1) provided that a written record of a private examination was not to be filed on the Court's records, with r 95(5) providing that a transcript could not be inspected without an order of the Court by anyone other

> Given the liquidators' powers to obtain information by compulsion, it has become the widespread practice for responsible persons to whom requests for information are addressed by liquidators to co-operate with the liquidators and to provide them with copy documents and other information and to submit to being questioned on an informal basis and without a formal order of the court. This is done on the implicit (if not explicit) understanding that the information supplied will be treated as confidential and will not be used except for the purpose of the liquidation. If there comes to be a generally perceived risk that the records of such informal interviews may be disclosed to third parties, there is an obvious danger that professional men will no longer co-operate with liquidators on a voluntary basis, but will insist on liquidators having recourse to the court's compulsory powers so that they may enjoy the protection of r 9.

[142] The issue of disclosure, in *Barlow Clowes*, arose in a different context. The various witnesses had provided voluntary statements to the liquidators in accordance with the practice described by the Judge. During the course of criminal investigations into the activities of the deposit-taking companies following a collapse that left a total liability to investors of over £115 million, those accused of offences requested copies of the transcripts of the interviews to assist preparation for their defence. In the Crown Court, Phillips J indicated that the appropriate course was for the liquidators to apply to the Companies Court for directions before a ruling was given. In the end, based on evidence from a leading English insolvency practitioner, Millett J declined permission, holding that "the proper and efficient functioning of the process of compulsory liquidation would be jeopardised if transcripts of the informal interviews of witnesses carried out by liquidators were to be made generally available to defendants to criminal proceedings".[162] The Judge considered that the appropriate course was for the Crown Court to determine whether the transcripts should be made available after considering an argument based on public interest immunity.[163]

[143] In *Barlow Clowes*, Millett J said:[164]

> Quite apart from any question of public interest immunity, there are powerful reasons for not permitting the voluntary disclosure of the transcripts by the liquidators. The information was obtained in circumstances

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than the liquidator or the Official Receiver. He added: "Those provisions are a necessary safeguard to ensure that the information obtained by means of this extraordinary process is used only for the purpose of the liquidation" (at 395).

162 Ibid, at 396.

163 Ibid, at 397.

164 Ibid, at 391.

> of confidentiality and by assurances, express or implied, that it would be used only for the purpose of the liquidation. Those assurances were given by officers of this court. They were properly given in order to obtain information necessary to enable this court to carry out its functions. The information is now sought to be used for purposes collateral to the liquidation and foreign to those for which it was obtained. It ought to be unthinkable that the court should authorise its own officers to renege on their assurances in such circumstances in the absence of some compelling reason to do so.

[144] Those remarks were based on an earlier decision of the same Judge, in *Re Esal (Commodities) Ltd (No 2),*[165] in which His Lordship had said:

> … where leave is sought to make use of material obtained by the use or under the threat of sec 268 proceedings, then, save in exceptional circumstances, leave should be granted only if the use proposed to be made is within the purpose of the statutory procedure, that is to say, that the use proposed to be made of the material is to assist the beneficial winding-up of the company.

[145] Even in England, the protection given to the transcript is not unqualified. As is clear from Millett J's view that the issue of use of the transcript for the purpose of criminal proceedings might turn on the applicability (or otherwise) of public interest privilege, it is necessary in every case to consider whether there is a countervailing public interest favouring disclosure. This approach would also be taken in New Zealand, primarily by reference to s 69 of the Evidence Act 2006.

[146] Although *Barlow Clowes* is referable to liquidations ordered by the Court, in light of my holding that liquidators appointed by shareholders or directors are subject to the same supervisory jurisdiction, there can be no difference in principle on that score. There is, however, a separate question. Do changes made to the private examination provisions when the 1993 Act was passed remove the confidentiality that otherwise attaches to what was said at an examination, held under either s 261(3)(c) or following a Court order under s 266(2)?

[147] Under the 1955 Act, a distinction was drawn between private and public examinations. Section 262 dealt with private examinations and s 263 with those of a public nature. Following the 1980 Amendment to the 1955 Act, a provision akin to

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165 *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708 (ChD) at 723.

s 262 was enacted which enabled the Official Assignee to summon a person for examination without the need for a Court order.[166]

[148] The private nature of the examination was emphasised by s 262(8) of the 1955 Act. It provided:

> **262 Power to summon persons suspected of having property of company**
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> ...
>
> (8) Save with the consent of the court, on the application of the provisional liquidator or the liquidator and subject to such conditions as the court may prescribe, it shall not be lawful for any person to publish a report of any examination under this section, or of any matter arising in the course of any such examination, and every person who, in breach of this subsection, publishes any such report shall be liable to a fine not exceeding $200.

[149] A similar provision appeared in the Insolvency Act 1967,[167] enabling the Official Assignee to examine a bankrupt or other person who might assist in his or her inquiries) and s 262A of the 1955 Act, through incorporation by reference.[168] The nature of the prohibition on publishing any report of a private examination was considered in *Re Baird (A bankrupt)*,[169] in the context of the Official Assignee's stated intention to annex transcript of private examinations of third parties to a statutory report that he was required to make for the Court. After reference to competing submissions, Master Kennedy-Grant said:[170]

> I accept [counsel for the Official Assignee's] submission, for the following reasons:
>
> (i) The word "publish" imports a far wider degree of dissemination than occurs in either the incorporation of the transcript in the Official Assignee's report in any of the three ways I have described above or use of the transcript for the purpose of examining the bankrupt. The Shorter Oxford English Dictionary (3rd ed, 1973) gives the following definitions of the word:
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> > "1. trans To make publicly or generally known; . . . to tell or noise abroad; . . . 4. . . . b. To make generally accessible or available; to place before or offer to the public . . .".

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166 Companies Act 1955, s 262A. See also paras [44] and [44] above.
167 Insolvency Act 1967, s 68(7).
168 Companies Act 1955, s 262A(5)(c).
169 *Re Baird (A bankrupt)* [1994] 2 NZLR 463 (HC).
170 Ibid, at 468–469.

(ii) The word "report" imports a degree of completeness greater than that involved in the use of portions of the transcript of the private examination for the purpose of the public examination of a bankrupt. The Shorter Oxford English Dictionary, in the edition already referred to, gives the following meaning of the word:

> ". . . 2. An account brought by one person to another, esp of some matter specially investigated . . . c. A formal statement of the results of an investigation, or of any matter on which definite information is required, made by some person or body instructed or required to do so . . . 3. A statement made by a person; an account, more or less formal, of some person or thing . . . d. An account, more or less complete, of the statements made by a speaker or speakers (as in a debate, lecture, etc), of the proceedings at a meeting, or of any occurrence or event, esp with a view to publication in a special form, or in the newspaper press . . .".

...

(v) A contrary interpretation would have a serious impact on the work of the Official Assignee and of this Court. It would mean that whenever an Official Assignee wished to summarise or quote, or to append the whole of the transcript of a private examination under s 68 or documents obtained in the course of it, in his report to the Court under s 69(3) or s 109(2) or to use an extract from such a transcript in the course of his examination of the bankrupt in a public or private examination or of another person in a private examination he would require to obtain the consent of the Court before doing so. In the case of use of the transcript for the purpose of the examination of a bankrupt, the need to apply would present no great problem because it could be made in the course of the examination. In the case, however, of incorporation in his report of information obtained from a private examination in any of the ways I have described and in the case of use of an extract from the transcript in the private examination of another person, there would be need for an application to the Court before the Official Assignee could proceed. This could delay the proceeding and lessen it effectiveness.

(vi) The potential prejudice to persons who have been examined privately under s 68 is, in my view, slight because:

- In the case of incorporation in the Official Assignee's report to the Court under s 69(3) or s 109(2), the provisions of R 66 of the High Court Rules will apply, with the automatic prohibition of searching until determination of the examination under R 66(3) and the power of the Court to forbid searching after determination without leave of the Court under R 66(7).

- In respect of the use of the transcript in another private examination because of the restrictions on access to that examination and the application of s 68(7) to that other examination.

[150] In the alternative, were he wrong on that point, the Master took the view that, as a matter of discretion, relevant factors would justify Court consent to "publication" of the examination by placing the documents before the Court as part of the Official Assignee's report and to their use by the Official Assignee in examining (in that case) the bankrupt. Out of an abundance of caution, the Master elected to deal with the issue by granting consent, on the basis that the transcript and exhibits not be provided to any person other than the bankrupt and should not be available for inspection or copying by persons other than the bankrupt or proved creditors.[171]

[151] The absence of a provision equivalent to s 262(8) of the 1955 Act tends to suggest that Parliament intended that, while s 261(3)(c) examinations were to be conducted by liquidators in such manner as they thought appropriate, individualised arrangements ought to be made, before the examination, as to the use to which the transcript and exhibits produced may later be put.

[152] If, for example, objection were taken by a proposed examinee to a liquidator's suggestion that the transcript be available for distribution to anyone whom the liquidator might nominate, it would be open to the intended examinee to decline to attend and let the liquidator apply to the Court under s 266(2)(a), so that the use of the transcript could be regulated by the Court. That approach would also encourage conduct of the type to which Millett J referred in *Barlow Clowes*, whereby responsible persons to whom s 261(2) applies might be prepared to provide documents and information on a more informal basis, subject to agreement as to the extent of any confidentiality to attach to them.[172] Indeed, that approach provides an incentive to both liquidator and proposed examinee to take a responsible approach to the issue because, otherwise, each may be put to the unnecessary cost of an application under s 266(2)(a) of the 1993 Act, to resolve the issues.

[153] In this case, it is clear from the subsequent conduct of the New Zealand liquidators that they believed the examination was being conducted on a private and confidential basis. That is the reason why, initially, they declined to make a copy of

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171 Ibid, at 470.

172 *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385 (ChD) at 395–396. See also paras [141], [143] and [145] above.

the transcript of Ms Dekker's evidence available to her and to ANZ NZ.[173] In those circumstances, the stance taken by the New Zealand liquidators to provide the transcript to themselves, as Australian liquidators, amounted to misconduct. Use of the transcript, for a purpose extraneous to the New Zealand liquidations, that infringed against the basis on which the New Zealand liquidators contended that the examination was conducted.

[154] I am sure the misuse arose out of an unthinking conflation of their roles as New Zealand liquidators and Australian liquidators.[174] Had the Australian liquidators not been the same persons as the New Zealand liquidators, it is hard to imagine that the New Zealand liquidators would have supplied the examination transcript so readily.

[155] All of that said, the transcript has already been used, by being placed before the Federal Court in Australia. Subject only to a request from this Court to the Federal Court to have the transcript removed from the record, there is nothing more that could be done to protect the content of the examination. Even that may have a degree of futility attached to it, given the need for me to touch on the content of that examination, in the course of this judgment. For those reasons, I conclude that while the New Zealand liquidators have misused the transcript, there is no appropriate sanction that I can impose at this stage. That does not mean that Ms Dekker will be wrongly disadvantaged; I protect her position in another way.[175]

*(d) Should retrospective approval for the use of the transcript be given to the Australian liquidators?*

[156] I am not prepared to grant relief to the Australian liquidators on this application for retrospective approval to use the transcript in the manner they did. Because Messrs Sheahan and Lock hold office as both Australian and New Zealand liquidators, they cannot, as Australian liquidators, assert that they did not know what they were doing, as New Zealand liquidators. In effect, they (as Australian liquidators) were parties to the misconduct of the New Zealand liquidators. There is

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173 See para [25] above.
174 See para [4] above
175 See para [157] below.

the added point that the Australian liquidators are subject to the supervision of the Federal Court, not this Court.

[157] In my view, though I cannot compel this course, the Australian liquidators should disclose what has occurred to the Federal Court and seek such orders as they think appropriate with regard to future use of the transcript as evidence. It is also open to ANZ NZ or Ms Dekker, in light of what I have said in this judgment, to apply to the Federal Court for such order as they might think appropriate to forbid or limit the ability of any other person to inspect (or otherwise use) the transcript.

**Costs**

[158] Both parties have succeeded, to some extent, on the various applications. In those circumstances, I reserve costs for further argument.

**Result**

[159] For the reasons given:

(a) I dismiss the New Zealand liquidators' application for examination of Ms Dekker and production of documents by her.

(b) I dismiss ANZ NZ's application for remuneration and expenses to be paid in relation to the July 2011 examination of Ms Dekker.

(c) The Australian liquidator's application to examine Ms Dekker, under the Cross-border Act, is adjourned. I will hear from counsel, in Court for chambers, at 9am on the first available date after 18 February 2013, on whether an order should be made at that time. That will enable either expert evidence to be filed or for an application to be made to the Federal Court.[176]

[176] See para [114] above.

(d) I make a declaration that the New Zealand liquidators acted improperly in providing a transcript of Ms Dekker's July 2011 examination to the Australian liquidators for use in an Australian proceeding. They should not have done so without obtaining the consent of Ms Dekker or (in the absence of her consent) this Court.

(e) Costs are reserved. If costs cannot be agreed, I invite counsel to file a joint memorandum indicating appropriate timetabling orders to resolve such issues promptly.

[160] I will also hear from counsel, at the next hearing, on whether any further directions or declarations may be required to give effect to this judgment, in light of my reasoning. I have not made orders that respond to each and every application made as I consider those that I have made should deal with all matters in dispute. Nevertheless, if counsel consider that any further orders were required, I am prepared to hear them on that.

[161] I thank counsel for their assistance.

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P R Heath J

Delivered at 3.00pm on 15 November 2012