

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2010-409-000123
[2022] NZHC 2994**

UNDER the Companies Act 1993
IN THE MATTER of the liquidation of Property Ventures Ltd
and others
BETWEEN KEVIN JOHN WHITLEY as liquidator of
PROPERTY VENTURES LTD
(In Liquidation)
Applicant
AND MEREDITH CONNELL (sued as a firm)
Respondent

Hearing: 7 September 2022 and telephone conference with Counsel on
26 October 2022
Counsel: J Moss for Applicant
M J Hodge for Respondent
Judgment: 16 November 2022

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 16 November 2022 at 11.00 am
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] Robert Walker was formerly the liquidator of Property Ventures Ltd (in liq) (PVL) and subsidiary companies. John Scutter was a co-liquidator of PVL for a period between 2013 and 2018. Kevin Whitley is the recently appointed liquidator of PVL and several subsidiaries (the PVL companies).¹

[2] Meredith Connell is a law firm that acted upon the instructions of Mr Walker in matters concerning PVL and its subsidiaries.

[3] In reliance upon s 261 of the Companies Act 1993 (the Act), Mr Whitley has required Meredith Connell to deliver to him files and other documents where Meredith Connell acted upon the instructions of Mr Walker as liquidator of PVL and associated companies. Meredith Connell has not provided any documents. Mr Whitley applies for orders under ss 261 and 266 of the Act that Meredith Connell provide the files and documents to him.

[4] The application seeks orders:

- 1.1 that the respondent, Meredith Connell, comply with the s 261 notices issued to them by the applicant dated 5 October 2021, 24 November 2021 and 7 December 2021;²
- 1.2 requiring that the respondent to produce any books, records or documents relating to the business or affairs of Property Ventures Limited (in liq) (PVL) that is in their possession or control (the documents).

[5] Meredith Connell holds several files but contends they belong to Mr Walker and not the PVL companies. It argues the Court's power to order it to produce documents relating to the PVL companies, but not belonging to them, can only be exercised under s 266(2) of the Act. It says this requires consideration of issues relevant to whether, in the exercise of the Court's discretion, orders compelling production should be made, and that orders should not be made in this case.

¹ I understand the companies are Property Ventures Limited (in liq), LivingSpace Properties Ltd (in liq), Cashel Ventures Ltd (in rec and liq), Castle Street Ventures Ltd (in liq), Lichfield Ventures Ltd (in liq), Five Mile Holdings Ltd (in liq), Tay Ventures Ltd (in liq), Gibbston Water Holdings Ltd (in liq), St Asaph Ventures Ltd (in liq), Tuam Ventures Ltd (in liq), Beechnest Ventures Ltd (in liq), 92 Lichfield Ltd (in liq), and Montecristo Construction Company Ltd (in liq).

² Mr Hodge has confirmed that Meredith Connell does not take issue with the form of the notices under s 261 upon which Mr Whitley relies or with the fact that the notice of application appears to confine itself to documents of PVL when Meredith Connell's files concern PVL and other related companies.

- [6] The issues that Meredith Connell says require consideration are the following:
- (a) Do Meredith Connell's files/documents belong to the PVL companies or to Mr Walker?
 - (b) Would an order requiring Meredith Connell to produce the files/documents disclose privileged and/or confidential communications between it and Mr Walker?
 - (c) Is Meredith Connell entitled to exercise a general or retaining lien over the files/documents in respect of unpaid legal fees?
 - (d) Are the files/documents being sought for a genuine investigative purpose?
 - (e) Are the orders sought unnecessary, unreasonable, or oppressive?
 - (f) Is it an abuse of process for Mr Whitley to seek the files/documents in advance of a determination against Mr Walker for production of his files/documents?

Background

[7] Mr Walker was appointed liquidator of PVL by order of the High Court on 27 July 2010. He was appointed liquidator of other related companies at various times following his initial PVL appointment. John Scutter was a co-liquidator of PVL by appointment of the High Court on 4 June 2013, until his resignation on 22 March 2018.

[8] Mr Whitley is the current liquidator of the PVL companies.³ In that capacity, Mr Whitley is engaged in several court proceedings against Mr Walker and Mr Scutter.

³ Mr Whitley was appointed liquidator of Livingspace Properties Ltd (in liq), Cashel Ventures Ltd (in liq), Castle Street Ventures Ltd (in liq), Lichfield Ventures Ltd (in liq), Five Mile Holdings Ltd (in liq), Tay Ventures Ltd (in liq), Gibbston Water Holdings Ltd (in liq), and St Asaph Ventures Ltd (in liq) on 22 September 2021. At the hearing, Mr Moss advised that since filing this application, Mr Whitley has been appointed liquidator of the further companies in n 1 above.

The details of those proceedings have been helpfully summarised in a judgment of Wylie J in *100 Investments Ltd v Walker*⁴ as follows:

- (a) An application by Mr Whitley that Mr Walker, as the former liquidator of PVL and related companies, deliver up all documents, files and emails in his possession or under his control relating to the liquidations.
- (b) Claims by Mr Whitley against several parties, including against Mr Walker and Mr Scutter, alleging breach of duties owed to the PVL companies under the Act and breach of fiduciary duty and knowing receipt.
- (c) In this proceeding, an application to review the remuneration of Mr Walker and Mr Scutter in the liquidation of PVL and, if it is found that the amounts paid to them were unreasonable, an order they refund any overpayments.

[9] A litigation guardian has been appointed for Mr Walker in the proceeding to which [8(b)] relates. In this proceeding, David Goodall has been appointed as Mr Walker's litigation guardian.⁵

[10] Meredith Connell was engaged by Mr Walker from March 2017 to act on matters concerning the liquidation of PVL companies. Although it holds nine files, there are only six of those files being sought by Mr Whitley. I will describe the files (to the extent the evidence allows) later in the judgment.

[11] Following Mr Whitley's appointment, he made requests of Mr Walker and Mr Scutter for documents they held of the PVL companies. The requests were made under ss 283A and 261 of the Act. Mr Whitley considers these requests have not been adequately complied with, particularly by Mr Walker.

[12] On 5 October 2021, Mr Whitley emailed Meredith Connell, advising:

⁴ *100 Investments Ltd v Walker* [2022] NZHC 1379 at [4]-[7] and [11]-[14].

⁵ *Commissioner of Inland Revenue v Property Ventures Ltd (in liq and rec)* HC Christchurch CIV-2010-409-123, 29 July 2022 (reissued 3 August 2022) (Minute).

I have been appointed replacement liquidator to various Companies, list appended, by the Registrar under s283(6) of the Companies Act 1993 to replace Robert Walker following vacancy in office.

...

I wish to uplift all and any files that you or your firm have acted on with respect to these Companies and /or the liquidator.

Please advise when these are available to be uplifted.

[13] On 11 October 2021, Meredith Connell replied:

Thank you for your email. Could you please confirm the basis upon which you are seeking these files? There are significant sums owing to the firm in respect of them.

[14] Then, on 20 October 2021, Meredith Connell's managing partner, Steven Haszard, wrote to Mr Whitley as follows:

Mr Walker is indebted to Meredith Connell for a considerable sum in respect of the provision of legal services. Meredith Connell accordingly asserts its lien over all of his files and documents.

[15] In an email of 26 October 2021, Mr Whitley challenged Meredith Connell's assertion to a lien against a liquidator and asked for some authority to support its lien.

[16] On 5 November 2021, Mr Haszard provided reasons why Meredith Connell did not consider it had any obligation to release the files. The matters advanced reflect the position Meredith Connell has taken in this proceeding and can be summarised as:

- (a) Meredith Connell's retainer had been with Mr Walker and Mr Scutter jointly or, in respect of some matters, with Mr Walker alone, and its files do not belong to the PVL companies and could not therefore be provided to Mr Whitley.
- (b) Meredith Connell has a lien over the files for unpaid fees.
- (c) Meredith Connell's files contain privileged and/or confidential information belonging to Mr Walker and Mr Scutter jointly, or Mr Walker solely, and Meredith Connell is required to maintain that

privilege and confidentiality in respect of its former clients' information.

- (d) That insofar as the files contained company records, they should be sought from Mr Walker and Mr Scutter, rather than from Meredith Connell.
- (e) It would be particularly onerous for Meredith Connell to have to identify the company records on its files because they comprise hundreds of thousands of pages that it would have to manually review to identify records that may properly be subject to a s 261 notice or a s 266 production order.
- (f) Mr Whitley had not provided an explanation for wanting to uplift the files, and there is concern he is being funded by a former director of PVL, David Henderson, and his request may have been made for a collateral or improper purpose.

[17] On 24 November 2021, Mr Whitley's counsel, Mr Moss, wrote to Meredith Connell, advising that Mr Whitley would be applying to the Court for production of the documents held by Meredith Connell relating to the affairs of the PVL companies. He made an additional request on behalf of Mr Whitley that, pursuant to s 261, Meredith Connell provide all of its fee accounts and associated time records that Meredith Connell had charged PVL companies or Mr Walker and Mr Scutter in their capacity as liquidators of PVL.

[18] On 10 December 2021, Meredith Connell's counsel, Mr Hodge, wrote to Mr Moss advising he was instructed by Meredith Connell and was authorised to accept service on its behalf.

[19] Mr Whitley's application was filed on 23 December 2021.

[20] On 26 April 2022, Mr Moss wrote to Mr Hodge and sought information regarding the amount Meredith Connell was owed for fees and for which it asserted a lien over the files. He also made a request for:

...all trust account records including all record[s] and documents recording or relating to the receipting of funds received from or on behalf of PVL (In Liq) and the transfer of funds received from or on behalf of PVL (In Liq) and the transfer of funds on behalf of PVL (In Liq) within or from the trust account of Meredith Connell.

[21] On 19 May 2022, Mr Hodge wrote to Mr Moss but did not provide the trust account records or details of Meredith Connell's unpaid fees. Mr Hodge wrote:

Trust account records

This request begs a key question that will need to be decided by the court ... whether [Meredith Connell] is properly regarded to have been acting for the companies or for the liquidators in carrying out their statutory duty to maximise recovery for creditors. If the latter, then [Meredith Connell] would be acting in breach of its obligation to maintain confidentiality, if not privilege, in providing these documents to your client.

...

MC's unpaid fees

I accept that MC will need to provide proof of unpaid fees in relying on a lien in the proceedings. This will be done pursuant to directions of the Court...

Mr Whitley's reasons for making this application

[22] Mr Whitley confirms that following his appointment, he wrote to Mr Walker and Mr Scutter requesting all documents of the companies under ss 261 and 283A of the Act. He also wrote to other parties including a Mr Eathorne (who was an employee or contractor of Mr Walker), banks, and at least one other law firm to obtain documents of the PVL companies. He says that Mr Walker and Mr Scutter have not complied with his requests and that he filed proceedings against them for the production of documents and seeking directions in respect of their remuneration. Those applications have not progressed while a decision was made whether to appoint a litigation guardian for Mr Walker.

[23] Mr Whitley says the lack of documentation has impeded him carrying out his duties, and he has applied to uplift Meredith Connell's files to enable him to fully understand what has occurred in the liquidations to date, as:

Without the provision of documents from both the former liquidators and [Meredith Connell] I am essentially operating in the dark with only bits and pieces I have been able to pick up from some institutions that have answered my s261 notices such as banks and one law firm (Buddle Findlay) who had a peripheral role in the liquidation.

[24] Mr Whitley rejects Meredith Connell's concern that he is acting for an improper or collateral purpose. He says:

The applications for production of documents have been made with my primary duty of advancing the interests of all creditors in the most efficient manner in mind. The point of making application against [Meredith Connell] was because of the delays that were occurring with obtaining the documents from Mr Walker and because I suspect that the files from [Meredith Connell] will be complete. I have no such surety from Mr Walker.

[25] Specifically, Mr Whitley confirms that he is not making the application to assist the former director of PVL, Mr Henderson, and is not controlled by any creditor of the PVL companies in the performance of his duties. He says he was appointed because of his independence, and the fact that he had no association with Mr Henderson or any of his entities prior to his appointment as liquidator speaks to this. He accepts he is currently being funded by a creditor of PVL, 100 Investments Ltd, but says that does not compromise his independence and that funding by creditors is entirely normal, and often necessary, in company liquidations.

[26] Mr Whitley is unable to say what he will do with information that he obtains because he does not know what information exists. Information is necessary, he says, to assess what course will enable him to discharge his statutory duties.

The positions taken by Mr Walker and Mr Scutter

[27] Both Mr Walker (and his litigation guardian) and Mr Scutter are aware of this application.

[28] Mr Scutter will abide the decision of the Court.

[29] Mr Moss has made an enquiry of Mr Walker's litigation guardian and Mr Walker maintains legal professional privilege over Meredith Connell's files to the extent that it is available.

Meredith Connell's evidence and the files

[30] Mr Haszard has made an affidavit on behalf of Meredith Connell. He says Meredith Connell was instructed on nine files by Mr Walker. He does not provide copies of any letters of engagement or any other evidence concerning how the relationship between Mr Walker and Meredith Connell was contractually defined.

[31] He provides a brief description of Meredith Connell's nine files, which he says run to hundreds of thousands of pages. He did not carry out any of the legal work on the files, has only a limited general understanding of the files, and has not reviewed the documents on the files.

[32] Of the nine files, Mr Haszard's evidence focuses on file number 1, which he says is the "main file". It relates to litigation commenced by Mr Walker in 2012 against directors, auditors and valuers of PVL and in respect of which Meredith Connell was instructed in March 2017. The proceeding was settled in December 2017. I understand that most of the documents held by Meredith Connell were uplifted from former solicitors and that the majority of the hundreds of thousands of pages Mr Haszard refers to are on this file.

[33] Mr Haszard says there may be documents of the PVL companies on the files, but it is impossible to know that without a document by document review of all the documents on the files. As he does not give any evidence of how the documents are stored (hardcopy, electronic or both), it is not clear what is exactly meant by a "document by document review".

[34] Mr Haszard also says that "[As] with all legal files", the files will contain privileged material and separating privileged documents from non-privileged documents would also require a costly and time-consuming document by document review. He also asserts that all of the information on the files is confidential.

Mr Haszard does not, however, identify any particular documents from any of the files which are privileged.

[35] Mr Haszard says Meredith Connell is owed fees by Mr Walker of \$299,601.07. He does not provide any fee accounts (paid or unpaid) rendered by Meredith Connell to Mr Walker or say what fees were paid and by whom. There is evidence from Mr Whitley that Meredith Connell's fees were paid by PVL.

Mr Whitley's position in relation to the files

[36] At a teleconference I convened with counsel on 26 October 2022, I confirmed what files/documents held by Meredith Connell are in issue.

[37] Mr Moss advises that in respect of Meredith Connell's file number 1, the application can be "parked" until after the application that Mr Walker provide records and other documents in the liquidation is heard.

[38] Mr Whitley also does not seek Meredith Connell's files numbers 8 and 9. These concern proceedings brought by 100 Investments Ltd in which Mr Walker is personally named as a defendant and a complaint made against Mr Walker to the New Zealand Institute of Chartered Accountants.

[39] In issue are:

- (a) Meredith Connell's files numbers 2 to 7 (inclusive);
- (b) Meredith Connell's fee accounts that have been paid by PVL and time records that relate to them; and
- (c) Meredith Connell's trust account records insofar as they relate to the receipting of funds from or on behalf of PVL and the transfer of such funds.

Sections 261 and 266 of the Companies Act

[40] This application is made in reliance upon ss 261 and 266 of the Companies Act.

[41] Section 261 relevantly provides:

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

to do any of the things specified in subsection (3).
- (3) A person referred to in subsection (2) may be required—
...
 - (b) to provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests:

...
- (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, 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).

...

[42] Section 266 relevantly provides:

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 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.

...

[43] Section 261(1) is concerned with documents “of the company” that are in the possession or under the control of the person served with a request under that section. Heath J noted in *ANZ National Bank Ltd v Sheahan*:⁶

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 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.

...

(footnote omitted)

[44] Documents that are “of the company” may extend beyond those owned by the company. In *Buddle Findlay v Isaac*,⁷ the Court of Appeal held that because the firm of solicitors held certificates of title at the direction of the parent company they were “documents of” that company, notwithstanding that title in the documents vested in intervening subsidiaries.

[45] A liquidator’s powers in the Act to access documents and examine persons, while necessarily broad, are not to be exercised beyond the point where unfairness results.⁸ In *Dalton v Hong*, Associate Judge Smith noted that the discretion to make an order involves a careful balancing of factors. On the one hand, the Court should consider the reasonable requirements of a liquidator to carry out his or her functions,

⁶ *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [38].

⁷ *Buddle Findlay v Isaac* (1996) 7 NZCLC 261,132 (CA).

⁸ *Dalton v Hong* [2018] NZHC 2266, [2018] NZAR 1497 at [64], citing *Norrie v Sutich* [2013] NZHC 2495.

but on the other, there is a need to avoid making an order which will be wholly unreasonable, unnecessary, or oppressive to the person concerned.⁹

[46] In *Official Assignee v Grant Thornton*, Associate Judge Abbott summarised the position in this way:¹⁰

[9] Whether the matter comes before the Court by way of an order for compliance with a requirement under s 261 or on a request for an order for examination or production of documents [under s 266], the Court will balance the need to enable the liquidator to obtain information to investigate the affairs of the company with a need to maintain fairness in proceedings, by taking into account the effect of an order on the party being compelled.¹¹ It is for the liquidator seeking the order to satisfy the court that there is a proper case, after balancing all relevant factors.¹²

[47] In *Concrete Structures Ltd v NMHB Ltd (In Liq)*,¹³ Associate Judge Andrew identified factors that are generally relevant to the exercise of the discretion as follows:

- (a) Whether the requirement of the liquidator is reasonably necessary for the discharge of his or her functions and duties;
- (b) Whether the requirement of the liquidator would impose unnecessary and unreasonable burdens on the person the subject of the liquidator's notice (mere inconvenience or additional work is not however sufficient reason to validly oppose the liquidator's application);
- (c) The alternative legal procedures which are available to the liquidator (bearing in mind that pre-trial discovery is now firmly part of the litigation process);
- (d) The nature of the proposed proceedings (if any are contemplated) and whether the person concerned would be made more vulnerable to future claims as a result;
- (e) Whether the person subject of the notice or the proposed order is a former officer or employee of the company or someone else who has provided services to the company; and

⁹ At [70].

¹⁰ *Official Assignee v Grant Thornton* [2012] NZHC 2145.

¹¹ Citing *Re Northrop Instruments & Systems Ltd* [1992] 2 NZLR 361 (HC) at 365 where McGechan J commented that while the Court will endeavour to assist a liquidator to perform public interest functions, there is a countervailing concern to restrain liquidators from excess "however well-intentioned"; *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, (1992) 4 All ER 876 (HL); and *Laing v KPMG Peat Marwick* (1989) 4 NZCLC 65, 180 (HC).

¹² Citing *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer and Oppenheim (a firm)*, above n 11, at 439.

¹³ *Concrete Structures Ltd v NMHB Ltd* [2020] NZHC 1218 at [42]

- (f) The nature and significance of the information sought and the public interest in the information.

Do the Meredith Connell files belong to PVL or Mr Walker?

[48] Mr Whitley's position is that Meredith Connell's files that are in issue belong to the PVL companies as they concern advice and services provided to Mr Walker in relation to work he was performing for the PVL companies as liquidator. Mr Whitley contends that as the present liquidator of those companies, he is entitled to the files as of right.

[49] Meredith Connell argues Mr Whitley ignores the distinction between a solicitor who acts for a company (in liquidation or not) and a solicitor who acts for a liquidator of a company. Here, Meredith Connell contends it acted for Mr Walker and the files belong to him and not the PVL companies. It says Mr Whitley is only entitled to them if the Court makes an order under s 266(2), and it should not do so in this case.

[50] Meredith Connell's submission relies on *Bunting v Buchanan*.¹⁴ That case concerned a dispute between directors and shareholders of a company over fees and disbursements charged by the respondent liquidators. The first respondent claimed legal professional privilege in respect of correspondence and records of communications with solicitors and counsel he had instructed in relation to various issues that had arisen in the liquidation, including in relation to litigation brought against the company during liquidation. The applicants argued that any solicitor-client privilege belonged to the company because when conducting the company's defence of the litigation, the liquidator was an agent for the company acting in place of the directors. On this basis, the liquidator could not claim privilege against them as the company's directors. The liquidator accepted that he was an agent of the company but argued that the claimed privilege had to be considered in light of the liquidator being a creature of statute, exercising statutory powers and that the scope of the agency was limited by his principal statutory duty to protect and realise the assets of the company for its creditors. He argued it was inappropriately simplistic to say that merely because the claims were made against the company, privilege in any documents created in the

¹⁴ *Bunting v Buchanan* [2013] NZHC 1921.

course of litigation necessarily belonged to it, and that, in fact, the privilege was his alone.

[51] Associate Judge Abbott held that privilege in the documents belonged to the liquidator and said:

[38] I take as my starting point the applicants' contention that all communications between the [liquidator] and his legal advisors in relation to the litigation, were as an agent for [the company] ... I accept that a liquidator is an agent for a company in some circumstances, including where he conducts litigation on its behalf (as is apparent from the Supreme Court's decision in *Mana*).¹⁵ This is because the liquidator is acting in place of the directors. However, that fact does not predetermine whether legal advice obtained by the liquidator is obtained for the company (on that agency basis) or in his own right. A decision by a director to commence or defend litigation may well be considered part of the management of the affairs of a company, up to the time of liquidation. However, the decision that a liquidator then takes to continue with the prosecution or defence of the litigation, or to bring proceedings or defend a proceeding commenced after liquidation, is more appropriately analysed as a performance of the liquidator's duty to maximise recovery for creditors (and, if applicable, shareholders).

[39] On that analysis, legal advice will be obtained either as performance of the liquidator's statutory duty (as distinct from performance of a duty to the company), or to enable the liquidator to carry out that duty. Either way, the privilege belongs to the liquidator and not to the company. On this basis I find that privilege in the [liquidator's] communications with his solicitors and counsel belongs to the [liquidator].

[52] I do not agree with Associate Judge Abbot's analysis. To my mind, he failed to sufficiently recognise a liquidator is principally an agent of the company from which flow the normal consequences of agency.¹⁶ These include the obligation to produce all records and documents under the agent's control concerning the principal's affairs.¹⁷ This is a well-settled position.¹⁸

[53] The authors of *Company and Securities Law in New Zealand* describe the office of liquidator as:¹⁹

¹⁵ *Mana Property Trustee Ltd v James Developments Ltd (No 2)* [2010] NZSC 124, [2011] 2 NZLR 25.

¹⁶ Andrew R Keay *McPherson & Keay The Law of Company Liquidation* (5th ed, Sweet & Maxwell, London, 2021) at 558.

¹⁷ Peter Watts and F.M.B. Reynolds (eds) *Bowstead & Reynolds on Agency* (20th ed, Sweet & Maxwell, London 2014) at [6-090].

¹⁸ *Re Silver Valley Mines* (1882) 21 Ch D 381 (CA).

¹⁹ John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) at 890.

...“a hybrid composite with elements of fiduciary, trustee, agent,... and (in some instances) ‘officer’ of the court.”

The liquidator is the company’s agent. It follows acts of, or transactions entered into by, a liquidator bind the company and not liquidator personally. The agency relationship between a liquidator and a company is unusual in two respects: (1) it is the liquidator as agent who has control over the company as principal; and (2) the liquidator has duties under the Act which are focused on protecting creditors. It is an agency “subject to external rules and ethical obligations”. In addition to the duties imposed by the Act, a liquidator is subject to the usual fiduciary duties imposed on all agents, such duties being owed to the company.

(footnotes omitted)

[54] While the agency between a liquidator and the company is subject to external rules and obligations, such as the principal duty under s 253 of the Act, as noted by the Court of Appeal in *Dunphy v Sleepyhead Manufacturing Co Ltd*,²⁰ the important role played by a liquidator in protecting the interests of creditors does not undermine the conclusion that they are an agent of the company. The Court said:²¹

We do not consider that there is any real doubt that a liquidator is an agent for the company. As noted in *Keay McPherson: The Law of Company Liquidation* (4ed 1999) at 287, this is not a “normal” agency position because the liquidator controls the principal (the company) and has statutory duties under the Companies Act which are focused on protecting the interests of creditors. But it is still an agency. It is simply an agency subject to external rules and ethical obligations: see *Reynolds Bowstead and Reynolds on Agency* (18ed 2006) at [6-009]. In our view *McPherson* correctly state the position at p 288 as follows:

“In relation to the company, viewed as a corporate entity, there is little doubt that the liquidator occupies the position of agent. This gives her or him power to bind the company without personal liability and imposes upon the liquidator certain fiduciary duties and duties of skill and care. From this it follows that the liquidator’s position is similar to that of directors – (to whom he or she is often likened) ...”
[Citations omitted].

[55] In *Re Southern Pacific Personal Loans Ltd*, the Court held that:²²

The different capacities in which a liquidator may act are illustrated by legal proceedings which may be brought. A company in liquidation may commence or defend legal proceedings in its own name. If it does so it is the company which is the party and not the liquidator. In instructing lawyers to act on behalf

²⁰ *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602.

²¹ At [22].

²² *Re Southern Pacific Personal Loans Ltd* [2013] EWHC 2485 (Ch), [2014] 2 WLR 1067 at [23].

of the company in such proceedings, the liquidator acts as the agent of the company.

[56] The English Court of Appeal in *Re Anglo-Moravian Hungarian Junction Railway Co* considered that when a liquidator appointed a solicitor to assist in the performance of their duties, the contract is made with, and liability fixed upon, the company rather than the liquidator.²³ James LJ stated:²⁴

The contract with the solicitor is a contract by him as agent for the company on behalf of the company, and to be carried into effect out of the assets of the company. That is so settled; and I think we should be very loath to disturb decisions upon the authority of which for years windings-up have been conducted.

[57] Mr Moss referred to two decisions which he considers determine this issue. The first is *Re Tricorp Investments Ltd*,²⁵ which concerned whether certain documents held by a receiver (Russell) of two companies, appointed under a debenture, were documents “belonging to”²⁶ the companies within the meaning of s 9(1) of the Companies Special Investigations Act 1958, and were therefore required to be delivered to statutory receivers of the companies appointed pursuant to that Act.

[58] Thorp J considered the nature of a receiver’s agency and the purposes of the Companies Special Investigations Act. He concluded that the question of what part of the records of a contractual receivership are documents “belonging to the company” was to be determined according to the rules which normally determine the rights as between principal and agent of the principal to recover documents created or received by the agent for the purpose, and in the course of, the agency. He referred to *Bowstead on Agency* for the point that:²⁷

The principal is entitled to have delivered up to him at the termination of the agency all documents concerning his affairs which had been prepared by the agent for him. In each case it is necessary to decide whether the document in question came into existence for the purpose of the agency relationship or for some other purpose, e.g. in pursuance of a duty to give professional advice.

²³ *Re Anglo-Moravian Hungarian Junction Railway Co* (1875) 1 Ch D 130 (CA).

²⁴ At 133.

²⁵ *Re Tricorp Investments Ltd; Watson v Russell* (1988) 4 NZCLC 64,620 (HC).

²⁶ In *Petterson v Gothard* [2012] NZHC 666 at [55], Heath J noted that words “belonging to” in s 9(1) of the Companies Special Investigations Act 1958 were synonymous with “of the” in s 261(1) of the Companies Act 1993.

²⁷ At 64,627, see also Peter Watts and F.M.B. Reynolds (eds) *Bowstead & Reynolds on Agency*, above n 17, at [6-090]-[6-093].

[59] Thorp J concluded that documents such as cheque books, receipt books, bank statements, PAYE and wage records, invoices, contracts and correspondence affecting contracts made for and on behalf of the companies, proceedings received by Russell in relation to claims, either upon himself as receiver or upon the companies, and correspondence or copies of correspondence sent or received in relation to such matters, were all correctly classified as documents or records created or received by him as the agent for the companies and in the course of his agency. It followed the documents belonged to the companies.²⁸ He accepted, however, that Russell's own working papers would not belong to the companies.²⁹

[60] Mr Moss also referred to *Petterson v Gothard*,³⁰ which concerned four companies that were in receivership and in liquidation. The liquidator required the receivers to deliver certain documents to him and, when the receivers failed to comply with his requirements, he applied to the Court for an order compelling the receivers to provide the documents. The documents in question were relevant to the calculation of the receiver's costs and expenses and their allocation among the proceeds of realisation of circulating and non-circulating assets, and general administration of the receivership. Heath J referred to *Re Tricorp Investment Ltd*, described Thorp J's reasoning as unimpeachable and applied it to hold that the records sought were those of the company, not the receivers.

[61] Mr Hodge argues that *Petterson v Gothard* and *Re Tricorp Investment Ltd* do not support Mr Whitley's case. He notes they involved applications against receivers, and the roles of a liquidator and receiver are different. He also submits the cases recognise there is a distinction between documents created or received by a receiver as agent of a company, which belong to the company, and documents created in the receivership that are outside of that category and are the receiver's own documents. Contrary to this distinction, he says, Mr Whitley seeks to treat the liquidators and the companies in liquidation as one and the same.

²⁸ At 64,627.

²⁹ At 64,628.

³⁰ *Petterson v Gothard* [2012] NZHC 666.

[62] While *Re Tricorp Investments Ltd* and *Petterson v Gothard* concerned applications against receivers, the agency principles identified apply equally here. Both a liquidator's and a receiver's agency are of a special kind in similar respects. In *Re Tricorp Investments Ltd*, Thorp J recognised that the receiver was not under the control of his company principal in the way he carries out his functions. The same is the case with a liquidator. Thorp J also noted that the receiver was concerned first and foremost to protect the debenture holder's and not the company's interests. A liquidator's principal duty under s 253 is to deal with the assets and their proceeds for the benefit of creditors, and in the event of a surplus, to those entitled to them. In addition, Thorp J considered that in the circumstances of that case, and having regard to the purposes of the Companies Special Investigations Act, the duty of a contractual receiver to produce documents belonging to the company was not limited by any special right which he had in the documents because of his status as a receiver.³¹ In my view, such is also the case here. Mr Walker no longer has any reason to concern himself with the interests of those to whom he owed duties under s 253. He does, however, have an obligation under s 283A of the Act to provide Mr Whitley, as his successor liquidator, with the information he reasonably requires to carry out his functions and duties.

[63] I consider the approach taken in *Re Tricorp Investments Ltd* and *Petterson v Gothard* to be correct. In deciding if Meredith Connell's files "are of" or belong to the PVL companies, the question that must be answered is whether the documents on them came into existence in the course of and for the purposes of Mr Walker's agency as liquidator of the PVL companies, or for some other purpose.

[64] Mr Whitley has already accepted that Meredith Connell's files numbers 8 and 9 are not documents of the PVL companies because they relate to Mr Walker's private affairs. Obviously, for instance, when Mr Walker sought advice from Meredith Connell concerning a complaint made against him to the Institute of Chartered Accountants he was not doing so in the performance of his duties as an agent of the PVL companies, but to protect his private interests.

³¹ At 64,626.

[65] In respect of the other files that are in issue, Mr Haszard advises that these relate to the following:

- (a) File number 2 concerns an instruction by Mr Walker, as liquidator of Livingspace Properties Ltd, seeking documents and examination orders against a third party as well as further legal actions arising in response to this.
- (b) File number 3 concerns instructions by Mr Walker, as liquidator of Tuam Ventures Ltd, in proceedings over priority disputes in respect of a surplus obtained by the company's receivers from settlement of earthquake claims.
- (c) File number 4 relates to general advice and attendances in relation to Mr Walker's role and function as liquidator.
- (d) File number 5 was an instruction by Mr Walker about a non-party discovery application brought against him as liquidator of Gibbston Community Water Company 2014 Ltd and other PVL companies.
- (e) File number 6 was an instruction by Mr Walker as liquidator for PVL for advice and attendances in relation to the assignment of debt and securities to PVG Securities Trust for the benefit of PVL and PVL companies.
- (f) File number 7 contains advice sought by Mr Walker as liquidator for PVL about bringing a proceeding.

[66] Meredith Connell has provided no evidential basis upon which I could conclude that these files relate to matters that concern Mr Walker's private affairs or that advice given was personal to him. To the contrary, the files relate to legal proceedings in which Mr Walker, as liquidator, was involved or was contemplating, or specific advice sought concerning his duties as liquidator.

[67] It is relevant also, in my view, that while Meredith Connell considers Mr Walker is personally liable for payment of its fees, the evidence before me is that Meredith Connell's fees were paid by PVL. While that is certainly not determinative of the issue before me, I consider the fact Meredith Connell's advice was paid for using PVL's funds also suggests that the advice belongs to PVL and not Mr Walker personally.³²

[68] Drawing on my conclusions as to the function of a liquidator as agent of a company, all of the files that are in issue came into existence during and in the course of the performance by Mr Walker of his duties as liquidator and they belong to the PVL companies.

Privilege

[69] Mr Hodge submits, and I accept, that protection of legal professional privilege is fundamental to the administration of justice,³³ and that the application of the principle of legal professional privilege is strict and does not fall to be weighed against other considerations.³⁴ Meredith Connell says it cannot be required to produce documents that would breach Mr Walker's privilege and should not be expected to undertake the significant and costly task of reviewing the files to separate privileged from non-privileged documents.

[70] Mr Whitley's position is that Meredith Connell has provided no evidence that documents on its files are privileged and/or confidential to Mr Walker, and if privilege exists in respect of any documents on the files it must be a joint privilege of Mr Walker and the PVL companies. On this basis, Mr Walker cannot assert privilege against Mr Whitley as the current liquidator of the PVL companies.³⁵

[71] Both parties referred to s 393 of the Companies Act, which provides:

³² See in a trust context *Lambie Trustee Ltd v Addleman* [2021] NZSC 54 at [51], where in giving the judgment of the Court William Young J considered it a rough rule of thumb that advice paid for using trust money is most unlikely to be personal to a trustee.

³³ *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326.

³⁴ *Foley's Transport Ltd v Weddell NZ Ltd (in rec and liq)* (1996) 9 PRNZ 392 (HC).

³⁵ For a discussion on common interest privilege, joint privilege and the joint interest exception, see *Lambie Trustee Ltd v Addleman*, above n 32, at [63]-[75].

393 Privileged communications

- (1) Subject to subsection (2), nothing in this Act requires a legal practitioner to disclose a privileged communication.
- (2) Nothing in subsection (1) of this section applies to a communication made to or by a person referred to in section 261(2)(f) while acting or having acted as a solicitor for a company to which that section applies and which that person is required to disclose under section 261(3).
- (3) For the purposes of this section, a communication is a privileged communication only if—
 - (a) it is a confidential communication, whether oral or written, passing between—
 - (i) a legal practitioner in his or her professional capacity and another legal practitioner in that capacity; or
 - (ii) a legal practitioner in his or her professional capacity and his or her client,—

whether made directly or indirectly through an agent; and
 - (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
 - (c) it is not made or brought into existence for the purpose of committing or furthering the commission of an illegal or wrongful act.
- (4) If the information or document consists wholly of payments, income, expenditure, or financial transactions of a specified person (whether a legal practitioner, his or her client, or any other person), it is not a privileged communication if it is contained in, or comprises the whole or part of, a book, account, statement or other record prepared or kept by the legal practitioner in connection with a trust account of the legal practitioner within the meaning of section 6 of the Lawyers and Conveyancers Act 2006.
- (5) The court may, on the application of any person, determine whether or not a claim of privilege is valid and may, for that purpose, require the information or document to be produced.
- (6) For the purposes of this section, the term legal practitioner means a barrister or solicitor of the High Court, and references to a legal practitioner include a firm or an incorporated law firm (within the meaning of the Lawyers and Conveyancers Act 2006) in which he or she is, or is held out to be, a partner, director, or shareholder.

[72] It will be observed that s 393(1) provides that nothing in the Act requires a solicitor to disclose legally privileged communications. However, this is subject to s 393(2), which codifies the common law rule that a company solicitor cannot assert

legal professional privilege in relation to company information sought by a liquidator, specifically in relation to disclosure of information under s 261(3). This is because a liquidator stands in the position of the company and therefore cannot be denied that information.³⁶

[73] Here, what is most significant is that Meredith Connell has neither reviewed any of the files nor identified any specific documents for which privilege could be claimed. It is for Meredith Connell to provide evidence to establish an entitlement to privilege. An assertion that all legal files contain such material is not sufficient in my view. In *Kupe Group Ltd v Ariadne Australia Ltd*,³⁷ Wylie J said:

The onus is on the party setting up the claim. It must be remembered that privilege is just what it says - it is an exception to the general rule for discovery and right of inspection. A party setting up the claim has an onus to establish its entitlement to the benefit of the privilege: *Re Highgate Traders Ltd* [1984] BCLC 151 at 161, and in my opinion that entitlement must be established clearly and unequivocally.

[74] In *Dalton v Hong*, after acknowledging the significant weight that the Court places upon an assertion of privilege, Associate Judge Smith noted that the solicitor in that case had made only “a blanket assertion of privilege without having reviewed all of the documents he holds”.³⁸ He held that it was for the solicitor to identify the documents in respect of which privilege (and confidentiality) was claimed and in each case to state the basis for the claimed privilege or confidentiality. The Associate Judge rejected the solicitor’s suggestion that independent counsel be appointed to review the files and directed the solicitor to undertake a review, to prepare a list of all documents for which privilege or confidentiality was claimed, the basis upon which the documents were said to be privileged or confidential, and to submit those documents for inspection by the Court.

[75] While I consider that Meredith Connell’s files belong to the PVL companies and not the former liquidators, I cannot rule out the possibility that there are upon those files documents in respect of which Mr Walker is entitled to assert privilege

³⁶ Insolvency Law and Practice (online ed, Thomson Reuters) at [CA261.07]; *Dalton v Hong*, above n 8, at [75]-[76] and *Concrete Structures Ltd v NMHB Ltd (in liq)*, above n 13, at [37].

³⁷ *Kupe Group Ltd v Ariadne Australia Ltd* (1991) 4 PRNZ 135 (HC) at 138.

³⁸ *Dalton v Hong*, above n 8, at [111].

because, say, they relate to advice given to him in relation to his personal affairs.³⁹ Because Meredith Connell has not identified any documents for which privilege is claimed, it is not possible for me to make any determination this is the case, or to assess the argument that such privilege cannot be asserted against Mr Whitley because the PVL companies are jointly interested in the documents in respect of which privilege is claimed.

[76] Meredith Connell says it cannot be expected to review the files because of the time and costs involved. The paucity of information provided by Meredith Connell as to the size and contents of the files, the means by which documents are stored, and the work that will be involved in reviewing them, means I cannot accept that submission. Also, Mr Whitley has limited the files he seeks, which significantly reduces the burden of such work. Importantly, Mr Whitley is not presently seeking delivery of Meredith Connell's file number 1, which was the largest of the files. When I consider Mr Haszard's description of the subject matter of the remaining files that are in issue, it is difficult to see how the task of reviewing them would impose an unacceptable burden upon Meredith Connell, particularly as one would expect the documents on the files are, in the main, stored, and could be searched, electronically.

[77] I therefore consider Meredith Connell must undertake a review of the files in issue and assess whether privilege can be claimed in respect of any documents on them and to provide details of documents for which privilege is asserted.

[78] I further note that, insofar as documents on the relevant files are those of the PVL companies to which Mr Whitley is entitled, the issue of confidentiality does not arise. However, any confidentiality issues that emerge in respect of other documents identified by Meredith Connell following their review of the files may be dealt with by the Court at that point.

³⁹ *Foley's Transport Ltd v Weddel New Zealand Ltd (in rec and in liq)*, above n 34.

Lien

[79] Meredith Connell is owed a substantial sum for fees and asserts a general or retaining lien over the files. Mr Whitley argues there is a statutory bar under s 263 of the Act to the assertion of a lien by Meredith Connell.

[80] Section 263 provides:

263 Restriction on enforcement of lien over documents

- (1) A person is not entitled as against the liquidator of a company, to claim or enforce a lien over books, records, or documents of the company.
- (2) If the lien arises in relation to a debt for the provision of services to the company before the commencement of the liquidation, the debt is a preferential claim against the company under section 312 of this Act to the extent of 10% of the total value of the debt, up to a maximum amount of \$2,000.

...

[81] Meredith Connell argues that its right to claim a lien is not affected by s 263. It says there must be a distinction between the position that applies to fees incurred before and after a company goes into liquidation. It says s 263 does not apply to a lien claimed for the provision of services rendered to a company's liquidator as otherwise a liquidator is free to change solicitors with unpaid fees owing, and the solicitor cannot enforce their right to a lien over the documents in the usual way.

[82] Mr Hodge argues Meredith Connell's contention is supported by a purposive approach to the interpretation of s 263(1). The purpose of the section is, he submits, to ensure a liquidator is able to have access to company documents without the company's solicitor asserting a lien, thereby preventing a liquidator accessing documents needed to conduct the liquidation. He argues it cannot have been the purpose of the section to confer an unjustified benefit on liquidators, not enjoyed by other consumers of legal services, to be able to change solicitors when owing fees without a right of the solicitor to claim a lien. He says the fact that Mr Whitley is a replacement liquidator does not affect the position.

[83] The starting point is that the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.⁴⁰ The text of s 263 is clear in its terms that subject to s 263(3) (which does not apply here), no person is entitled to claim or enforce, as against a liquidator, a lien over books, records or documents of a company in liquidation.

[84] Insofar as Meredith Connell argues that a distinction must be made between pre and post-liquidation debt, the section already does so by providing that if a lien arises in relation to debt for the provision of services to a company before the commencement of a liquidation, it shall, to the extent provided, be a preferential claim against the company.

[85] I accept that a purpose of s 263 is to ensure liquidators have ready access to company documents. However, if Meredith Connell was correct in its construction of the section, this purpose would be frustrated in a case such as this where a successor liquidator is faced with an assertion of a lien in respect of fees incurred by his or her predecessor.

[86] Implicit in Meredith Connell's submission is that it is unfair if solicitors are not able to assert a lien over their files in respect of services rendered to liquidators. I do not accept that is the case. Law firms can be assumed to be well able to make arrangements with their clients to protect themselves for payment of their fees. Here, it is notable that Meredith Connell does not claim its outstanding fees in the liquidation but regards Mr Walker personally liable for payment of them.

[87] Further, Mr Moss makes the point that former liquidators are entitled to claim as a preferential creditor in a liquidation for the full amount of their fees and expenses which would include legal expenses incurred in the performance of their duties. It follows then, that in respect of such post-liquidation debts, the preference is not limited as it is in respect of pre-liquidation debt under s 263(2).

[88] I find that Meredith Connell cannot assert a lien over the files.

⁴⁰ Legislation Act 2019, s 10(1).

The breadth and purpose of the orders sought

[89] Meredith Connell advances several related arguments that the Court should not make any order that it produce its files and other documents because:

- (i) the documents are not being sought for a genuine, investigative purpose;
- (ii) the orders sought are unnecessary, unreasonable, or oppressive; and
- (iii) it is an abuse of process for Mr Whitley to seek the documents in advance of a determination against Mr Walker for delivery of his files/documents.

[90] In my view the position is clear that in requesting delivery of documents “of the company” a liquidator does not have to show any particular purpose or objective or that the documents are relevant to the performance of their functions as liquidators under the Act. A liquidator is entitled to documents of the company as they are the proper custodians of the company’s documents from the time of liquidation.⁴¹

[91] However, I accept the discretion to make orders under s 266 is to be exercised after a careful balancing of factors which include the reasonable requirements of the liquidator to carry out his or her functions and the need to avoid making orders that are unreasonable, unnecessary, or oppressive to the persons concerned.⁴²

[92] In *Petterson v Gothard*, Heath J considered the position was best explained by the House of Lords in *British & Commonwealth Holdings Plc (joint administrators) v Spicer and Oppenheim (a firm)*, where Lord Slynn of Hadley said:⁴³

The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents (“reconstituting the company’s state of knowledge”) but in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably

⁴¹ *Dalton v Hong*, above n 8, at [90].

⁴² At [79]

⁴³ *British & Commonwealth Holdings Plc (joint administrators) v Spicer and Oppenheim (a firm)*, above n 11, at 885.

requires to see the document to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, ...

A genuine investigative purpose?

[93] Meredith Connell submits that Mr Whitley's requirements are of "almost unqualified breadth" and that he has not identified any particular matters he wishes to investigate which are relevant to the liquidation, nor has he requested documents limited by their relevance to those matters.

[94] The obvious response to this criticism is that until Meredith Connell filed Mr Haszard's affidavit, Mr Whitley had no way of knowing what documents might be available. It was necessary, in these circumstances, for him to cast his net widely. The classes of documents that he seeks are now limited, clearly identified and in Meredith Connell's possession.

[95] Further, as I have found that Meredith Connell's files belong to the PVL companies, in line with the authorities, I do not consider Mr Whitley is obliged to provide specific reasons for requiring delivery of them.

[96] Also, this application needs to be considered in the context of the liquidations and difficulties faced by Mr Whitley in the performance of his duties. The liquidation of PVL and related companies was conducted by Mr Walker for several years. The liquidations were clearly complex. The companies also had very substantial creditors, and this remains the case. Mr Whitley says that on the information he has the Inland Revenue Department is owed more than \$29 million, there are unsecured trade creditors of almost \$8.5 million, and a small number of preferential creditors. The former liquidators, particularly Mr Walker, have not provided Mr Whitley with the cooperation he requires. He is in the difficult position where he needs to piece together, from limited information, the steps that have been taken in the liquidation to date and the reasons why those steps were taken. He is also taking proceedings against the former liquidators for the benefit of creditors and cannot expect their unqualified cooperation. He is in no position to assess what information may be available to him

or what he may need to do with it once it is obtained to progress the liquidations to conclusion.

[97] Against that background, the following passage from the judgment of Megarry J in *Re Rolls Razor Ltd (No 2)* is apposite:⁴⁴

...The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained...

[98] Mr Whitley is seeking to obtain documents belonging or relating to the PVL companies to reconstitute the knowledge of the companies and to make informed decisions concerning the steps he must take for the benefit of creditors. Both are legitimate functions. In *ANZ National Bank Ltd v Sheahan*, Heath J said:⁴⁵

[56] ... 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 the 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.

[99] I consider that Mr Whitley has shown he made his application for a proper and genuine purpose.

The allegation of an ulterior purpose

[100] Meredith Connell argues there are concerns that Mr Whitley's application is for the ulterior purpose of obtaining documents in relation to a litigation adversary (that is, primarily Mr Walker but also Mr Scutter) and that he should properly advance that purpose by obtaining an order for discovery in those other proceedings or a

⁴⁴ *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 591-592.

⁴⁵ *ANZ National Bank Ltd v Sheahan*, above n 6.

production order against Mr Walker personally. Meredith Connell submits Mr Whitley should not be seeking production of documents “by the backdoor method” of seeking legal files from the former liquidators’ solicitors.

[101] It is submitted that Mr Haszard has narrated circumstances raising concerns about the purpose of the request. These are:

- (a) The long-standing and ongoing legal battles between Mr Henderson and Mr Walker.
- (b) Mr Walker ceased to be an insolvency practitioner following a complaint by Mr Henderson.
- (c) Mr Whitley was appointed as replacement liquidator and funded by a company associated with Mr Henderson.
- (d) 100 investments Ltd has brought proceedings against Mr Walker, making claims against him and others.
- (e) Mr Whitley has filed proceedings against Mr Walker that substantially replicate the 100 Investments Ltd proceeding, and these two proceedings have been consolidated.
- (f) Meredith Connell’s legal files are of obvious interest to Mr Whitley and 100 Investments Ltd in the consolidated proceedings against Mr Walker.

[102] The submission is premised on what I find is an incorrect view that Meredith Connell’s files belong to the former liquidators and that Mr Whitley is seeking some improper advantage as a result. The files belong to the PVL companies and it cannot possibly be the case that Mr Whitley could be prevented from obtaining delivery of them because that might be prejudicial to Mr Walker or Mr Scutter.

[103] The evidence satisfies me that Mr Whitley has made this application for a genuine purpose and it is well recognised that where a liquidator is taking a bona fide

step in the liquidation to obtain information for genuine purposes, the Court may make orders for the production of documents or convene an examination against a person in circumstances where litigation against that person is proposed or, indeed, commenced.⁴⁶ I do not therefore accept the fact that the documents sought have some relevance to litigation that Mr Whitley is or might be pursuing in his capacity as liquidator against Mr Walker and Mr Scutter is impermissible or amounts to “an ulterior purpose”.

[104] In *Norrie v Sutich*, Associate Judge Doogue said:⁴⁷

...The fact that once armed with any material that might be thrown up as a result of exercise of the statutory power to examine, the liquidator may issue proceedings, is a permissible objective of carrying out the examination. The fact that some or all of the very officers who are required to provide information might be targets for litigation is not a reason for exempting them from orders under the Act.

[105] Finally, Mr Whitley has deposed that he is acting independently of Mr Henderson or anyone else, and the fact that the liquidation is funded by a creditor of the company is not unusual in a liquidation situation. I have no reason to doubt his evidence.

The orders are unnecessary, unreasonable or oppressive

[106] Meredith Connell submits that it will be a costly and time-consuming exercise for it to review its files and sort privileged and non-privileged documents and that this is unnecessary, unreasonable or oppressive in circumstances where Mr Whitley has:

- (a) provided scant evidence of a genuine investigative purpose to have the files; and

⁴⁶ *Fatupaito v Stewart* [2021] NZHC 1679; *Stewart v Fatupaito* [2022] NZCA 21, *Finnigan v Ellis* [2017] NZCA 488; [2018] 2 NZLR 123, *Re Cory-Wright & Salmon Ltd (in rec and in liq)* (1989) 4 NZCLC 65,180 ; *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008 at [29]–[33]; *ANZ National Bank Ltd v Sheahan*, above n 6; *Re Northrop Instruments & Systems Ltd* [1992] 2 NZLR 361 (HC); *Sargison v McCabe* [2012] NZHC 3194; and *Norrie v Sutich*, above n 8.

⁴⁷ At [34].

- (b) the obvious purpose for wanting the files is to obtain an advantage over a litigation adversary.

[107] These submissions are largely a repetition of matters I have rejected above. I should emphasis two points in relation to them. First, the cases establish that the making of an order under ss 261 or 266 will not be regarded as unreasonable because it may be inconvenient, require the party subject to an order to collate significant documents, or necessitate significant work, although these are matters that will be taken into account by the Court in the exercise of its discretion.⁴⁸

[108] Second, Meredith Connell's submission would have greater cogency had Mr Whitley been seeking production of file number 1. One could understand Meredith Connell's concern should it be required to undertake the document review and sorting exercise on a very large litigation file created mostly before it had any involvement in the litigation. But as Mr Whitley is not presently seeking delivery of that file, that is not the position. As has been discussed, Meredith Connell has put insufficient evidence before the Court from which I could make a finding that requiring it to review files numbers 2 to 7 would impose a significant, let alone an unreasonable or oppressive burden upon it.

[109] Meredith Connell also submits that Mr Whitley must know quite a lot about what occurred in the liquidation prior to his appointment because he has filed separate proceedings in the High Court, which include various claims against the former liquidators in relation to the conduct of the liquidation. It also suggests that as an officer of the Court, Mr Whitley must have satisfied himself that there was a sound evidential basis to support the claims that were made. It does not follow from the above, in my view, that Mr Whitley possesses sufficient information to fulfil his functions and duties as a liquidator of the PVL companies. That he is possessed of sufficient information to pursue certain claims cannot bar him from seeking to reconstitute the knowledge of the company more generally.

⁴⁸ *Dalton v Hong*, above n 8, at [70].

Abuse of process

[110] Meredith Connell also argues this application is an abuse of process. Mr Hodge referred to *ANZ National Bank Ltd v Sheahan*, where Heath J said:⁴⁹

[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 judgement of the Full Court of the Federal Court of Australia, in *Re Excel Finance Corporation Ltd (Receiver and Manager Appointed): Worthley v England*. In summary:

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

(footnotes omitted)

[111] Mr Hodge goes further and submits in reliance upon an obiter dicta comment of Asher J in *New Zealand Law Society v Deliu*,⁵⁰ that it is not necessary to establish that Mr Whitley has an abusive purpose in making this application as a matter of subjective intent if the Court is satisfied that the procedure he has elected to follow has an abusive effect. Asher J said:

The proceeding cannot be described as frivolous or vexatious. There is a genuine attempt to resolve issues in the High Court, and if there is a reference in the Court of Appeal, and there is technically jurisdiction to do so. Nevertheless, it is the wrong procedure in the circumstances, which if allowed to continue is likely to cause delay and give rise to serious practical problems. In this sense it may be an abuse of process.

[112] There is nothing, in my view, improper or abusive about Mr Whitley's use of the Companies Act procedures to obtain documents belonging to or related to the PVL companies. They provide the most efficient and cost-effective method, in light of non-cooperation by various parties, of obtaining documents that Mr Whitley needs to undertake his duties.

⁴⁹ *ANZ National Bank Ltd v Sheahan*, above n 6.

⁵⁰ *New Zealand Law Society v Deliu* [2014] NZHC 2467; [2015] 2 NZLR 224 at [114].

[113] Meredith Connell assumes that Mr Whitley will obtain all documents that are held on its files by way of disclosure from Mr Walker in other proceedings. This is unlikely to be the case. Not only is it Mr Whitley's position that Mr Walker has been uncooperative in providing documents (which I have no reason to doubt on the evidence presently before me), but there are almost certainly going to be documents held by Meredith Connell that are not in the possession of Mr Walker, such as Meredith Connell's working papers, file notes and trust account records. Mr Whitley also has no way of knowing if Mr Walker's records are complete.

[114] Further, Mr Whitley may be put to significant expense to obtain documents from Mr Walker by alternative methods to the detriment of the creditors of the PVL companies, and if such documents are obtained, they may be subject to restrictions upon their use which will not be the case in respect of documents obtained directly from Meredith Connell on this application.⁵¹

Fee accounts, trust account records and time records

[115] Mr Whitley is seeking copies of Meredith Connell's trust account records relating to the receipting of funds received from or on behalf of PVL and the transfer of funds received from or on behalf of PVL within or from the trust account. He also seeks Meredith Connell's fee accounts which were paid from PVL's bank account and the time records supporting the fee accounts.

[116] Meredith Connell accepts there is a genuine investigative purpose in Mr Whitley seeking trust account records that show the receipt in and then payment out of its trust account of funds obtained from the settlement of litigation undertaken on behalf of PVL, although it considers a substantial amount of information is already in Mr Whitley's possession through his involvement in the 100 Investments litigation.

[117] Mr Whitley has a legitimate reason to inspect Meredith Connell's trust account records to identify what amounts were paid to the firm on behalf of the PVL companies

⁵¹ High Court Rules 2016, r 8.30.

and how those funds were disbursed. The trust account records are not privileged,⁵² will be readily available and I can see no reason why they should not be provided.

[118] Similarly, Mr Whitley has an interest in fee accounts that were paid using PVL funds. He is entitled to confirm payment of those funds from either the PVL bank account or from funds held within Meredith Connell's trust account, and they too should be provided.

[119] I am not satisfied that there is any legitimate basis for Meredith Connell to be required to provide its time records. There is no challenge to Meredith Connell's fees, nor any apparent basis upon which, after such a period of time, they could be challenged.⁵³ There is no reason to look behind the fee accounts to the particular time records of Meredith Connell. I do not consider the time records need to be provided.

Remuneration

[120] Meredith Connell's position is that if an order is made for the production of documents beyond trust account records, that an order for reimbursement of its costs and expenses of producing wider categories of documents is required. It provides no authority for the reimbursement of costs and expenses.

[121] In *Petterson v Gothard*, Heath J considered that, in general terms, s 261(1) evidences a Parliamentary intention that a liquidator is entitled to obtain delivery of books, records or documents of the company as of right, without the need to expend liquidation funds to pay remuneration or expenses of the person required to comply with the obligation.⁵⁴ He noted that s 261(4)-(6) deals with the circumstances in which a person required to do something under s 261 may have expenses and remuneration met out of the liquidation fund.

[122] So far as a person who is acting, or who has at any time acted, as a solicitor for the company is concerned:

⁵² Companies Act, ss 393(4).

⁵³ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, r 29.

⁵⁴ *Petterson v Gothard*, above n 26, at [12].

- (a) Section 261(4) reposes a discretion in a liquidator to pay reasonable travelling and other expenses in relation to a requirement to comply with s 261(3), but this does not apply to compliance with a request for documents made under s 261(1).
- (b) Section 261(5) provides that the solicitor may apply to the Court for an order entitling him or her to receive reasonable remuneration and travelling and other expenses to comply with the requirement of s 261(3). Again, that does not extend to a request for documents under s 261(1).

[123] In *Walker v Angus*,⁵⁵ the respondents submitted that an allowance should be made for the burden that would be placed on them complying with orders under s 266(2)(b) of the Act by analogy with s 261(5), and in reliance on the inherent jurisdiction of the Court. Mander J noted that in the absence of any specific power to award reasonable remuneration and expenses under s 266, it could be inferred that Parliament's omission was deliberate. However, he considered the better view was that the legislature likely did not consider it necessary to explicitly express the Court's jurisdiction to make ancillary directions and orders when exercising its discretion in relation to formal applications which were already before it.

[124] Mander J said that he was mindful that orders under s 266(2) were made in furtherance of the public interest that a liquidator be able to ascertain relevant information with as little expense as possible, and that he or she will usually have limited funds with which to work. He did not award remuneration or expenses on the basis that:

[124] On balance, and proceeding on the basis that the court may have such a jurisdiction, I do not consider it would be appropriate in the present case for the respondents to be reimbursed by the liquidator for the costs incurred in complying with the orders. That burden was a factor which I took into account in exercising my discretion. Inevitably there will be time incurred and inconvenience associated with ensuring compliance with the orders, but I do not consider in the circumstances that goes beyond the responsibilities associated with the ordinary costs of business of companies that finance commercial ventures or professional practices servicing such clients. Accordingly, the respondents' applications are declined.

⁵⁵ *Walker v Angus* [2018] NZHC 2354.

[125] Here, there is no statutory basis upon which Meredith Connell is entitled to remuneration or expenses. Assuming the Court has jurisdiction to award them in its inherent jurisdiction, for similar reasons as were applied in *Walker v Angus*, it should not do so in this case. Such costs as Meredith Connell will incur in reviewing the files are not uncommonly incurred by law firms. They are a cost of doing business in the practice of the law. Meredith Connell has also not satisfied me that the time and expense of reviewing the files in issue is such that reimbursement of costs should be ordered.

Result

[126] I make the following orders:

- (a) Mr Whitley's application in respect of Meredith Connell's file number 1 is adjourned pending further order of the Court.
- (b) Meredith Connell is to review the documents on files numbers 2-7 (inclusive) and, subject to para (c) below, deliver such documents on those files that relate to the business, accounts or affairs of PVL or related companies of which Mr Whitley is liquidator, to Mr Whitley.
- (c) Should any question of privilege or confidentiality arise that would affect Mr Whitley from being able to see any such documents, Meredith Connell is to file and serve a memorandum, listing the documents for which a claim to privilege or confidentiality is made, identifying in each case the names of the parties and the date of the document, and stating the basis on which the document is said to be the subject of privilege or an entitlement to confidentiality.
- (d) If Mr Whitley does not accept any asserted claim to privilege or confidentiality, I reserve leave to either party to apply to the Court by memorandum for further orders as may be appropriate, in which case I will make directions to determine the matter.

- (e) Meredith Connell is also to produce for Mr Whitley's inspection its trust account records evidencing the receipt of funds from or on behalf of PVL and the transfer of such funds from or within its trust account, along with any fee accounts which were rendered by Meredith Connell and paid by PVL companies.
- (f) Counsel are to confer on appropriate timeframes within which the steps set out above are to be completed, and in the event of disagreement leave is reserved to either party to seek further directions.

[127] As far as costs are concerned, counsel should confer and if agreement cannot be reached, memoranda may be filed within 15 working days. Submissions are to be no longer than five pages.

O G Paulsen
Associate Judge

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