

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

CIV-2006-485-2020

IN THE MATTER OF the Companies Act 1993
AND IN THE MATTER OF an application pursuant to section 266
of the Companies Act 1993 for production
of records by International Direct Ltd (in
liquidation)

Hearing: 14 November 2006

Appearances: C.D. Batt for Applicant - the liquidator of International Direct Limited
(in liquidation)
P. Dalkie for Mr M. Bennett and Ms D. Watson

Judgment: 17 November 2006

In accordance with r540(4) I direct the Registrar to endorse this judgment with a
delivery time of 3.15pm on the 17th day of November 2006.

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

[1] There are two applications before the Court:

- a) An application by Mr Robert Bruce Walker (“the liquidator”), the liquidator of International Direct Limited (in liquidation) (“the company”) for an order for the attendance of Mr Michael Hebden Bennett (“Mr Bennett”) and the provision of information pursuant to sections 261 and 266 Companies Act 1993.
- b) An application by the liquidator for an order that Ms Deidre Watson (“Ms Watson”) produce certain books, records or documents relating to the affairs of the company to the liquidator pursuant to sections 261 and 266 Companies Act 1993.

[2] In each case the applications are opposed.

[3] I will deal with each application in turn.

Application for order for attendance on liquidator of Mr Bennett

[4] This application filed on 20 October 2006 seeks specific orders that Mr Bennett:

- (a) Attend on the liquidator.
- (b) Provide the liquidator with the information about the business, accounts, or affairs of the company, that the liquidator has by notice requested.
- (c) 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.

[5] The applicant liquidator, Mr Walker, is the liquidator of International Direct Limited (in liquidation) (“the company”), having been appointed as such on 5 December 2005.

[6] By way of background:

- a) The company was first placed into liquidation by a shareholders resolution on 17 January 2003. This appointed Stephen Mark Lawrence and Brendon James Gibson of Ferrier Hodgson & Co liquidators.
- b) On 12 February 2003 Stephen Lawrence resigned as liquidator and was replaced by Grant Graham, also of Ferrier Hodgson & Co.
- c) On 5 December 2005 Brendon Gibson and Grant Graham resigned as liquidators and Robert Bruce Walker was appointed at that time.

[7] A Notice pursuant to s261 Companies Act 1993 dated 12 June 2006 was issued to Mr Bennett by the liquidator. This required him to attend upon the

liquidator for examination relating to the affairs of the company. It also stated that Mr Bennett was:

required to deliver to me (the liquidator) on that day (the day of examination) any books, records and documents of the company in your possession or under your control.

[8] Mr Bennett did not comply with this s261 Notice. As a result, on 20 October 2006 the present application was filed in this Court by the liquidator.

[9] On 13 November 2006 Mr Bennett filed a Notice of Opposition to the application.

[10] The grounds upon which Mr Bennett relies in opposing the application are stated as:

- a) Mr Bennett is an Australian resident and the notice cannot be issued to a person resident in Australia. There is no power to issue the notice and no jurisdiction to make or grant the application.
- b) The notice upon which the application is based is in any event defective in that it does not specify what documents Robert Walker is seeking, other than in a general way;
- c) The notice on which the application is based is defective as the purpose for the request has not been specified.
- d) The matters the subject of the notice have already been investigated by the previous liquidator.
- e) Appearing in the affidavit of Deidre Ann Watson sworn 10 November 2006 and the affidavit of Michael Hebden Bennett to be sworn and filed herein.

[11] Before me Mr Dalkie for Mr Bennett indicated when this matter was called that Mr Bennett has no intention of filing his affidavit referred to in paragraph [10](e) above at this stage. This is because Mr Bennett resides in Queensland, Australia, and according to Mr Dalkie, a threshold jurisdictional point arises. This is to the effect that there is no ability on the part of the liquidator to bring this present application against Mr Bennett as he is an overseas resident and no notice pursuant to section 261 can be issued to a person resident in Australia. This is the ground noted at paragraph [10](a) above and was the only point argued before me for Mr Bennett at the hearing of this matter on 14 November 2006.

[12] I turn to address this question.

[13] In response to Mr Dalkie's broad jurisdictional submission, Ms Batt for the applicant noted that Mr Bennett had been served with the application on 8 November 2006. Indeed, it is apparent that he is fully aware of the application itself. On 13 November 2006 he filed his detailed Notice of Opposition to the application.

[14] In considering the broad purposes of s261 Companies Act 1993, Brookers Company and Securities Law (vol 1) at para CA261.01 notes:

The functions of a liquidator include the duty to take possession of and to protect the company assets. However to discharge these duties properly, the liquidator may need to have access to information about the company that may not be contained in the company records made available on his or her appointment. Section 261 confers wide powers on liquidators to enable them to access information about the company and its business, assets and affairs.

[15] Section 261 states in part:

- (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 –
 - (a) A director or former director of the company; or
 - (b) A shareholder of the company; or
 - (c) A person who was involved in the promotion or formation of the company; or
 - (d) A person who is, or has been, an employee of the company; or
 - (e) A receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or
 - (f) A person who is acting or who has at any time acted as a solicitor for the company –

To do any of the things specified in subsection (3) of this section.

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

[16] Here, the liquidator has provided Mr Bennett as the sole director and shareholder of the company with a Notice under s261. This Notice also required the attendance of Mr Bennett upon the liquidator for examination pursuant to s261(3) Companies Act 1993.

[17] As I have noted above, this has not occurred. This triggers the operation of s266 Companies Act 1993 which states in part:

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.

[18] As I have noted, Mr Bennett is the sole director and shareholder of the company. The present application is made effectively pursuant to s266 on the basis that he has failed to comply with the s261 Notice issued by the liquidator.

[19] As I understand Mr Dalkie's argument on this jurisdiction question, it is that as Mr Bennett now resides in Queensland, Australia, he is out of the jurisdiction and

is not subject to the requirements of sections 261 or 266 Companies Act 1993. No specific authority for this broad submission was provided to me, however.

[20] In considering the provisions of sections 261 and 266 Companies Act 1993, there does not appear to be any limitation placed upon a liquidator who wishes to serve a notice upon or bring an application against a present or former director of the company who may be overseas.

[21] Before me Ms Batt for the applicant submitted that it was extraordinary on the part of Mr Bennett as the sole director of the company to suggest that because he had left New Zealand, then he had no obligations whatever to assist the liquidator. These obligations must remain extant. In my view, there is substance in these contentions.

[22] In *Re Rolls Razor Limited (No. 2)* (1970) Ch. 576 at p591 Megarry J said:

The process under(s261) is needed because of the difficulty in which the liquidator...is necessarily placed. He usually comes as a stranger to the affairs of the company which has sunk to its financial doom...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.

[23] With these words in mind, to accept the submission that Mr Bennett is not subject to the jurisdiction of this Court here, would mean that any director or former director of a company in liquidation could avoid the need to provide assistance to a liquidator simply by leaving the country. In my view, such an approach must be seen as unacceptable.

[24] Further, although no penalties are specified in the Companies Act 1993 for a refusal by a director or other party to act on a liquidator's s261 Notice, the provisions of s273 Companies Act 1993 should be noted. This section prohibits certain conduct and states in part:

- (1) If a company is in liquidation, or an application has been made to the Court for an order that a company be put into liquidation, as the case may be, no person may –

- (a) Leave New Zealand with the intention of –
 - (i) Avoiding payment of money due to the company; or
 - (ii) Avoiding examination in relation to the affairs of the company; or
 - (iii) Avoiding compliance with an order of the Court or some other obligation under this part of this Act in relation to the affairs of the company...
- (2) A person who contravenes ss1 of this section commits an offence and is liable on conviction to the penalty set out in s373(3) of this Act...

Section 373(3) provides for this penalty to be a fine of up to \$50,000 or to imprisonment for a period not exceeding two years.

[25] These provisions emphasise the importance for the proper conduct of a liquidation that a liquidator must have full access to information from directors and other associated parties.

[26] For these reasons I reject the contention put forward for Mr Bennett that there is no jurisdiction here to require him to comply with the s261 Notice or to obtain orders against him pursuant to s266 Companies Act 1993.

[27] That said, as I have noted at paragraph [11] above, no affidavit has yet been sworn and filed by Mr Bennett in support of his Notice of Opposition to the present application.

[28] To properly consider that application and the position advanced for Mr Bennett, the Court needs to be able to consider the affidavit from Mr Bennett which he has signalled in paragraph (e) of his Notice of Opposition.

[29] A direction is now made that by 1 December 2006 Mr Bennett is to file and serve this affidavit in support of his Notice of Opposition to the liquidator's application.

[30] And I direct that the present application for orders against Mr Bennett is then to be listed for call in the Associate Judge's List on 5 December 2006 and considered then.

[31] I turn now to consider the second application for orders against Ms Watson noted at paragraph [1](b) above.

Application for order for production of documents by Ms Watson

[32] This application, also filed on 20 October 2006, seeks an order that Ms Watson:

...Produce any books, records or documents relating to the business, accounts, or affairs of the company in her possession or under her control.

[33] Ms Watson is a barrister. Apparently she represented the company in Court proceedings, in particular leading up to the company's final months, which the liquidator states are relevant to the liquidation.

[34] From December 2005 up to June 2006 it seems that extensive correspondence has passed between the liquidator and Ms Watson over the liquidator's request that she supply to him all documents in her possession regarding the company or the conduct of its affairs. Certain documents were passed by Ms Watson to the liquidator on 3 March 2006, but further documents were sought.

[35] On 12 June 2006 a Notice pursuant to s261 Companies Act 1993 was issued to Ms Watson. This required her to deliver to the liquidator such books, records or documents of the company which were in her possession or under her control.

[36] There seems little argument that Ms Watson has failed to comply with this s261 Notice. As a result, on 20 October 2006 the present application was filed in this Court.

[37] On 13 November 2006 Ms Watson filed a Notice of Opposition to the application, together with a supporting affidavit.

[38] The stated grounds upon which Ms Watson relies in opposing the application are:

- (a) She is not a person who can be compelled to produce records pursuant to s261 of the Companies Act 1993;
- (b) The notice upon which the application is based is defective, in that it does not specify what documents Robert Walker is seeking, other than in a general way;
- (c) The notice on which the application is based is defective, as the purpose for the request has not been specified.
- (d) Appearing in the affidavit of Ms Watson sworn 10 November 2006 and the affidavit of Michael Hebden Bennett to be sworn and filed herein.

[39] Here the liquidator has issued the s261 Notice to Ms Watson pursuant to s261(2)(e) as an "...other person having knowledge of the affairs of the company".

[40] *Brookers Company and Securities Law* vol. 1 at para CA261.04(2) in considering persons on whom the obligation to provide documents is imposed states:

The obligation s261(1) imposes is not limited to a director or a shareholder, but can apply to any other person who has possession or control of the company records.

[41] Given the broad intention behind s261, I am satisfied that legal advisers and barristers acting on behalf of a company prior to liquidation would clearly fall within these provisions and be persons who can be compelled to produce company records pursuant to s261. As to this, see *Foleys Transport Limited v Weddel NZ Limited (in receivership and liquidation)*[1996] 7 NZCLC 261, 126.

[42] In the present case, the liquidator maintains that Ms Wilson as a barrister who has acted on a number of occasions for the company is someone who has held herself out as having knowledge of the affairs of the company. The liquidator says that no documentation has been provided to him for the final nine months of the company's pre-liquidation existence, a period when Ms Watson was representing the company in litigation as counsel. He contends this is totally unacceptable. In addition, the liquidator says he seeks documents here from Ms Watson both in her capacity as a barrister for the company, and in addition as an intermediary on the basis that she has set herself up as such between herself and the sole director of the company Mr Bennett. I make no comment as to this latter aspect. There is no need for me to do so. And it is strongly contested by Ms Watson. Suffice to say that on

the basis of the material before the Court, I am satisfied that Ms Watson is someone who has knowledge of the company's affairs, and is an appropriate person to be the subject of a s261 Notice.

[43] The second ground of objection advanced by Ms Watson is that the Notice is defective, in that it does not specify what documents the liquidator is seeking, other than in a general way.

[44] Ms Watson has deposed in her affidavit that she has received documents for the company in her capacity as a barrister when she was acting as counsel for the company. She maintains that the s261 Notice describes the documents sought in the broadest possible terms, and it is just too wide to answer.

[45] Notwithstanding this, in her affidavit sworn 10 November 2006, Ms Watson at paragraph 30 does refer to specific categories of documents which she holds for the company. She states in paragraph 28 of her affidavit that these documents are in the two large box files which she has. She then goes on in paragraph 31 of her affidavit to deal with the various categories of documents which she says will be in the box files. With regard to some of this material, Ms Watson in her affidavit says that the liquidator is welcome to that material. With regard to other material, she suggests that the documents might be provided to the Court so the Court can assess whether they are company documents or Mr Bennett's personal documents, and whether they are disclosable.

[46] All of this indicates to me that there is likely to be a range of documents held by Ms Watson to which the liquidator should have access to properly fulfil his role. At least some of them may well be documents that truly belong to the company, and which the liquidator obviously must be entitled to hold.

[47] That said, I reject the contention made on behalf of Ms Watson that the terms of the s261 Notice are indeed too broad. If issues may arise later over whether documentation relates to the company or to some other third party, these are matters for consideration then.

[48] The third objection from Ms Watson is that the s261 Notice is defective, as the purpose for the request has not been specified. In my view, this matter is quickly disposed of. Section 261(1) clearly enables a liquidator to issue the Notice in question. It simply seeks production of books, records, or documents of the company and does not require Ms Watson to attend on the liquidator for examination. I am satisfied there is authority for the issue of the Notice, and that the provisions of s261 and the Companies Act 1993 generally clearly spell out the purpose for which such requests to be made.

[49] Finally, Ms Watson relies upon her affidavit sworn 10 November 2006 in opposing the orders sought. There is no affidavit of Mr Bennett filed at this point.

[50] I have considered the matters raised in Ms Watson's affidavit. Noting these, and the fact that Ms Watson has already provided voluntary disclosure to the liquidator of a number of documents, and she has acknowledged, quite properly, that she holds additional documents, I am satisfied that in this case Ms Watson has on her own admission failed to deliver up certain documents held for the company relating to its affairs. This needs to be rectified.

[51] If this proves to be a matter upon which solicitor-client privilege might apply, then the starting point, as I see it, is that any privilege that arises is that of the company, which of course is the privilege of the liquidator here. If documents are privileged in some other sense such as privilege relating to the director Mr Bennett, then this is a matter for later enquiry – see *Foleys Transport Limited v Weddel (NZ) Limited*.

[52] One other matter is raised in Ms Watson's affidavit. This relates to her complaint at paragraphs 33 and following concerning what she describes as her professional embarrassment in the way she maintains the liquidator has proceeded in this matter. She complains particularly of the manner of service of the current application upon her at her chambers. She complains also that as far as she is aware, the liquidator has chosen not to issue similar s261 Notices to other previous professional advisers to the company.

[53] These matters are noted. They are not, however, strictly relevant to issues before me. I am satisfied that they are not of a sufficiently serious nature to justify an award of costs against the liquidator here.

[54] In summary then, and from the material which is presently before the Court, I am satisfied that Ms Watson is someone who has knowledge of the affairs of the company to a certain extent. The liquidator is clearly entitled to a level of co-operation from her. To her credit, Ms Watson in her affidavit has indicated at some length that she does hold a range of documents, and is prepared to make available a group of these for consideration by the liquidator.

[55] In my view, given the thrust of s261 and s266 Companies Act 1993, the liquidator is entitled to full co-operation from Ms Watson, and the order sought in the application before the Court should be made.

[56] An order is now made pursuant to s266(1) Companies Act 1993 that within 20 working days of the date of this judgment Deirdre Watson, barrister of Auckland, is to produce to the liquidator Robert Bruce Walker any books, records or documents relating to the business, accounts, or affairs of International Direct Limited (in liquidation) in her possession or under her control.

[57] At this point, costs are reserved.

Associate Judge D.I. Gendall

Solicitors:

Tripe Matthews & Feist, Wellington for Applicant

Rory McDonald, Barristers & Solicitors, Auckland for Mr Bennett and Ms Watson