Liquidator of W&P Piling Pte Ltd v Chew Yin What and Others
[2004] SGHC 108

Case Number : OS 115/2004

Decision Date : 28 May 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : P Jeya Putra and Magdalene Chew (AsiaLegal LLC) for applicant; Leslie Phua (Phua Wai Partnership) for first respondent; Chew Siang Tong (S T Chew and Partners) for second respondent; Tan Cheow Hin (CH Partners) for third respondent

Parties : Liquidator of W&P Piling Pte Ltd — Chew Yin What; Lee Kok Swee; Yeung Chun Keung

Insolvency Law – Winding up – Liquidator – Application by liquidator for court to order private examination of parties pursuant to s 285 Companies Act – When court will allow liquidator's application – Breadth of court's powers to order private examination – Section 285 Companies Act (Cap 50, 1994 Rev Ed)

Insolvency Law – Winding up – Liquidator – Whether application should be made ex parte or inter partes – Whether liquidator should place reasons for application on record and on oath – Rule 49 Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed)

28 May 2004

V K Rajah JC:

1 A liquidator of a company is usually a foreigner to the company's affairs. He is duty-bound to reconstruct the events that have led to the company's demise. He is expected within a relatively short period to assess the steps to be taken in order to maximise returns to the company's creditors and to review various aspects of the company's management that may have had a bearing on the company's demise. Officers of the company may have been guilty of misconduct or indiscretion. Quite possibly, even those who may have played no part in events leading to the demise may have reasons to obscure or ignore the facts as well as to minimise their involvement in the preceding events. The recurrent refrain from unco-operative directors is "I did not know", "I was not told" or "I cannot remember". Taking into account these difficulties and the need for expediency, the law has armed liquidators with a unique procedure to enable them to prise information pertaining to the company's affairs. Section 285 of the Companies Act (Cap 50, 1994 Rev Ed) ("CA") provides:

> (1) The Court may summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court considers capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company.
>
> (2) The Court may examine him on oath concerning the matters mentioned in subsection (1) either by word of mouth or on written interrogatories and may reduce his answers to writing and require him to sign them, and any writing so signed may be used in evidence in any legal proceedings against him.
>
> (3) The Court may require him to produce any books and papers in his custody or power relating to the company, but where he claims any lien on books or papers the production shall be without prejudice to that lien, and the Court shall have jurisdiction to determine all questions

relating to that lien.

(4) An examination under this section or section 286 may, if the Court so directs and subject to the Rules, be held before any District Judge named for the purpose by the Court, and the powers of the Court under this section and section 286 may be exercised by that Judge.

(5) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful excuse, made known to the Court at the time of its sitting and allowed by it, the Court may cause him to be apprehended and brought before the Court for examination.

2 This section is not peculiar to Singapore. Its progenitor has a distinguished English pedigree dating back to 1862. This section confers on the liquidator the extraordinary right to apply to court *ex parte* for leave to query persons on oath. The power has been described as one of an inquisitorial nature and, in a colourful turn of phrase, the equivalent statutory provision was characterised as a "Star Chamber clause" by Chitty J in *Re Greys Brewery Company* (1884) 25 Ch D 400 at 408. Case law suggests that the courts in various jurisdictions have shown a strong predilection towards accepting liquidators' views and "great weight" is accorded to their status as officers of the court entrusted with the discharge of a public function.

3 There is no doubt that this extraordinary power, which can also be invoked in judicial management cases and similarly under the bankruptcy regime, serves an essential and important purpose. If used correctly, it generally but not invariably redresses disadvantages without creating advantages. However, if used incorrectly, it could be draconian in its application and crushing in its consequences. Unnecessary legal costs can also be incurred by all involved and the scarce funds of a company that has crossed the Styx may be severely depleted. Legal proceedings in the Singapore context are generally required to be conducted in the manner of an adversarial contest. The process of taking evidence on oath pursuant to an order made under s 285 of the CA, in some ways, approximates the taking of "depositions" in American proceedings save for the fact that the former is not a mutual exercise. The procedure is one of the very narrow areas where, for reasons of exigency and expediency, an aberration has been allowed into a fundamental tenet of an adversarial system. The court therefore plays an important and critical role in policing the exercise of this power. With this brief overview, I will now turn to the facts of this application.

Factual matrix

4 The subject company, W&P Piling Pte Ltd, was placed under compulsory liquidation on 16 May 2003. The applicant is the sole liquidator of the company. The total value in respect of proofs of debt filed against the company as of the date of the subject application amounts to $14,540,985. This is clearly not an insubstantial amount. There are also a number of unsecured creditors. The company currently only has realisable assets in the region of $1m.

5 The company, as its name suggests, was involved in the building industry. Its parent company and main shareholder was another construction company, Wee Poh Construction Co (Pte) Ltd ("the parent company"). The parent company had already been placed under a scheme of arrangement pursuant to s 120 of the CA when this application was initiated.

6 The first and second respondents were directors of the company until 12 April 2003 when they abruptly resigned. The first respondent was both director and chairman of the company since it was incorporated in 1996. The second respondent was appointed after the first respondent and did not hold any executive position in the company. He was also a director of four other companies in the

Wee Poh group. Upon their resignation, Thamaseelvam s/o Poovenespran and Neo Ah Hwee ("the new directors") were appointed as directors. The new directors do not appear to have had any appreciable involvement in the company or the parent company prior to their appointment.

7 The third respondent is a professional engineer and was in the employment of Wee Poh Holding Ltd ("the holding company"), the ultimate holding company of the Wee Poh group. He had been nominated to the company's board by the holding company. His contract of employment with the holding company was terminated on 1 November 2003. On 11 December 2003, he commenced proceedings against the holding company for alleged breach of his service contract. It is common ground that he did not participate in any management or executive decisions relating to the company. His direct responsibilities solely related to technical issues that arose in the course of the company's day-to-day operations.

8 Following his appointment, the applicant sought and received the assistance of the new directors in the preparation of and the filing of the company's statement of affairs. This is a requirement imposed by s 270 of the CA on all companies that have been compulsorily wound up. He makes no complaint about the conduct of the new directors in these proceedings. It soon became apparent to the applicant that certain assets of the company could not be accounted for. The disappearance of these assets occurred well before the appointment of the new directors. These assets appeared *ex facie* from the company's books to have been mysteriously "written off" or "fully depreciated" between 30 June 2002 and 30 April 2003. Some of these assets were substantial, with a book value amounting to several hundreds of thousands of dollars.

9 The applicant felt he was duty-bound to get to the bottom of the matter. He wrote to all the previous directors of the company including the respondents to seek their assistance. He received varying degrees of co-operation from the previous directors. Armed with the information he had received from some of them, he decided to focus his attention on the respondents, writing to them on several occasions between 4 July 2003 and 10 November 2003 to ask for information relating to these assets. The second respondent failed to respond to the queries altogether. The third respondent contacted the applicant's office soon after he received the applicant's initial letter. He explained, both in writing and orally, that his involvement in the company's affairs, if any, was peripheral. He could not even begin to attempt to answer the queries posed. The first respondent only responded on 27 December 2003, claiming to be completely unaware of any material information or knowledge relating to queries raised in connection with the missing assets. The information sought could not therefore be provided. The applicant immediately requested that he reconsider his position.

10 On 31 December 2003, before any further response was received, the applicant sent to the respondents further questionnaires detailing, with particularity, the information and documents he sought. They were requested to respond within 14 days. He proposed also to meet them, following their responses, to further discuss the issues. The first respondent then requested an extension of time to 20 January 2004. The applicant granted this, once again renewing his request for a meeting to resolve "the outstanding matters in the liquidation". The first respondent responded curtly seeking yet another extension of one month to respond on the ground that he was busy with other projects. He submitted the address of the parent company as his contact address. The applicant, sensing that he was being given the runaround by the respondents, was by now reaching the end of his tether. He promptly replied insisting that the deadline he had set be punctiliously respected. The parties had reached an impasse.

11 Shortly after this exchange of correspondence, the applicant filed an application on 29 January 2004 to examine the respondents *viva voce*, in relation to the "missing assets" and related transactions, pursuant to s 285 of the CA. He filed his application by way of an *inter partes*

originating summons. Only upon service of this application did the first and second respondents finally succumb and attempt to give their responses to the queries that had been raised earlier.

12 In his response affidavit the first respondent claimed he was merely a representative of the parent company with no personal interest in the company. He asserted he was not conversant with the company's affairs. Furthermore he claimed to have already given all the information he was capable of giving to the outstanding queries through his belated answers. The application, he alleged, was filed to harass him and was a naked attempt to compel the parent company to admit it had the missing assets. He further alleged that the applicant displayed no objectivity in pursuing him when the real responsibility for the demise of the company fell on other shoulders.

13 The second respondent claimed in his response affidavit that he was not involved in the management and day-to-day running of the company. He was not a party to the executive or management decisions of the company. He also claimed that as all the company's records were in the possession of the applicant, he was unable to answer the queries in an appropriate or comprehensive manner. Notwithstanding, he gave in response to the questionnaire the "best answers" he knew. If he were to be compelled to answer the queries *viva voce* he would give the court the same responses. It would therefore be an exercise in futility and a waste of costs and time to make an order against him.

14 The third respondent emphasised in his affidavit that he had already fully co-operated with the applicant. He had written a letter to the applicant explaining his position in addition to personally calling at his office. He had no personal interest, direct or otherwise, in the company and could not answer any of the questions the applicant had posed. In short, he was not familiar with any of the subject transactions or queries. He vehemently asserted that there was simply no evidence linking him to any of the queried transactions.

15 It is not denied in these proceedings that the first and second respondents share a close personal relationship and have adopted a common stance in their approach to the company's affairs as fellow directors. Indeed the second respondent's counsel made what struck me as a rather enigmatic characterisation of their relationship when he described the second respondent as the "Robin" to the first respondent's "Batman". I will return to this later. The first and second respondents attempted to paint a picture of ignorance, suggesting that the company was being run and managed by other directors or delegated employees.

16 The applicant in his response affidavit pointed out that the first and second respondents personally held substantial amounts of shares in the ultimate holding company. Furthermore, they had signed numerous company resolutions and the first respondent had, in addition, personally signed invoices emanating from the company to the parent company. These invoices authorised some of the transactions that the applicant now queried. He was of the view that the first and second respondents were personally and actively involved in the running of the company and, indeed, had knowledge of the transactions he was seeking further information about.

17 From his enquiries he had also ascertained that some equipment belonging to the company was currently located at the premises of HL Shipbuilding and Engineering Pte Ltd ("HL"). The first respondent is a director of HL. The company had initiated proceedings to recover these assets from HL. An injunction had previously been granted to preserve the same pending a hearing on the merits of the company's claim.

18 I carefully perused the responses that the first and second respondents set out in their affidavits. I found them to be elliptical and generally economical with material facts. In the course of the arguments, I queried the first and second respondents' counsel about the running of the

company's operations after the departure of the previous managing director in February 2002. Counsel conceded that the first and second respondents were in charge. In so far as the third respondent is concerned, it was clear that he had been co-operative as well as forthcoming about his limited personal knowledge of the company's affairs. After hearing the arguments, I allowed the applications against the first and second respondents but dismissed the application against the third respondent. There has been no appeal. I think that this is an area that has engendered confusion in Singapore resulting in conflicting practices. It may therefore be helpful to the parties and others who might have similar applications to know the reasons for my decision.

The law

The Companies Act

19 When an order to wind up a company is made, one or more of those who are directors of the company at that juncture, as well as the secretary, have to submit to the liquidator a statement of affairs of the company ("the statement"). This must be done within 14 days of the order being made or within such extended time as the liquidator allows: s 270 of the CA. The liquidator is required, in turn, upon receipt of the statement, to submit a preliminary report on the company to the official receiver: s 271(1) of the CA. These statutory requirements are expected to be completed within a relatively short time frame, the rationale being that the insolvent company's affairs should be investigated and resolved without undue delay.

20 The scheme of the CA creates a regime that closely polices the liquidator's conduct. The Official Receiver and the court discharge crucial responsibilities in the statutory scheme. The Official Receiver has been vested with the statutory power to query and to inquire into any aspect pertaining to a compulsory winding up. Leave of court is required before various phases of the liquidation process are implemented and statutory powers exercised. Court-appointed liquidators are officers of the court and enjoy a unique standing in the insolvency process as they are perceived as not only serving private interests but also as concurrently discharging a public function. Deference to the office of liquidator should not, however, be equated with the unquestioning acceptance of his views or opinions. He is in many ways discharging responsibilities, not unlike those of an advocate, and as such, owes a higher duty to the court than to his clients – a duty that is on occasion overlooked.

21 To facilitate the liquidator's inquiries into the company's affairs, s 285 of the CA confers on the court the power to order the private examination of parties who may be "known or suspected" to have knowledge or information relating, or have possession of property belonging, to the company. The inclusion of the words "suspected" and "capable of giving information" is highly pertinent in so far as it signifies that the hurdle to be surmounted by a liquidator, prior to the exercise of the statutory power, is not high. It suffices that the liquidator has some reasonable basis for his belief that a particular source can assist him in his pursuit of documents or information or any other relevant knowledge. The singular importance of this extraordinary power is also legislatively signified by the presence of a concomitant statutory power empowering the court, either before or after the making of a winding up order, to effect the arrest of a past or present director or contributory if there is *probable cause* for believing that he is leaving Singapore to avoid an examination of the affairs of the company.

Companies (Winding Up) Rules

22 The Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed) ("CWUR") provide that an application for leave to examine under s 285 CA "shall" be made *ex parte*. If made by a creditor or contributory "the summons *and affidavit* in support thereof shall be served on the liquidator"

[emphasis added]: r 49 CWUR. The clear implication from the CWUR is that an application by a liquidator need not invariably be supported by an affidavit. I will return to this issue later. The examination ought to be held in chambers, either before the Registrar or a district judge. The procedure for examination is identical to that of a cross-examination with the presiding judicial officer exercising the powers of a judge taking evidence *viva voce* at a trial.

23 Both the CA and CWUR share an English provenance and generally mirror the English position as it stood several decades ago. Since then, the English and Australian insolvency schemes have undergone a sea change, particularly within the last decade or so. The relevant English and Australian legislation have been radically overhauled and in many fundamental ways have now departed radically from their original scheme and philosophy, from which the Singapore legislation has drawn significant inspiration. Real caution must now be exercised in evaluating the relevance of recent English and Australian authorities in insolvency matters, including this area of "deposition" taking. This shift in views and the current judicial predisposition in England is well captured in this observation by Harman J in *Re Adlards Motor Group Holding Ltd* [1990] BCLC 68 at 70:

> Today, with our closening to Europe, we are slipping into the fashion for inquisitorial procedures.

There is no basis for the Singapore court to similarly attempt to flow with the English tide when the local legislation has not been altered and policy matrices in this area have not tectonically shifted.

24 With this caveat in mind, it cannot be gainsaid that there is still an umbilical cord of jurisprudence, particularly with England, that continues to offer guidance in the fleshing-out of applicable principles in this context, and insolvency law in general. The guidance offered must be reviewed against the backdrop of commercial practices and policy considerations in Singapore. The earlier Victorian cases on this area of the law which have made copious references to inquisitions and Star Chamber procedures should also be regarded with some circumspection. These cases were decided in an era where there was a high premium on privacy competing with an indeterminate threshold for disclosure. A number of these decisions appear to have been the consequence of expediency rather than the principled application of the relevant provision. There is today a much stronger emphasis on protecting the rights of creditors and shareholders in the face of impropriety on the part of a company's management. Considering that public interest considerations pertaining to insolvency matters in England and Singapore may not always be congruent, though they share similarities, it may be useful to map out a conspectus of the guiding considerations governing the utilisation of the process sanctioned by s 285 of the CA. Purely for convenience, I will refer to the process as "deposition" proceedings.

The object of the deposition proceedings

25 The role of liquidator is not confined to the safeguarding, collection and redistribution of the company's assets. These represent only a portion of the responsibilities of the office. The liquidator is also obliged to inquire into underlying reasons for the company's demise as well as the peculiar responsibility and particular role of management in the antecedent events. While the CA does not stipulate when the liquidator should complete his tasks, it is plain that he must discharge his responsibilities diligently and within a reasonable time.

26 In the UK, the Cork Committee appositely observed (see para 192 of the report entitled *Insolvency Law and Practice* (Cmnd 8558, 1982)):

> The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society.

Insolvency proceedings "have never been treated … as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them": see para 1734 of the report.

27 Section 285 is couched in extremely generous terms. It should not therefore be interpreted in a constricted manner by reference to any apocryphal purposes. It clearly cannot be used for any collateral purpose that affords no benefit to the company. Other than that, it may be invoked for any proper purpose that can benefit the company and which is within the statutory powers of the liquidator and the scheme of the companies legislation. The liquidator is expected to assume different roles and to discharge different responsibilities in different insolvency milieu. Where, as is usually the case, a company fails because of business conditions or for reasons that do not hint of any impropriety, the liquidator ought to assume a benign approach in dealing with the failed company's affairs and processes. His role, in such an instance, is that of a *watchdog*. Where there *is* evidence of impropriety, the liquidator will have to shift gears. He then assumes the role of a *hound dog*. The court will, however, have to be astute to ensure that the liquidator does not use the insolvency scheme for improper third party *collateral* interests or personal considerations; in other words, he must not become a *lapdog* held thrall to improper considerations. Liquidators are usually viewed differently by the court, as compared to other litigants, because they are presumed to be independent, to have no personal interest in the outcome of the proceeding, and to carry no emotional baggage that may cloud their objectivity. In reality, they may on rare occasions be manipulated knowingly or unknowingly by creditors or third parties to pursue collateral objectives that may be inimical to the statutory objectives and scheme. Furthermore, a liquidator has no mandate to commence litigation which has no real prospect of succeeding. The court has an important role in ensuring that this does not happen and that the failings of a liquidator are not improperly visited upon a proposed examinee.

Exercise of discretion

28 While the court is conferred a wide unfettered discretion in the exercise of this power, it is axiomatic that an unfettered discretion does not amount to a licence for its capricious or unreasoned exercise. The purpose of the legislation must govern the exercise of the discretion and the application of the power. Case law from England, incrementally developed over the last 130 years, has identified certain criteria for the exercise of this discretion prior to the making of an order or in considering the merits of an application to set aside an *ex parte* order for examination. It would be convenient to discuss the principles for leave and the setting aside of an order for examination together, with the qualification that the information before the court is likely to be very different in the two contexts.

29 There have, in recent times, been two vividly contrasting approaches in fleshing out the scope of the present-day English equivalent to s 285 of the CA. The constricted view is that its purpose is to be restrained by reference to what is merely needed for reconstituting the knowledge of the company – thus confining its deployment to gathering knowledge that was previously known to the company. The expansive view is that the power may be invoked to assist in the accumulation of facts, information and knowledge that would enable or facilitate a liquidator in the discharge of his statutory functions. This would embrace information and knowledge that the company itself may not have been apprised of prior to the onset of insolvency. In assessing the merits of the two contrasting approaches as expressed by the English Court of Appeal in *In re British & Commonwealth Holdings Plc (Nos 1 and 2)* [1992] Ch 342, the House of Lords, on appeal, decisively and unequivocally settled in favour of the expansive view: see *British & Commonwealth Holdings Plc v Spicer and Oppenheim* [1993] AC 426. In a recent decision, *In re Pantmaenog Timber Pte Ltd* [2004] 1 AC 158, the House of Lords asserted that the sole implicit limitation for the application of the broadly similar English provision was that it could be invoked purely for the purposes of enabling the liquidator to discharge

his statutory responsibilities and functions in relation to his company being wound up. I accept that the wider approach correctly encapsulates the legislative policy in the Singapore context and ought to be applied in explicating the ambit of s 285 of the CA. Given its *raison d'être* there is no reason why the breadth of the statutory provision should be judicially truncated. The threshold test for information or documents is not one of "absolute need" but that of a "reasonable requirement". However, it should be emphasised in this context that the wider the range of issues or persons to be examined, the more circumspect the court has to be in ensuring that the power is invoked and utilised appropriately. In the context of the Singapore scheme for insolvent companies, there are several relevant considerations that ought to be taken into account:

(a) There is an inclination to lean in favour of the views of the liquidator. He is presumed to be neutral, independent minded and acting in the best interests of the company: see Megarry J in *In re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 592; and Sir Nicolas Browne-Wilkinson VC in *Cloverbay Ltd v Bank of Credit and Commerce International SA* [1991] Ch 90 at 104. Having a predisposition is not tantamount to accepting the assertions or opinions of the liquidator if it is incongruent with the discharge of his statutory functions. The court will be cognisant that, from time to time, liquidators overstep the mark in their zeal to discharge their duties, or they could be influenced by extraneous factors or collateral motives that might not dovetail with the company's interests. Several English cases have consistently used the term "great weight" in respect of the value to be placed on the liquidator's views in cases of this nature. This probably stems from the fact that a liquidator is viewed as discharging a quasi-public-interest function *qua* officer of the court. For my part, I prefer to use the term "general predisposition" in favour of the liquidators' views. Liquidators may also, sometimes, in the modern commercial context, fall prey unwittingly or unconsciously to commercial and professional conflicts that are not always immediately apparent. It ought to be the role of the court to support their office while policing their conduct, without any manifest predilection in their favour.

(b) The court must place on the scales of evaluation the purpose and the intent precipitating an application on the one hand, and the oppression, inconvenience and disadvantage it may visit upon the proposed examinee on the other hand. The exercise of the power is to facilitate the liquidator's attempt to ascertain the true facts in relation to the affairs of the company, its dealings, trading activity and so on. The proper exercise of this power will facilitate the accumulation of knowledge about the company and its affairs or dealings in an economical and expedient manner, perhaps obviating otherwise costly proceedings: see, in this context, the general observations of Buckley J in *Re Rolls Razor Ltd (No 1)* [1968] 3 All ER 698 at 700 and *Re Esal (Commodities) Ltd (1988)* [1989] BCLC 59 at 64 and 70. In some instances, however, responses to the queries raised on oath or by way of an affidavit may be amply sufficient in place of an oral examination. If such relevant information can be procured without the exercise of this coercive power, it should not be invoked. Nor should it be invoked to over-egg the pudding. The essential questions to be addressed are: Is the procedure necessary for the business of preserving, collecting, managing or distributing the company's assets? Is the liquidator conducting himself reasonably in the circumstances?

(c) No distinction should be made in the exercise of the power against officers of the company and third parties. I shall refer to them as "insiders" and "outsiders" respectively. It is obvious that officers of the company, such as directors, are duty-bound to assist in the deciphering and collating of the companies records and in shedding light wherever possible on the history of its corporate conduct. Notwithstanding, an order will not necessarily be made against directors as a matter of course. If it is apparent that they have rendered genuine assistance, have co-operated fully or have no information of relevance to a particular inquiry, a court may not be inclined to make a coercive order. What purpose would an order for examination in such an

instance achieve? In so far as outsiders are concerned, if they happen to possess relevant information and are nevertheless manifestly disinclined to co-operate, the absence of a fiduciary or contractual relationship will not fetter the exercise of the power. There is no pre-condition for the exercise of the power, such as the prior existence of a direct relationship between the company and the proposed examinee, though this is assuredly a pertinent factor that would be considered in evaluating why the application is being made.

(d) An order for oral examination will usually be viewed as more onerous than an order for the production of documents, which will be granted quite readily if relevance is established. The test for production of documents is not one of convenience or inconvenience, as the case may be, but whether there is a proper basis to justify the making of the order: *per* Browne-Wilkinson VC in the *Cloverbay* case at 103.

(e) To use the procedure as a means of proving a case against the examinee himself would be tantamount to an oppressive use of the statutory machinery; *a fortiori* if fraud is involved; *per* Browne-Wilkinson VC in the *Cloverbay* case at 103.

(f) Information may be sought and facts and documents discovered in relation to a specific claim that the liquidator contemplates against the examinee or a related entity. There is no rule that precludes the ordering of information against a proposed witness or someone connected with him: see the observations of Slade J in *In re Castle New Homes Ltd* [1979] 1 WLR 1075 at 1080. The question is, "Has the liquidator settled down to sue the person sought to be examined?": *per* Harman J in *Re Adlards Motor Group Holding Ltd* ([23] *supra*, at 70). If he has, this procedure is almost invariably inappropriate. Beyond this, it would be unhelpful to attempt to establish a "Rubicon" litmus test.

30 In instances where there is neither a reasonable basis for an investigation nor any real prospect of recouping losses or sustaining claims for the benefit of the company, the court ought to be extremely cautious in allowing a proposed examination to proceed: *Re Adlards Motor Group Holding Ltd*. Attempts to obtain advantages in the litigation process will also be carefully scrutinised. It may, for example, be improper to use the process to fortify an anticipated claim for negligence if there is no real hint of impropriety, as opposed to an oversight, by the proposed examinee: *Re Sasea Finance Ltd* [1998] 1 BCLC 559. The statutory process is not to be deployed as a tactical weapon to gain an undue strategic advantage in adversarial litigation. An undue delay in inquiring into relevant circumstances may also raise questions about the need for information or documents being sought. The proposed examinee can oppose or discharge an application for examination by showing (a) a case of oppression or unfair prejudice; (b) that the information is not reasonably required; (c) the liquidator is acting inappropriately outside his statutory functions or is motivated by improper considerations; (d) that there has been a lack of full and frank disclosure by the liquidator; or (e) that the examination is sought to give the company an undue tactical advantage. I should stress that the instances outlined here are intended to be purely illustrative and are not exhaustive.

Procedure for application

31 A useful insight into the modalities of invoking and applying the power appears in the following observations of Megarry J in *In re Rolls Razor Ltd (No 2)* ([29(a)] *supra*, at 586), bearing in mind that s 268 of the UK Companies Act 1948 (c 38) is *in pari materia* with s 285 of the CA:

> What … is before me now is a written statement of facts by the liquidator in support of his application. This statement has not been, and will not be, disclosed to the applicants. This departure from normal legal procedure has long been sanctioned by the courts in view of the

purpose of section 268. As Bowen LJ observed in *In re North Australian Territory Company* (1890) 45 Ch D 87, 93, this is an extraordinary section giving an extraordinary section giving extraordinary power of an inquisitorial nature, enabling the court to direct the examination of a person who is not a party to any litigation. Further, as Jessel MR said in *In re Gold Company*, 12 Ch D 77, 82, in the passage I have already read, the liquidator comes ex parte and makes no affidavit so that the files of the court will not disclose anything to the person against whom the application is made. He pointed out, at p 84, that it is not necessary for the liquidator "to make out a prima facie case – the probability of a case is enough."

Ex parte applications

32 The CWUR clearly sanctions *ex parte* applications. Indeed it appears to direct that the application "shall" be made *ex parte*. In my view, the word "shall", in the context of r 49 of the CWUR, is used in a facilitative context and ought not to be construed as imposing a mandatory procedural requirement. *Ex parte* applications are condoned to facilitate the making of urgent application, whenever this is dictated by the circumstances. There may be cogent reasons for the immediate production of documents or for the urgent questioning of a proposed examinee. This procedure permits the liquidator to apprise the court with speed and candour of the reasons for the application, without any undue concerns about penmanship or confidentiality. Generally, in the absence of special circumstances, a liquidator ought to attempt to elicit the co-operation of a proposed examinee before the statutory power is invoked. It is sound practice for a liquidator to make a written request for the documents he seeks or to submit a list of questions to the proposed examinee or both, prior to the filing of an application for examination. Liquidators who immediately invoke this coercive procedure in the absence of concerns about confidentiality or issues touching upon the integrity of evidence may be queried by the court about their alacrity in invoking this coercive power.

33 In the normal course of events applications for examination pursuant to s 285 ought not to be made *ex parte* but through an *inter partes* summons pursuant to the provisions of the CWUR. The essential principle is that a party should in the normal course of events be heard before an order is made against him. English and Australian authorities suggesting that orders should be made as a matter of course, regardless of whether other means of eliciting the information have been attempted, ought to be treated warily. That said, it must be recognised that situations may arise where prior notice of the information or documents sought may invite a redefining or massaging of facts; in a worst-case scenario documents might even be secreted or destroyed. Should there be any likelihood that this could happen, the court will take a pragmatic approach, the onus being on the liquidator to adduce some evidence that prior disclosure of an application may not be productive.

34 Such a measured approach, which stops short of invoking the statutory power, will lead to the saving of time and costs. It will also minimise any imbalance that might result if the procedure is too readily deployed. The procedure should also, in any event, be prudently applied against third parties, given that it is a radical aberration departing from the usual mode of eliciting information.

The liquidator's statement

35 Ideally, a liquidator should place his reasons for the application on record and on oath and this should be disclosed to a proposed examinee. Naturally, disclosure of all material facts must be made to the court by the liquidator: *Re John T Rhodes* (1987) 3 BCC 588. Instances may well arise where, because of public interest considerations or a certain measure of sensitivity involving informants, the confidentiality of communications with the court may have to be strictly preserved. In a radical departure from the precepts of the usual adversarial procedure, the court will in such cases

be prepared to maintain the confidentiality of such information that the liquidator may not be prepared to disclose to or share with a proposed examinee. The court will have to carefully evaluate such information before deciding whether to screen it from prying eyes. This procedure calling for confidentiality should only be resorted to in unusual cases where issues of privilege, impropriety, fraud or public interest could be at stake. In normal circumstances, the court would be loath to act on information that cannot be tested by reference to the rules of natural justice.

Outcome of application

36 This was not a difficult case to evaluate in so far as the first and second respondents are concerned. The liquidator attempted to seek their co-operation on more than a few occasions. The essential facts are not in dispute. The first and second respondents had clearly decided to be reticent about disclosing their personal knowledge and claimed to have buried their corporate heads like ostriches in the sands of delegation. Their assertions that they had no direct personal interest in the company carry little weight in the face of their substantial indirect interests. In any event, whether or not a director has any personal interests in a company is entirely beside the point: every director has, in the final analysis, independent statutory and fiduciary duties to his company.

37 I could not accept the first and second respondents' professed lack of knowledge about the company's affairs as a basis for refusing the application. The liquidator was clearly attempting to reconstruct events as well as to preserve and recover the assets of the company. He was not embarking on an extended wild goose chase. In this case, he had *specifically identified* the transactions and events which he wanted to review. *Ex facie*, there was more than just the smoke of suspicion which had clouded the first and second respondents' conduct. Assuming the applicant was correct, the company had been a victim of a serious fraud or, at the very least, a patent misfeasance. This happened during the first and second respondents' watch as company directors. Company directors, whether executive or otherwise, cannot hide behind an illusory screen of feigned ignorance when the corporate walls of confidence and trust dissolve at the onset of insolvency. They have fiduciary responsibilities to discharge, and conduct and actions to explain and to account for. They have continuing statutory and common law responsibilities to co-operate and share knowledge with a liquidator to assist in addressing outstanding issues. They are obliged to collaborate with the liquidator in reconstituting the knowledge of the company and to educate the liquidator on relevant issues.

38 Tay Yong Kwang J in *Re Lion City Holdings Pte Ltd* [2003] 3 SLR 493 at [18] rightly opined:

> It would be wrong to discharge the order for examination simply on the basis that [the director] asserted he had already disclosed what he knew. The liquidators are entitled to dispute that assertion or at least to test any professed lack of knowledge. Otherwise directors who answer every question with "I do not know anything about that" would be able to claim that they have already said what they are able to.

The court will carefully examine the pertinent circumstances before concluding whether it is appropriate to subject a proposed examinee, who professes ignorance or asserts he has rendered full co-operation, to the crucible of a *viva voce* examination. Former directors who adopt such tactics may open up another front of potential liability. It is not unreasonable in such circumstances for a liquidator to test their responses on oath in contemplation of further proceedings, if he can show that they have relevant information or knowledge.

39 That the first and second respondents should profess lack of any material knowledge in this case is hopelessly and jarringly at odds with the incontrovertible evidence of their actual participation

in the affairs of the company during the tenure of their office, as evidenced by the company resolutions. Their participation in the company's affairs is well-documented and irrefutable. In my view, the first and second respondents' objections to the applications consisted of misplaced rhetoric, bald generalisations, as well as unsubstantiated attacks against the applicant. They bear neither the test of scrutiny nor the hallmark of credibility. The applicant has yet to initiate any accusatorial litigation against them personally. The proposed examination is simply the commencement of an inquiry to elicit information and there appears to be no other appropriate or more convenient means by which the applicant can ascertain from the first and second respondents the "real" facts. All previous attempts to procure information from them which might have obviated the exercise of this coercive statutory power, had been to no avail.

40 In many ways this was a classic textbook case. Shortly before the company was wound up, the first and second respondents abruptly resigned. An obvious attempt to clear the decks by appointing the new directors was made. The company's knowledge bank was temporarily sterilised. Assets disappeared. A clear lack of accountability to the company by the directors, particularly the first and second respondents, was evident. They were mired in latent and patent fiduciary conflicts arising from their different appointments within the group of related companies in which they had substantial personal interests. While the first respondent had by all accounts what appears to be a primary role in the transactions, the second respondent cannot shirk his responsibilities as a director. The second respondent's counsel's casting of his client and the first respondent in the robes of "Robin" and "Batman" respectively, was a maladroit attempt to minimise responsibility. He failed to appreciate that even comic heroes are assigned responsibilities. Company directors bear a personal responsibility for their acts of commission or omission, as the case may be. In the eyes of the law they all share some measure of responsibility for the affairs of the company and cannot claim to have been "guided" or to have adopted the practice of taking "directions".

41 I had also considered the fact that the first respondent is a director of HL, against which the applicant had already commenced proceedings. While the court will not sanction an examination with any bearing upon adversarial proceedings that have already commenced, the proposed examination did not directly pose any issue of oppression. Firstly, the purpose of the examination did not hinge or flow from the earlier litigation. Secondly, the first respondent is being queried on his role *qua* director of the company and not as a director of HL. Thirdly, an order for examination does not preclude an examinee from raising at the *viva voce* examination any legitimate reason or basis for not responding to a particular question.

42 The third respondent was in an altogether different position. It was abundantly clear to me that he had fully co-operated with the liquidator to the best of his ability from the outset. His contract with the holding company was terminated on grounds that were entirely unconnected with the company's insolvency. Indeed, he had himself commenced proceedings against the holding company. The applicant had adduced no evidence of complicity tarnishing his position *qua* director. In response to my queries, applicant's counsel conceded that there were no documents or facts implicating him with any of the transactions that had been identified by the applicant. I failed to understand why the applicant was seeking to invoke coercive statutory machinery against him. The application, in so far as it relates to the third respondent, is wholly misconceived and axiomatically oppressive. There did not appear to be any additional information or knowledge that he could usefully share with the applicant. The applicant was plainly overzealous in initiating the application against the third respondent, making this a case of "overkill". The issue of his general responsibilities *qua* director was a separate issue that did not arise in the application.

43 In the result, I granted an order for examination in relation to the transactions identified by the applicant only against the first and second respondents. The application *apropos* the third

respondent was dismissed with costs.

Application against first and second respondents allowed. Application against third respondent dismissed.