IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-000874
[2023] NZHC 3048

UNDER	the Companies Act 1993 and High Court Rules 2016
BETWEEN	DAMIEN MITCHELL GRANT and ADAM STEVENSON BOTTERILL as liquidators of Ormiston Rise Limited (in liquidation) First Applicants
	DAMIEN MITCHELL GRANT and ADAM STEVENSON BOTTERILL as liquidators of Ormiston Rise Development Limited (in liquidation) Second Applicants
AND	ARENA ALCEON NZ CREDIT PARTNERS LLC First Respondent
	QUEASTOR ADVISORS, LLC Second Respondent

Hearing: 13 June 2023

Appearances: K A Cocks / L Rong for the Applicants
J C Caird / S L Hawksworth for the Respondents

Judgment: 31 October 2023

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 31 October 2023 at 4.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date......................................

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Introduction

[1] The first and second applicants, Damien Grant and Adam Botterill, are liquidators of Ormiston Rise Limited (in receivership and liquidation) (**ORL**), and Ormiston Rise Developments Limited (in receivership and liquidation) (**ORDL**).

[2] The liquidators have filed an originating application seeking orders under s 266(1) of the Companies Act 1993 (the **Act**) that Arena Alceon NZ Credit Partners, LLC (**Arena**), and Queastor Advisors, LLC (**Queastor**) comply with the liquidators' requirements under ss 239AG and 261 of the Act to produce books, records, and documents of ORL and ORDL and information about the business, accounts, and affairs of ORL and ORDL. This is the **266 Application**.

[3] Arena and Queastor are limited liability companies incorporated outside of New Zealand, in the United States of America. They do not have a place of business in New Zealand. When they filed the 266 Application, the liquidators also sought, on a without notice basis, leave under r 6.28 of the High Court Rules 2016 to serve the 266 Application on Arena and Queastor at their registered office overseas.

[4] Leave was granted[1] and Arena and Queastor were served. They filed an appearance under protest to jurisdiction (**Appearance**) on the grounds that the statutory powers relied on by the liquidators in the Act do not have extraterritorial effect; and Arena and Queastor have not submitted to the jurisdiction of the New Zealand courts.

[5] The liquidators now apply for an order setting aside the Appearance, maintaining that Arena and Queastor fall within the category of persons to which s 261 applies and s 261 can be applied extraterritorially. Therefore, the Court has jurisdiction to determine the 266 Application.

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[1] *Grant v Arena Alceon NZ Credit Partners LLC* HC Auckland CIV-2022-404-874, 4 August 2022 (Minute of Associate Judge Taylor).

[6] Arena and Queastor oppose the Appearance being set aside and further submit that the Court must dismiss the 266 Application pursuant to r 6.29(2) because the Court ought not to have granted the liquidators leave to serve the 266 Application on ORL and ORDL outside of New Zealand. They say that the liquidators' without notice application was incomplete and misleading; and ss 261 and 266 of the Act do not have extraterritorial effect as against a shareholder or creditor of a New Zealand company in liquidation.

Issues

[7] The Court must decide whether to set aside the Appearance under r 5.49(6)(b) and direct the 266 Application to proceed to a hearing; or dismiss the 266 Application pursuant to r 6.29(2).

[8] That decision involves considering two issues:

(a) Was the without notice leave application incomplete and misleading?

(b) Do the statutory powers relied on by the liquidators have extraterritorial effect?

Background facts

[9] ORL was incorporated on 8 July 2019 to purchase and develop land at 125C Murphys Road, Flat Bush. ORDL, a subsidiary of ORL, was incorporated on 16 January 2020 to undertake the development of around 77 units and associated works at the development property.

[10] On 18 February 2020, ORL, ORDL, and Arena entered into a syndicated senior facilities agreement (as amended and restated pursuant to a deed of amendment and restatement dated 24 June 2020) (**Senior Facilities Agreement**). The purpose of the Senior Facilities Agreement was to enable ORL to purchase and develop the land at Flat Bush. ORDL guaranteed the obligations of ORL to Arena under the Senior Facilities Agreement.

[11] On the same day, Arena and ORL entered into a Syndicated Mezzanine Facility Agreement (**Mezzanine Facility Agreement**). The purpose of the Mezzanine Facility Agreement was to refinance the deposit paid for the purchase of the property, and to fund the balance of the purchase price for the property. ORL's obligations to Arena under the Mezzanine Facility Agreement were also guaranteed by ORDL.

[12] The Senior Facilities Agreement and Mezzanine Facility Agreement were secured by (among other things) a General Security Agreement over all the assets of ORL (**ORLGSD**), and a first registered mortgage over the property (**Mortgage**). The ORLGSD and the Mortgage are held by Queastor as security trustee for Arena pursuant to a Security Trust and Subordination Deed dated 18 February 2020 (**Security Trust Deed**).

[13] Arena is also a minority shareholder in ORL, holding 19.5% of its shares.

[14] On 28 April 2021, Arena made demand on ORL under the Senior Facility Agreement, following an event of default. The demand was not remedied, and on 6 May 2021 Arena instructed Queastor to appoint receivers.

[15] On 7 May 2021, ORL was placed into receivership, with Neale Jackson and Grant Graham of Calibre Partners appointed as joint receivers. On 8 May 2021, ORDL was placed into receivership, with Messrs Jackson and Graham also appointed as joint receivers.

[16] By the time the receivers were appointed, construction had commenced on all stages of the development. The receivers say that their initial focus was on securing the assets and stabilising the development.[2] They considered that the continuation of certain works in the development was important to preserve the value of the companies' assets, and to avoid significant risks associated with ceasing all works immediately.[3]

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[2] *Jackson v Grant* [2022] NZHC 2113 at [13].
[3] At [13].

[17] The receivers prepared a development budget of $29 million for the continuation of works, including earthworks and civil and design works through to 31 August 2021 in accordance with ORDL's plans for the development. To fund those works, ORL, ORDL and Arena entered into a Receivership Facility Agreement on 4 June 2021 under which Arena provided funding of up to $30 million to continue the works in line with the development budget. ORL and ORDL's obligations under the Receivership Facility Agreement were secured by the ORLGSD.

[18] To repay the secured debt, the receivers conducted a sales process for the land and development by way of a public tender. On 19 August 2021, the receivers accepted an offer from TV Neighbourhood South Limited, an entity related to Arena.

[19] On 25 August 2021, Damien Grant was appointed as administrator of ORL by way of board resolution.

[20] ORL was placed into liquidation by way of creditors' resolution passed at the watershed meeting on 29 September 2021. Mr Grant was appointed liquidator.

[21] On 3 December 2021, ORDL was placed into liquidation by order of this Court at Auckland. Mr Grant was appointed as liquidator.

[22] Between August 2021 and February 2022, Mr Grant issued a series of notices on Arena and Queastor under ss 239AG and 261 of the Act, requiring them to deliver up documents, records and information relating to ORL and ORDL.

[23] On 4 April 2022, Mr Botterill was appointed alongside Mr Grant as joint liquidator of ORL and ORDL.

The liquidators' and the Court's statutory powers

[24] The liquidators derive their power to require books, records, documents and information from s 261 of the Act:

> **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—

(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).

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

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

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

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

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

…

(6A) A person who fails to comply with a notice given under this section commits an offence and is liable on conviction to the penalty set out in section 373(3).[4]

[25] Administrators are given the same powers under s 239AG of the Act:

239AG Administrator's right to documents, etc

Sections 261 and 263 to 267 apply with all necessary modifications as if every reference to liquidator and liquidation was a reference to administrator and administration.

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4 A fine not exceeding $50,000 or to imprisonment for a term not exceeding 2 years.

[26] Section 266 of the Act sets out the Court's power to require compliance with liquidators' s 261 notices; or to make orders against persons to whom s 261 applies:

> **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 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.
>
> (3) Where a person is examined under subsection (2)(a), —
>
> (a) the examination must be recorded in writing; and
>
> (b) the person examined must sign the record.
>
> (4) Subject to any directions by the court, a record of an examination under this section is admissible in evidence in any proceedings under this Part, section 383, subpart 6 of Part 8 of the Financial Markets Conduct Act 2013, or section 44F of the Takeovers Act 1993.

Was the liquidators' without notice leave application incomplete and misleading?

[27] Where, as here, an overseas party has been served pursuant to an order granting leave under r 6.28 of the High Court Rules, r 6.29(2) provides that the overseas defendant is entitled to challenge whether leave was correctly granted:

> If service of process has been effected out of New Zealand under r 6.28, and the Court's jurisdiction is protested under r 5.49, and it is claimed that leave was wrongly granted under r 6.28, the Court must dismiss the proceeding *unless the party effecting service establishes that in the light of the evidence now before the Court, leave was correctly granted*.
>
> (emphasis added)

[28] As the learned authors of *McGechan on Procedure* explain:[5]

> ...the onus remains on the party effecting service to show that leave was properly granted. Provided, however, that there was no material non- disclosure in the plaintiff's previous ex parte application for this leave, the fact that leave was so granted is normally sufficient for the plaintiff to show that it has a good arguable case for service under r 6.28.

[29] Where a challenge is made to the granting of leave to serve overseas, the Court considers the leave application afresh, in light of the new evidence and submissions of both parties.[6] The onus is on the party effecting service to establish that New Zealand is the appropriate forum.[7]

[30] Rule 6.28(5) states that the Court may grant an application for leave to serve a party overseas if the applicant establishes that:

(a) the claim has a real and substantial connection with New Zealand;

(b) there is a serious issue to be tried on the merits;

(c) New Zealand is the appropriate forum for the trial; and

(d) any other relevant circumstances support an assumption of jurisdiction.

[31] Arena and Queastor claim that leave was wrongly granted under r 6.28.[8] They accept that the requirements of r 6.28(5)(a), (c) and (d) are met. However, they submit that the liquidators have failed to establish that there is a serious issue to be tried under r 6.28(5)(b).

[32] When Associate Judge Taylor gave the liquidators leave to serve Arena and Queastor overseas he determined that there was a serious issue to be tried:[9]

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5 Jessica Gorman and others (ed) *McGechan on Procedure* (online ed, Thomson Reuters,) at [HR6.29.04].

6 *Bell v Lal* [2012] NZHC 1264 at [3].

7 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [44].

8 This claim was not made in their Appearance or notice of opposition to the liquidators' application to set aside their Appearance but was advanced in submissions.

9 *Grant v Arena Alceon NZ Credit Partners LLC* (Minute of Associate Judge Taylor), above n 1, at [6].

> The applicants are seeking the books, records and documents in order to establish the secured level of debt owed by ORL and/or ORDL to Arena and Queastor, and the means by which the preservation payments have been added to the secured loan balance. Arena and Queastor have declined to provide any books, records, or documents sought by the applicants. Accurate establishment of the secured indebtedness of ORL and ORDL is of obvious importance to unsecured creditors of ORL and ORDL.

[33] The Associate Judge's conclusion reflected the grounds in the liquidators' without notice application for leave, including that:

> [2] The grounds on which the order is sought are as follows:
>
> …
>
> (h) [Arena] was the main lender to the development project, undertaken by ORDL on behalf of ORL, at the Property.
>
> (i) [Arena] made direct preservation payments to contractors engaged by ORL and/or ORDL.
>
> (j) the books, records and documents sought from [Arena and Queastor] relate to the Property, the development of units and associated works at the Property, the secured level of debt owed by ORL and/or ORDL to [Arena and Queastor], and the preservation payments added to the secured loan balance.
>
> (k) [Arena and Queastor] have failed to provide sufficient information and documentation relating to the above.

[34] Mr Grant filed a single affidavit in support of the 266 Application and the application for leave.[10] He detailed the liquidators' requests for information from Arena/Queastor between August 2021 and February 2022, including by way of formal notices under ss 239AG and 261 of the Act. Mr Grant concluded:

> 3.32 I remain concerned as to the appropriateness of Arena/Queastor's payments classified as Preservation Advances, with insufficient documentary verification having been provided to me by Arena/Queastor and/or the receivers.
>
> 3.33 I have not been able to find any contractual basis in the Facility Agreements for Arena/Queastor to charge for the Preservation Advances. Arena/Queastor have not provided sufficient detail relating to these advances, the secured level of debt, Receivers' Funding, or the Final Interest Payments. As such, they have failed to comply with the s 261 notices.

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[10] Affidavit of Damien Mitchell Grant dated 3 June 2022.

> 3.34 This application is necessary, as I require the information to investigate the affairs of ORL and ORDL and verify that all expenses have been validly incurred, and that the level of secured debt has been appropriately verified.

[35] Arena and Queastor submit that the liquidators' without notice application, and Mr Grant's affidavit filed in support, was incomplete and misleading as it did not alert the Associate Judge to the fact that the liquidators had applied for discovery orders for the same documents in another proceeding in this Court. In that proceeding, the liquidators apply for a declaration as to the proper amount of the secured debt (the **Declaration Application**). Arena and Queastor explain that the appropriateness of the preservation payments and their contractual basis are matters directly in issue in the Declaration Application. Furthermore, since leave was granted, discovery orders have been made against them and they are complying with the orders.

[36] The liquidators maintain that the 266 Application is necessary and has merit. They say that the documents and information sought in the 266 Application extend beyond the specific categories of documents sought in the Declaration Application. Additionally, when the liquidators applied for leave under r 6.28, their application for discovery had not been heard and there was no guarantee that they would be successful.

Assessment

[37] The liquidators should have disclosed the Declaration Application and the discovery orders sought in that application when they applied for leave to serve the 266 Application overseas. When making a without notice application for leave to serve an overseas party under r 6.28 "the utmost good faith must be observed, and full and fair disclosure must be made of all the facts which should be considered by the Court in dealing with the application".[11] The Court in *Bramwell v The Pacific Lumber Co* stated that "an application for leave to serve out of jurisdiction ought to be made with great care and looked at strictly".[12]

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11 *Pilkington v McArthur Trust Ltd* [1938] NZLR 131 at 133.

12 *Bramwell v The Pacific Lumber Co* (1986) 1 PRNZ 307 (HC) at 309.

[38] Having said that, I do not consider that leave was incorrectly granted because of this omission. I have three reasons for reaching this conclusion.

[39] First, while there is some overlap, the books, records, documents, and information sought by the liquidators in the s 266 Application extend beyond the categories sought by the liquidators in the Declaration Application, which were:[13]

(a) documents relating to the negotiation and meaning of the term "Final Interest Payment" in the Facility Agreements;

(b) documents relating to the decisions by Arena/Queastor and the receivers to continue to make the preservation payments and payments in advance for further work; and the reasons for paying pre-receivership amounts; and

(c) specific documents relating to each of the preservation payments and payments applied under the Receivers' Facility Agreement.

[40] After the leave decision, Gordon J ordered Arena, Queastor and the receivers to make discovery of all documents in category (a).[14] Her Honour also ordered Arena and Queastor to make discovery of all documents relating to decisions taken to incur the preservation costs; and the reasons for and necessity of incurring the disputed preservation costs.

[41] I describe the books, records, documents, and information sought by the liquidators in the present s 266 Application in the following section of this judgment. They extend beyond documents described at [39](a) to (c) above.

[42] Second, when the liquidators applied for leave under r 6.28, their application for discovery had not been heard and there was no guarantee that they would be successful. Discovery is the exception in proceedings commenced by originating

[13] *Jackson v Grant*, above n 2, at [35], [47] and [49].
[14] At [62].

application (as the Declaration Application was). It is relevant that Arena and Queastor opposed the discovery application.

[43] Third, I do not accept that as a matter of principle, an application by a liquidator for a Court order for compliance with their requirements is without merit simply because the liquidator has also applied for discovery of the same or similar information in another proceeding. There is no logical reason why that conclusion should follow. It is relevant that each application proceeds on a different basis and involves different considerations. An application for discovery is made under the High Court Rules 2016 and turns on issues of relevance and proportionality. Whereas a liquidator's power to require documents, and the Court's power to order compliance with any such requirement, is derived from the Act. I cannot see any principled reason why a liquidator should not be able to pursue both avenues or why the fact that one has been taken should lead to the conclusion that the other is without merit.

Do the statutory powers relied on by the liquidators have extraterritorial effect?

[44] Arena and Queastor claim that the Court lacks jurisdiction to determine the 266 Application because ss 261 and 266 of the Act do not have extraterritorial effect as against a shareholder or creditor situated overseas. They emphasise the starting presumption that New Zealand statutes do not have extraterritorial effect. And that while the Court has previously held that ss 261 and 266 apply to a current or former director of the company in liquidation situated overseas,[15] the same rationale does not apply to a foreign shareholder or creditor.

[45] The liquidators claim that ss 261 and 266 have extraterritorial effect in the circumstances of this case. They emphasise that Arena elected to become a shareholder of ORL, and that both Arena and Queastor entered into Facility Agreements with ORL/ORDL which are explicitly governed by New Zealand law. They place considerable importance on the fact that Arena and Queastor were closely involved in the affairs of ORL/ORDL, making direct payments to contractors

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15 *Re International Direct Ltd (in liq)* HC Wellington CIV-2006-485-2020, 17 November 2006 and *Grant v Pandey* [2013] NZHC 2844.

undertaking the development. They say that they are unable to verify these payments, as the relevant documents are held by Arena/Queastor.

[46] Before considering the question of extraterritoriality it is helpful by way of orientation to focus on precisely what information the liquidators require.

What information do the liquidators require?

[47] The liquidators' written notices identified in the 266 Application range from August 2021 to February 2022. They are stated to be variously notices under s 261(1), (2)(e) and (3)(b) of the Act. The application does not set out the documents or information required under each notice or specify which information remains outstanding. Therefore, to identify what information the liquidators require, it is necessary to review the notices themselves and the associated correspondence exhibited to Mr Grant's affidavit.

31 August 2021 notice to Arena under s 239AG

[48] On 29 August 2021, Mr Botterill requested that Arena/Queastor advise:

(a) the current level of debt outstanding between senior lenders from ORL;

(b) any notices of default/breach issued to ORL prior to the appointment of the receivers;

(c) any reasons for the appointment of receivers.

[49] Arena responded on 31 August 2021, stating that the debt stood at $179,895,000. Arena also provided copies of the Notice of Default to ORL dated 28 April 2021 and Property Law Act notice dated 7 May 2021.

[50] On that same day, Mr Botterill issued a notice to Arena under s 239AG of the Act for a "breakdown/statement of the debt level … and what it is comprised with reference to the syndicated senior development facilities agreement". Arena responded with a breakdown of the debt owed to Arena on 6 September 2021.

[51] It would appear therefore that this s 239AG notice is satisfied.

6 September 2021 notice to Arena under ss 239AG and 261

[52] On 6 September 2021, Mr Botterill issued a notice under ss 239AG and 261 requiring Arena to deliver any books, records, or documents of ORL held by Arena including but not limited to:

(a) all correspondence (including emails) between Arena and ORL (including its board, solicitors and/or agents);

(b) instructions and advice;

(c) pre-loan originating correspondence and negotiations;

(d) loan drawdown details;

(e) evidence of and notices of default (besides those provided already).

[53] On the same day, Mr Botterill wrote to Queastor, requiring information about the preservation advances, receivers' funding, and final interest payment(s).

[54] On 9 September 2021, Arena responded to the 6 September 2021 notice through their solicitors. They stated that ss 239AG and 261(1) of the Act do not apply to it as an entity based in the United States of America. Notwithstanding that position, Arena stated that it did not hold any books, records, or documents of ORL. It asserted that the categories of documents identified in the notice did not fall within the ambit of s 261(1).

16 September 2021 notice to Arena under s 261(1) and 261(2)(e) and (3)(b)

[55] On 16 September 2021, Mr Botterill wrote to Arena's solicitors disputing the jurisdiction point and repeating the request for the categories of documents identified in the 6 September notice, stating that these were documents of ORL to which s 261(1) of the Act applies. He also required "any document or communication that ORL was party to."

[56] Additionally, Mr Botterill requested "the remainder of information and documents about the business, accounts, or affairs of ORL pursuant to s 261(2)(e) and (3)(b). It is unclear what this request refers to.

[57] On 23 September 2021, Arena's solicitors responded, reiterating their position that ss 261 and 239AG do not have extraterritorial effect and stating that in any case the documents requested do not come within the scope of s 261; they could not understand the Administrator's requests; and the documents requested ought to be held by ORL or its agents.

[58] On 27 September 2021, Arena's solicitors responded to the administrator's 6 September 2021 letter, providing an explanation of the preservation advances, copies of deeds of assignment between various parties who provided services to the development, and suggesting that the liquidators direct any queries in relation to the receivers' funding to the receivers. Arena also submitted a proof of debt for the remaining debt in the sum of $3,658,007.62.

28 September 2021 informal request

[59] On 28 September 2021, Mr Botterill wrote to Arena's solicitors. He asked for:

(a) clarification of Arena's basis for adding costs incurred by ORDL (including its receivership) to ORL's loan balance;

(b) a breakdown of what the $18,500,000 advanced to the receivers was spent on; how the costs were properly incurred for ORL; and evidence that all the funds had been spent;

(c) copies of the contracts between ORL and the third parties to which the deeds of assignment related and clarification of whether ORL (in rec) or ORDL (in rec) engaged those parties.

[60] Arena responded through its solicitor on 29 September 2021, stating that details of how the proceeds of the receivership funding facility were applied should be directed to the receivers and any questions as to how the proceeds were spent could

be addressed in the fullness of time. They also said that the questions raised about the contracts with third parties would be responded to in the fullness of time.

7 October 2021 notice to Arena under s 261

[61] On 7 October 2021, Mr Botterill wrote to Arena through its solicitors, referring to s 261(2) and (3) of the Act and requiring Arena to provide "the documents as previously requested".

First 266 Application

[62] On 29 October 2021, Mr Grant filed an originating application seeking orders under s 266 of the Act requiring Arena to produce books, records, and documents of ORL, and to produce information about the business, accounts, and affairs of ORL (**First 266 Application**). This application was dismissed on 14 April 2022 as the liquidator failed to serve Arena validly in a manner permitted by Delaware and New York law and therefore the Court did not have jurisdiction.[16]

[63] On 30 October 2021, Arena responded through its solicitors to the 7 October 2021 notice. Arena restated that requests for details as to how the proceeds of the Receivership Funding Facility were applied should have been made to the receivers and they understood the receivers had provided the liquidators with that information already. Arena provided further explanation for the Preservation Advances, including copies of the invoices to which those payments related.

17 December 2021 notice to Arena under s 261

[64] On 17 December 2021, Ms Cocks, purportedly for ORDL, required Arena to deliver up all books, records, or documents of ORDL it held; and any information about the business, accounts, or affairs of ORDL, including but not limited to:

(a) all correspondence (including emails) between Arena and ORDL (including its board, solicitors and/or agents);

[16] *Grant v Arena Alceon NZ Credit Partners, LLC* [2022] NZHC 783.

(b) instructions and advice;

(c) pre-loan originating correspondence and negotiations;

(d) loan drawdown details;

(e) evidence of and notices of default;

(f) any documentation or communication to which ORDL was a party.

[65] Arena's solicitors responded on 19 January 2022 that s 261 did not apply to Arena as an entity based overseas. Without prejudice to that position, they stated that Arena did not hold any books, records, or documents of ORDL.

25 February 2022 notice to Arena and Queastor under s 261(1)

[66] On 25 February 2022, Ms Cocks on behalf of the liquidators required Arena/Queastor to deliver up any books and records of ORL or ORDL in their possession, specifically:

(a) any 'as is' valuations done on the land and the development;

(b) any value analysis and/or documents relating to continuing works and value added to the development;

(c) any documents/information relating to the method and timing of the sale of the development;

(d) any documents/information relating to verification of the amounts paid as preservation advances by ORL/Queastor;

(e) any documents/information relating to verification of the secured loan balance payable to Arena/Queastor;

(f) any documents/information relating to the $18 million fee charged to the secured loan.

[67] Arena/Queastor's solicitors responded on 4 March 2022, reiterating that s 261 does not apply to the entities; and stating that the notice requested documents that did not fall within the scope of s 261 of the Act, and were requests for documents that ought to be held by, or in the control of ORL and ORDL or their agents.

[68] On 11 March 2022, the receivers, who had been served with a notice in similar terms, advised that they did not hold any documents relating to the Preservation Advances paid to the third parties and indicating that these payments were made directly by Arena.

Summary of information sought

[69] From this review, I conclude that there are two sets of documents/information sought by the liquidators in the 266 Application, which I repeat here for ease of reference.

[70] The first set, listed in the 6 and 16 September notices (with respect to ORL) and the 17 December 2021 notice (with respect to ORDL) is:

(a) all correspondence (including emails) between Arena and ORL or ORDL (including its board, solicitors and/or agents);

(b) instructions and advice;

(c) pre-loan originating correspondence and negotiations;

(d) loan drawdown details;

(e) evidence of and notices of default (besides those provided already);

(f) any documentation or communication to which ORL or ORDL was a party.

[71] The second set, identified in the notice of 25 February 2022 and concerning both ORL and ORDL is:

(a) any ‘as is’ valuations done on the land and the development;

(b) any value analysis and/or documents relating to continuing works and value added to the development;

(c) any documents/information relating to the method and timing of the sale of the development;

(d) any documents/information relating to verification of the amounts paid as preservation advances by ORL or Queastor;

(e) any documents/information relating to verification of the secured loan balance payable to Arena or Queastor;

(f) any documents/information relating to the $18 million fee charged to the secured loan.

[72] I will now consider the statutory powers on which the liquidators rely generally, before considering their potential extraterritorial effect.

The statutory framework

[73] It is clear from ss 261 and 266 that a liquidator may ask for the assistance of the Court in one of two ways. They may apply under s 266(1) for an order that a person who has failed to comply with a written requirement of the liquidator under s 261 comply with that requirement. Alternatively, they may apply to the Court under s 266(2) for an order that a person “to whom s 261 applies” attend the court to be examined, and/or produce books, records or documents relating to the business, accounts, or affairs of the company in that person’s possession or under their control.

[74] Here, the liquidators have chosen the former route, asking the Court to order Arena/Queastor to comply with the written notices they have issued under s 261.

[75] The legislative history to ss 261 and 266 was considered by the Court of Appeal in *Finnigan v Ellis*.[17] The Court noted that the s 266 powers of examination have long been a feature of New Zealand company law.[18] However, the present scope of the liquidators' powers under s 261 is the product of steady extension through legislative intervention.[19] When first enacted, the Companies Act 1955 empowered only the then Supreme Court to order the production of money, company property or books to the liquidator; or to summon persons suspected of having property of the company or capable of giving information about the promotion, formation, trade, dealings, affairs or property of the company.[20] The Court could require any such person to produce books and papers in their custody relating to the company. Section 262A was added in 1980 to confer unilateral powers of examination on the Official Assignee acting as liquidator, or a liquidator other than the Official Assignee with the permission of the Court.

[76] The Court of Appeal noted that in explaining the proposed transition from the 1955 Act to the 1993 Act, the Law Commission did not recommend any major changes to the examinable subject matter available to liquidators but omitted the need for a court order.[21] The Court observed:

> [17] The purpose of the new provisions was simply to improve the efficiency of the procedural rules governing corporate insolvency: "The procedures relating to liquidation … have been simplified, reducing the involvement of the Courts." *In the absence of express language or necessary implication, the allowance for light-handed judicial oversight of liquidators' powers must weigh against an expansionary reading beyond the settled boundaries.*
>
> [18] Powers of examination and to order the production of documents are now conferred on all liquidators without the prior direction of the High Court. ...Failure to comply with a requirement of the liquidator under s 261 is an offence punishable by fine or imprisonment. *This factor is relevant when considering the breadth of those powers, given that the controls of the courtroom will not be present when a liquidator exercises his or her s 261 powers.*
>
> (footnotes omitted)
>
> (emphasis added)

17 *Finnigan v Ellis* [2017] NZCA 488, [2018] 2 NZLR 123.
18 At [13].
19 At [13].
20 Companies Act 1955, ss 252 and 262.
21 At [16].

[77] The Court of Appeal[22] cited Greig J in *Laing v KPMG Peat Marwick* who, after reviewing relevant English cases, said the following of s 266's equivalent under the 1955 Act:[23]

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

[78] The Court of Appeal in *Finnigan* held that as a matter of statutory interpretation, the phrase "any matter relating to the …affairs of the company" is limited to information about the company's management, accounts, and the handling of its business affairs including its assets and liabilities.[24] Relevantly in that case, information about a former director's personal financial position could not be construed as being a matter relating to a company's "business, accounts or affairs".[25]

The presumption against extraterritorial effect

[79] The general principle recognised by the Supreme Court in *Poynter v Commerce Commission* is that statutes are presumed not to have extraterritorial effect.[26] In *Poynter* the issue was whether the provisions of the Commerce Act 1986 prohibiting price manipulation applied to Mr Poynter, who did not reside in or carry on business in New Zealand. The Commerce Act prescribes in s 4 how the Act applies to conduct outside New Zealand. It was common ground that Mr Poynter's conduct did not fall within s 4. The Chief Justice stated that:

> [15] It is a common law principle of general application in the interpretation of statutes that they are presumed not to have extraterritorial effect. Where statutes are silent on the question of extraterritorial application, the content and purpose of the legislation may overcome the presumption. But

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22 At [35].
23 *Laing v KPMG Peat Marwick* (1989) 4 NZCLC 65, 180 (HC) at 65,182
24 At [38].
25 At [39]–[41].
26 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300.

> the Commerce Act is not silent on the question of extraterritorial application.
> …
>
> (footnotes omitted)

[80] Tipping J, delivering the reasons for himself, Blanchard, McGrath and Wilson JJ, similarly said:

> [36] *Bennion on Statutory Interpretation* states, as a general proposition, that an enactment is to be treated as not having extraterritorial effect unless a contrary intention appears and subject to any relevant rules of private international law. *Craies on Legislation* states, to the same effect, that, in the absence of contrary evidence, a legislative proposition is addressed to anyone who is within the territory to which the proposition extends. An enactment will generally apply to things done and people in the territory to which it extends, and no further. *There is a presumption that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication.* (emphasis added)

[81] His Honour further explained:

> [45] We are by no means insensitive to the suggestion that extraterritoriality issues should now be viewed from the perspective of the substantial changes that have taken place in recent times in the way people and businesses communicate with each other. Nor are we insensitive to what the Court of Appeal called the realities of globalisation. We do not, however, consider it is appropriate in the present context for the courts to impose piecemeal common law glosses onto a statutory code. The more is this so if such glosses require significant development of the common law. It is far better, both in principle and pragmatically, for Parliament to address the issues arising in a comprehensive way rather than for the courts to effect ad hoc additions by a process which does not accord with appropriate principles of statutory interpretation. The presumption that express language or necessary implication is required to achieve extraterritorial effect exists to reinforce the proposition that it is for Parliament not the courts to decide what extraterritorial effect an enactment should have. The policy issues in making that assessment are for Parliament not the courts. The courts simply give effect to such extraterritorial reach as Parliament has clearly specified.

Discussion of extraterritorial effect of ss 266 and 261 by New Zealand courts

[82] I was referred to only two New Zealand authorities considering whether ss 261 and 266 apply extraterritorially. Both concerned former directors of New Zealand companies in liquidation.

[83] In *Re International Direct Ltd*[27], a liquidator brought an application for an order against the company's sole director and shareholder requiring the director-shareholder to attend an examination and to provide the liquidator with information about the business, accounts, or affairs of the company pursuant to ss 261 and 266. The application was challenged, in part, on the basis that the director-shareholder was an Australian resident, and consequently that the Court had no jurisdiction to make or grant the application. In rejecting that contention, Associate Judge Gendall observed that there did "not appear to be any limitation" contained in ss 261 and 266 on a liquidator to serve notice or bring an application against a present or former director of a company who may be overseas.[28] His Honour considered the purpose of the power given to liquidators under s 261 as stated by Megarry J in *Re Rolls Razor Ltd (No 2),*[29] saying:

> [23] With these words in mind, to accept the submission that [the director-shareholder] 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.

[84] His Honour then referred to s 273 of the Companies Act, which relevantly provides that no person may leave New Zealand with the intention of avoiding examination in relation to the affairs of the company or compliance with an order of the Court and s 373(3), which provides for penalties of up to either a $50,000 fine or a two year period of imprisonment.[30] His Honour considered that those provisions emphasised "the importance for the proper conduct of a liquidation that a liquidator must have full access to information from directors and other associated parties",[31] before finally rejecting the contention that the Court lacked jurisdiction to require the director-shareholder to comply with the liquidator's s 261 notice, or to make orders against him under s 266.[32]

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27 *Re International Direct Ltd (in liq)*, above n 15.
28 At [20].
29 *Re Rolls Razor Ltd (No 2)* (1970) Ch. 576 at 591.
30 *Re International Direct Ltd (in liq)*, above n 15, at [24].
31 At [25].
32 At [26].

[85] In *Grant v Pandey,* Associate Judge Bell also held that ss 261 and 266 applied extraterritorially to overseas directors.[33] His Honour considered that as a director had to consent to their appointments, and as directors could be based overseas, acceptance meant that such directors voluntarily submitted to New Zealand law as it applied to their position as a director.[34] Given the duties imposed by Part 16 of the Act, his Honour regarded there to be "no reason in principle why directors who live outside New Zealand should be relieved from complying with the duties under ss 261 and 266".[35] On that basis and relying on the policy reasons given by Hirst LJ in *Re Seagull Manufacturing Co Ltd*,[36] his Honour considered the policy of Part 16 of the Act to "count against" any extraterritorial limitation to a liquidator's powers.[37]

[86] Notwithstanding this, Associate Judge Bell was careful to emphasise that the basis for his decision was only due to the defendant's position as a director of the company:[38]

> I emphasise that the basis for my decision is because Mr Rai is a director of the company, he is subject to duties under the Companies Act even while he is overseas. That basis for my decision does not necessarily extend to [other] persons listed in s 261(2). Different considerations may arise when considering whether other persons within s 261(2) are subject to that section if they [are] outside New Zealand.

[87] In view of the dearth of New Zealand case law on this issue I turn to the position in the United Kingdom and Australia for guidance.

The United Kingdom

[88] The equivalent provisions to ss 261 and 266 of the Act are ss 234, 235, 236 and 237 of the UK Insolvency Act 1986 (UK Insolvency Act). In these sections the term "office-holder" means the administrator, administrative receiver, liquidator or provisional liquidator, as the case may be.[39]

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33 *Grant v Pandey* [2013] NZHC 2844.
34 At [14]–[17].
35 At [19].
36 *Re Seagull Manufacturing Co Ltd (in liq)* [1993] Ch 345 (CA) at 360.
37 *Grant v Pandey,* above n 15, at [21].
38 At [27].
39 Insolvency Act 1986 (UK), s 234.

234 Getting in the company's property.

…

(2) Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder.

…

235 Duty to co-operate with office-holder.

…

(2) Each of the persons mentioned in the next subsection shall—

(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and

(b) attend on the office-holder at such times as the latter may reasonably require.

(3) The persons referred to above are—

(a) those who are or have at any time been officers of the company,

(b) those who have taken part in the formation of the company at any time within one year before the [date of administration/receivership/liquidation],

(c) those who are in the employment of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,

(d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question, and

(e) in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company.

…

(5) If a person without reasonable excuse fails to comply with any obligation imposed by this section, he is liable to a fine and, for continued contravention, to a daily default fine.

236 Inquiry into company's dealings, etc.

...

(2) The court may, on the application of the office-holder, summon to appear before it—

(a) any officer of the company,

(b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or

(c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

(3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit [to the court] an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.

…

(4) The following applies in a case where—

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court—

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

237 Court's enforcement powers under s. 236.

(1) If it appears to the court, on consideration of any evidence obtained under section 236 or this section, that any person has in his possession any property of the company, the court may, on the application of the office-holder, order that person to deliver the whole or any part of the property

to the office-holder at such time, in such manner and on such terms as the court thinks fit.

…

(3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 or this section shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom.

(4) Any person who appears or is brought before the court under section 236 or this section may be examined on oath, either orally or (except in Scotland) by interrogatories, concerning the company or the matters mentioned in section 236(2)(c).

[89] In *Re Tucker (a bankrupt), ex p Tucker* s 25 of the Bankruptcy Act 1914 (the predecessor to the UK provisions) was held not to have extraterritorial effect.[40] Section 25(1) empowered the court to summon persons "capable of giving information respecting the debtor, his dealings or property" and to require such persons to "produce any documents in his custody or power relating to the debtor, his dealings or property". Section 25(6) provided that the court could order such persons who "if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England".

[90] In that case, the debtor's trustee in bankruptcy applied under s 25 for the court to issue a summons requiring the debtor's brother, a resident in Belgium, to attend and to produce documents before a court in the UK, or to alternatively be examined and ordered to produce documents in Belgium. Dillon LJ (writing for the Court) considered, after observing both the rule of construction that statutes were presumed not to have extraterritorial effect and the territorial limits of the court's power of subpoena, that:[41]

> … I would not expect s 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court …
>
> Finally, and to my mind conclusively, by sub-s(6) of s 25 the court is given a power … to order the examination out of England of "any person who if in England would be liable to be brought before it under this section". This wording carries inevitably, in my judgment, the connotation that if the person

[40] *Re Tucker (a bankrupt), ex p Tucker* [1990] Ch 148 (CA).
[41] At 158.

> is not in England he is not liable to be brought before the English court under the section …

[91] In *Re MF Global UK Ltd (in special administration) (No 7)* David Richards J considered that ss 236 and 237 of the Act were in "substantially the same terms" as s 25 of the Bankruptcy Act 1914,[42] and that it was impossible to overlook the authoritative standing of the decision in *Re Tucker*.[43] Accordingly, the Judge held that s 236 of the UK Insolvency Act did not have extraterritorial effect.[44]

[92] While the Judge considered himself bound by precedent, he nevertheless observed that in the absence of authority and the wording in s 237(3), "there would in my view be a good deal to be said for concluding that s 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds".[45]

[93] Shortly thereafter, in *Official Receiver v Norriss*, s 236(3) of the UK Insolvency Act was held to have extraterritorial effect despite the judgments in *Re Tucker* and *Re MF Global Ltd*.[46]

[94] Judge Hodge QC considered it relevant that ss 236 and 237 differed from s 25 of the Bankruptcy Act 1914 in that it provided a "freestanding power, independent of the power to summon … to submit to the court an account of dealings and to produce books, papers and records".[47] The Judge contended that the s 236 power to require the production of documents fell outside of *Re Tucker*, because the thrust of that decision was that a court would not compel someone outside the jurisdiction to be examined on oath and to produce documents together.[48]

[95] The Judge also noted that *Re MF Global Ltd* did not consider *Mid East Trading Ltd*,[49] which held that the court had power to make an order under s 236 of the UK

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42 *Re MF Global UK Ltd (in special administration) (No 7)* [2015] EWHC 2319 (Ch), [2016] Ch 325 at [21].
43 At [32].
44 At [32].
45 At [32].
46 *Official Receiver v Norris* [2015] EWHC 2697 (Ch) at [21].
47 At [14].
48 At [16] and [21].
49 At [19].

Insolvency Act for documents situated abroad where the liquidator reasonably required those documents in order to carry out their statutory functions, and where production of the documents did not impose unnecessary or unreasonable burdens on those required to produce them.[50]

[96] In *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace,* Mr Johnson QC followed *Official Receiver v Norriss* and accordingly held s 236(3) of the UK Insolvency Act to apply extraterritorially.[51] The Judge agreed with the analysis in *Norriss* that the court's power to require the production of documents under s 236(3) was independent of its power to summon under s 236(2), that the exercise of one such power did not require the exercise of the other, and so therefore differed from the earlier s 25 of the Bankruptcy Act 1914.[52] The Judge considered that, regardless of the power to summon under s 236(2):[53]

> … the power to require the production of documents and information is different. It is less invasive, and does not involve the exercise of anything akin to the Court's subpoena power. In the modern word of cross-border business practices, it is natural to construe that power as extending to any of the categories of person identified, whether within or outside the jurisdiction.

[97] However, Mr Johnson QC also considered that in the case of orders against persons "capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company", courts should determine, by analogy to *Re Paramount Airways Ltd* and *Blita (UK) Ltd v Nazir*,[54] whether the respondent was "sufficiently connected with the jurisdiction for it to be just and proper to make an order despite the foreign element".[55] In that case, the Judge considered the respondent bookkeeper was sufficiently connected to the jurisdiction because he was an important part of the company's operations, and that no one else would have the documents and information critical to administering the winding up of the company.[56]

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50 *Re Mid East Trading Ltd* [1998] 1 BCLC 240 (CA).
51 *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace* [2019] EWHC 2503 (Ch), [2020] 1 WLR 1176 at [54].
52 At [54(ii)].
53 At [54(iii)].
54 *Re Paramount Airways Ltd (in administration)* [1993] Ch 223 (CA) and *Blita (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1.
55 *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace* [2019] EWHC 2503 (Ch), [2020] 1 WLR 1176 at [54(iv)].
56 At [55(ii)].

[98] The latest decision of the English High Court to deal with the extraterritorial application of s 236 of the UK Insolvency Act is the decision of Sir Geoffrey Vos C in *Re Akkurate Ltd (in liq)*.[57] While the Judge made the orders sought on the basis that a European Council regulation governing insolvency proceedings (applicable in that case) meant s 236 had extraterritorial effect, the Judge considered that s 236 did not, by itself, have extraterritorial effect. The Judge reached that view after reviewing both the English High Court's decisions in *Re MF Global*, *Norriss* and *Wallace*, and decisions of the House of Lords and UK Supreme Court in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* and *Blita (UK) Ltd (in liq) v Nazir*.[58] He concluded that he was bound by *Re Tucker* and accordingly required to adopt the approach in *Re MF Global UK Ltd*.

[99] The Judge considered that the substantial similarities between the wording of s 25 of the Bankruptcy Act 1914 and ss 236 and 237 of UK Insolvency Act were such that *Re Tucker* had to apply.[59] The Judge rejected the notion that the structural difference between s 236, as compared with its predecessor, was a substantial change between the provisions. The Judge observed that both provisions allowed for the court to summon certain people and to require certain people to produce documents.[60]

[100] Furthermore, the Judge considered that the decision in *Mid East Trading Ltd*, relied on in *Norriss* and *Wallace*, did not "provide any firm foundation for a departure from *Tucker* by a court of first instance", given the ratio of that case was not concerned with the making of an order under s 236 against a person outside the jurisdiction.[61] The Judge reasoned that *Re Tucker* had been cited in both the Court of Appeal and the House of Lords without disapproval, and that any "compelling reasons for thinking that s 236 ought, in the contemporary commercial environment, to have extra-territorial effect" did not affect the reasoning in *Re Tucker*.[62] As for the correctness of *Re Tucker*, the Judge agreed with David Richards J's view that absent authority and

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57 *Re Akkurate Ltd (in liquidation)* [2020] EWHC 1433 (Ch), [2021] Ch 73 at [70].

58 *Masri v Consolidated Contractors International (UK) Ltd* (No 4) [2009] UKHL 43, [2010] 1 AC 90 and *Blita (UK) Ltd v Nazir*, above n 54.

59 *Re Akkurate Ltd (in liq)*, above n 57 at [48].

60 At [49].

61 At [50].

62 At [51]–[52].

s 237(3), there would be "a good deal to be said" for s 236's extraterritorial application.[63]

[101] More broadly, other provisions of the UK Insolvency Act have been held to have extraterritorial effect.

[102] In *Re Paramount Airways Ltd*, the Court of Appeal of England and Wales held that s 238(2) of the UK Insolvency Act, which enabled a liquidator to apply for an order reversing a transaction entered into by the company in liquidation with any person at an undervalue, applied extraterritorially.[64] Sir Donald Nicholls V-C, writing for the Court, considered that no acceptable limitation on the provisions otherwise facially "unlimited territorial scope" could be found.[65]

[103] Similarly, in *Re Seagull Manufacturing Co Ltd (in liq),* the case cited by Associate Judge Bell in *Grant v Pandey*, the Court of Appeal held s 133 of the UK Insolvency Act, which provides for the public examination of officers of a company in liquidation, to have extraterritorial effect.[66] Peter Gibson J, for the Court, considered that *Re Tucker* was distinguishable, in large part, because s 133 was concerned with a more limited class of persons as opposed to that under s 236.[67]

[104] Notably, on the policy considerations underlying the extraterritorial application of s 133, Peter Gibson J said:[68]

> Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice. That seems to me to be a wholly improbable intention to attribute to Parliament.

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63 At [53].
64 *Re Paramount Airways Ltd (in administration)* [1993] Ch 223 (CA).
65 At 239.
66 *Re Seagull Manufacturing Co Ltd (in liq)*, above n 36.
67 At 357–359.
68 At 354.

[105] Furthermore, in *Blita (UK) Ltd (in liquidation) v Nazir*, the UK Supreme Court held s 213 of the UK Insolvency Act, which empowers the court to declare persons who had carried on the business of a company with intent to defraud creditors liable to make a contribution to the company's assets, to have extraterritorial effect.[69] The judgments of Lord Sumption, and of Lord Toulson and Lord Hodge each referred to and accepted the analysis given in *Re Paramount Airways Ltd* and *Re Seagull Manufacturing Co Ltd*.[70]

[106] However, in *Masri v Consolidated Contractors International (UK) Ltd*, the House of Lords held that a judgment creditor's powers under the relevant civil procedure rules to examine a company judgment debtor's officers did not apply extraterritorially to an officer based overseas.[71] Lord Mance, who delivered the lead speech, explained that the extraterritorial question in that case "[stood] between" *Re Tucker* and *Re Seagull Manufacturing Co Ltd*.[72] His Lordship found that the relevant rule was "not conceived with officers abroad in mind", and that while there was no express exclusion of overseas officers, the factors which enabled the Court of Appeal in *Re Seagull Manufacturing Co Ltd* to find the presumption of territoriality displaced (such as the public interest in ensuring those responsible for a company's affairs be liable to public investigation[73]) were not present in that case.[74]

Australia

[107] The applicability of the Australian jurisprudence to New Zealand is questionable because the Australian Corporations Act 2001 expressly provides that its provisions apply to persons overseas depending on their 'tenor'.[75]

[108] Under s 477(3) of the Corporations Act 2001, a liquidator of a company is entitled to inspect at any reasonable time any books of the company. A person who refuses or fails to allow the liquidator to inspect such books is guilty of an offence. This power is broadly analogous to s 261(1) of the Act.

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69 *Blita (UK) Ltd v Nazir*, above n 54.
70 At [108]–[110] per Lord Sumption and at [213]–[214] per Lord Toulson and Lord Hodge.
71 *Masri v Consolidated Contractors International (UK) Ltd*, above n 58 at [26].
72 At [23].
73 At [23].
74 At [26].
75 Corporations Act 2001 (Aus), s 5(7).

[109] Section 483 deals with the delivery of property of the company to the liquidator. Under s 483(1) the Court may require a person who is a contributory, trustee, receiver, banker, agent, officer, or employee of the company to pay, deliver, convey, surrender or transfer to the liquidator any money, property of the company or books they possess to which the company is prima facie entitled. Commentary suggests that whether an Australian liquidator may claim extraterritorial assets is open to debate,[76] despite early authority that Australian liquidations are limited in their application to property situated in Australia.[77]

[110] Section 596A, headed "Mandatory examination", requires an Australian Court to summon for examination about a corporation's examinable affairs, those who are or were officers or provisional liquidators of a corporation, provided they were either officers or provisional liquidators within a specified period.

[111] Under section 596B, the Court may summon a person for examination about a corporation's examinable affairs if the Court is satisfied that the person may be able to give information about examinable affairs of the corporation. Examinable affairs are generally defined as the promotion, formation, management, administration, restructuring, winding up or other affairs of the corporation.[78]

[112] In Australia it is both settled and clear that ss 596A (mandatory examination by the Court) and 596B (discretionary examination) have extraterritorial effect. In *Waller v Freehills*, Finn, Dowsett and Siopsis JJ in the Federal Court of Australia considered s 5 of the Corporations Act, which relevantly provides that each provision applies "according to its tenor" to natural persons whether resident in or a citizen of Australia or not, to be a "clear expression of parliament's intention that the provisions of the Corporations Act" were, according to their tenor, extraterritorial in effect.[79] Their Honours then found that nothing "in the tenor" of either ss 596A or 598B suggested that Parliament intended the provisions not to apply extraterritorially.[80] The Court found that the language of both provisions were "wide enough" to apply to

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76 *McPherson's Law of Company Liquidation* (online ed, Thomson Reuters) at [17.1210].
77 *Primary Producers Bank of Australia Ltd v Hughes* (1931) 32 SR (NSW) 14 (SC).
78 Corporations Act 2001 (Aus), s 9.
79 *Waller v Freehills* [2009] FCAFC 89, (2009) 258 ALR 67 at [53].
80 At [54].

persons regardless of where they were resident, and considered the policy considerations noted in *Re Seagull Manufacturing Ltd* to be a sufficient basis for why Parliament would have legislated to give the provisions extraterritorial effect.[81] Their Honours also drew support for their conclusion from the fact that other provisions in the Australian Corporations Act had been expressly modified to apply only territorially.[82]

[113] Addressing the concern that the extraterritorial effect of s 596B was particularly expansive given it allowed the summoning of those who merely "may be able" to give information about a corporation's examinable affairs, their Honours said:

> [61] As the scope of persons to whom s 596B applies can embrace persons with a more remote involvement in the affairs of the Australian company in liquidation than those affected by s 596A, an order for examination made pursuant to s 596B has a greater risk of adversely affecting international comity on the basis of the absence of a sufficient connection with Australia. However, it appears this risk is recognised and accommodated within the section, by giving the court a discretion as to whether to issue the examination summons. Thus, it appears that the legislative scheme seeks to meet in some respect international law concerns regarding comity by vesting in the court discretion as to whether to issue a summons for the examination of a nonresident in the first place, as opposed to giving the court a power to determine whether such summons once issued, should be served.

[114] While it does not appear that *Waller v Freehills* has been considered by the High Court of Australia, the decision has been followed several times, including most recently in *Krejci in his capacity as liquidator of Myoora Land Pty Ltd (in liq) v Myoora Land Pty Ltd*.[83]

Assessment

[115] There is no express language in ss 266 or 261, or elsewhere in the Act, indicating that Parliament intended the powers conferred in those sections to have extraterritorial effect. Therefore the question is, according to *Poynter*, whether such an intention must be necessarily implied.

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81 At [55]–[56].
82 At [57].
83 *Krejci in his capacity as liquidator of Myoora Land Pty Ltd (in liq) v Myoora Land Pty Ltd* [2023] FCA 620.

[116] Before proceeding further, I should clarify that I consider that the answer to liquidator's application lies in whether s 261 has extraterritorial effect. As noted earlier, a liquidator may apply under s 266(1) for an order that a person who has failed to comply with a written requirement of the liquidator under s 261 comply with that requirement. Alternatively, they may apply to the Court under s 266(2) for an order that a person "to whom s 261 applies" attend the court to be examined, or produce books, records or documents relating to the business, accounts, or affairs of the company.

[117] Here, the liquidators have applied for an order under s 266(1) that Arena/Queastor comply with notices the liquidators have served on them under s 261. Whether the court has jurisdiction to make such an order turns on whether s 261 has extraterritorial effect. If s 261 does not have extraterritorial effect, the notices are of no effect as against Arena/Queastor, and they are unenforceable under s 266. If s 261 does have extraterritorial effect, I can see no reason why the court would not have jurisdiction to require compliance with those notices under s 266(1). Whether the court decides to make the order, in its discretion, is another matter.

[118] Section 261 confers on a liquidator a statutory power to require a person to deliver books, records or documents of the company (s 261(1)) or to attend on the liquidator, provide the liquidator with information, be examined by the liquidator or their solicitor, and to assist in the liquidation (s 261(3)). As noted, s 261(6A) provides that a person who does not comply with a notice of the liquidator given under s 261 commits an offence and is liable on conviction to a penalty. Therefore, s 261 does two things: it confers a statutory power on a liquidator to require, by written notice, information and cooperation; and it requires the recipient of a notice to comply by making it an offence not to do so.

[119] The liquidators have not pointed to any feature of ss 261 or 266, or the Act more broadly, that indicates that Parliament intended s 261 to have extraterritorial application. The focus of their argument in support of s 261 having extraterritorial effect is on the facts of this case.

[120] The liquidators emphasise that Arena elected to become a shareholder of ORL, and that both Arena and Queastor entered into Facility Agreements with ORL/ORDL which state that the applicable law is New Zealand law. Further, that Arena/Queastor owe "more duties than that of a disinterested party" because of their level of involvement in the development and the affairs of ORL/ORDL. They refer to the fact that under cls 4.2 – 4.7 of the Facility Agreements they were entitled to obtain documents relating to the development, such as project consultant reports, progress certificates, progress reports and consultancy reports. They also place significance on the fact that Arena/Queastor made direct payments to contractors who undertook work on the development. I understand these to be the preservation payments.

[121] The question of whether legislation has extraterritorial effect is a question of statutory interpretation. It is a matter of discerning Parliament's intention when enacting the legislation. The particular facts of the case at hand are not relevant, although they will be relevant to whether a Court exercises its discretion to make an order under s 266. I therefore reject the liquidators' submission that the statutory powers have extraterritorial effect because of the close involvement of Arena and Queastor with the company's affairs, or because they and ORL/ORDL elected New Zealand law to govern their contractual relationship.

[122] This Court has held that s 261(3) has extraterritorial effect against directors or former directors because of their voluntary assumption of duties including duties under Part 16 of the Act. The same rationale cannot be said to apply to shareholders, creditors, or other people who merely know something about the business or affairs of the company. A shareholder does not assume duties to the company when they acquire shares. They have limited rights against, and liabilities to, the company which are generally constrained to whatever rights attach to the shares. They are not responsible for the company, and do not control its business or operations.

[123] Creditors do not consent to any obligations under the Act, and they do not have responsibility to the company. Furthermore, secured creditors generally sit outside the liquidation regime.

[124] I acknowledge that there might be good reasons for why a liquidator's powers under s 261 should have general extraterritorial effect. A liquidator's principal duty is to take possession of, realise and distribute the assets of the company.[84] The Act confers extensive powers on a liquidator to obtain documents and information to enable them to carry out their function and role.[85] I can see that a liquidator's ability to obtain the information and/or documents they require to investigate the affairs of the company and carry out their statutory function and role could be frustrated if s 261 does not have extraterritorial effect beyond directors or former directors of the company in liquidation.

[125] At this point it is relevant to note the differences between s 261(1) and 261(3) in terms of the nature of the information that may be sought by the liquidator and who it may be sought from.

[126] Under s 261(1) a liquidator may require a director, shareholder, "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. The sub-section is concerned with documents that belong to the company. As Heath J noted in *ANZ National Bank Ltd v Sheahan:*[86]

> 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.

[127] By contrast, under 261(3) a director, former director, shareholder, person involved in the promotion or formation of the company, solicitor, or receiver, accountant, auditor or bank officer or other person "having knowledge of the affairs of the company" is obliged to comply with a liquidator's notice under s 261(3). A liquidator may require these people to attend on the liquidator, provide the liquidator

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84 Companies Act 1993, s 253.

85 Sections 261, 262, 274.

86 *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [38]. In another decision, Heath J construed "records" for the purposes of s 261(1) as including company records under s 189 and all documents kept by the company to meet the company's obligations under 194 of the Act: *Petterson v Gothard (No 3)* [2012] NZHC 666.

with information, be examined on oath, or assist the liquidator to the best of their ability.

[128] Section 261(3) is therefore wider in scope that s 261(1). Whereas a person must possess or control books, records or documents that rightly belong to the company to be within the scope of s 261(1), any person who has knowledge of the affairs of the company is within the scope of s 261(3). Whereas the information that can be required under s 261(1) is confined to books, records, and documents of the company; any "information about the affairs of the company" may be required under s 261(3). Further, the liquidators' powers in s 261(3) are more invasive, including requiring people to meet with them, be privately examined under oath and to "assist" the liquidator.

[129] With this distinction in mind, I was initially attracted to the proposition that s 261(1) should have extraterritorial effect as a matter of necessary implication. A liquidator, who assumes control of the company from the directors, is entitled to take custody of the books, records, and documents, as company property. Arguably any person who holds company property, even outside the territory, should be required to deliver up this property to the liquidator, which may include important information that the liquidator needs to properly investigate the company's affairs.

[130] The United Kingdom jurisprudence outlined provides some support for this view. Notably, even those cases which found that the relevant provisions did not have extraterritorial effect acknowledged that there was "much to be said" for the provisions having extraterritorial application.

[131] Against that, there is reason to be cautious about applying these observations to the New Zealand context.

[132] Section 235 of the UK Act is most directly comparable to s 261 of the Act, as it imposes a duty on certain people to co-operate with a liquidator by providing them with any information concerning the company which the liquidator reasonably requires or attending on the liquidator when they reasonably require. Like s 261, the

liquidator need not obtain an order from the court to require cooperation under this provision.

[133] However, the range of people required to cooperate with a liquidator under this provision is more limited than s 261 of the Act. Section 235 is confined to current or former officers, current or recent employees, or people who have taken part in forming the company within one year of liquidation. So, the liquidator cannot require cooperation from a shareholder, creditor, or more broadly any "other person having knowledge of the affairs of the company". Nor can a liquidator require their formal examination on oath or affirmation as a liquidator can under s 261 of the Act.

[134] The English cases discussed have all been concerned with applications to the Court for orders under s 236 of the UK Insolvency Act, rather than the exercise by liquidators of their powers under s 235. It is conceivable that the English High Court might take a different view when it is a liquidator's power to require compliance, without the oversight of the Court, that is in issue. In some of the UK and Australian cases discussed, the courts have explicitly taken comfort from the fact that the court has a discretion as to whether it makes an order, and the court's oversight will ensure that the statutory powers are used within reasonable bounds.[87]

[135] To my mind, the fact that there is no Court involvement in the liquidators' exercise of their powers under s 261 is a compelling factor telling against those powers having extraterritorial application. As the Court of Appeal said in *Finnigan v Ellis,* "the allowance for light-handed judicial oversight of liquidators' powers must weigh against an expansionary reading beyond the settled boundaries".[88]

[136] It is difficult to take guidance from the Australian jurisprudence because, as noted, the Australian Corporations Act 2001 expressly provides that its provisions apply to persons overseas depending on their 'tenor'. This was a decisive consideration in *Waller and Freehills*.

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87 For example, *Re MF Global UK Ltd (in special administration) (No 7)*, above n 42, at [32] and *Waller v Freehills*, above n 79 at [61].

88 *Finnigan v Ellis*, above n 17, at [17].

[137] I note also that there does not appear to be an equivalent to the New Zealand s 261(3) power of a liquidator to require (without order of the Court) people with knowledge about the affairs of the company to meet with them, be examined, provide information or assist.

[138] Ultimately, I reach the view that despite the attractiveness of at least s 261(1) having extraterritorial effect from the point of view of the effective and efficient administration of New Zealand liquidations, it is not clear from the words or scheme of the Act that Parliament intended that result.

[139] The Supreme Court in *Poynter* was at pains to emphasise that the presumption against legislation having extraterritorial effect is strong and must be clearly displaced by express words or as a matter of inevitable logic from the express terms of the statute read contextually considering the purposes of the Act.[89] The presumption against extraterritoriality is grounded in the principle of comity of nations – that Parliament should not be assumed to have intended to exert its authority over the subjects of another state.[90] Further, that it is for Parliament, not the judiciary, to decide whether to exert its authority extraterritorially, after weighing the broader policy and political considerations.[91]

[140] In *Poynter* the Supreme Court rejected the submission that a more relaxed approach should be taken to the extraterritorial scope of domestic legislation. Acknowledging the appealing policy considerations for why certain provisions should have extraterritorial effect, the Supreme Court emphasised that such policy making was for Parliament; the Court's role being simply to give effect to the extraterritorial reach that Parliament clearly specified.

[141] That is clearly seen by the Supreme Court's review of the Court of Appeal's earlier decision:

> [65] At the start of this passage the Court refers to the policy and scheme of the Act. That, in our respectful view, was to invoke a scheme which is not objectively discernible and a policy which Parliament has not signalled with

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89 *Poynter v Commerce Commission*, above n 26, at [46].
90 At [37].
91 At [45].

> the necessary clarity. It is very important in the potentially sensitive area of extraterritoriality that Parliament make the necessary policy determinations and evidence them clearly in the resulting legislation. Parliament is in a much better position than the courts to ascertain and reconcile all the potential ramifications for this country's international relations and trade. .. the ramifications of extending the reach of a New Zealand statute into other countries may not universally be beneficial. The matter must be looked at from all relevant perspectives and only Parliament, with the assistance of the Executive, can satisfactorily undertake the necessary exercise.

[142] Significantly, in dismissing the appeal, the majority of the Supreme Court observed that Parliament could always amend the legislation with the necessary clarity and precision required to give it extraterritorial effect.[92]

[143] I also find the following passage from a judgment of the English Court of Appeal cited by the Supreme Court in *Poynter* to be instructive:[93]

> [16] The general principle is that 'an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters' (*Bennion on Statutory Interpretation* (4th edn, 2002) p 306). In *Clark v Oceanic Construction Inc* [1983] 1 All ER 133 at 144, [1983] 2 AC 130 at 152, in the context of a tax statute, Lord Wilberforce considered the scope of the territorial principle. He stated:
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>> "That principle, which is really a rule of construction of statutes expressed in general terms, and which, as James LJ said is a "broad principle", requires an inquiry to be made as to the persons with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp or intendment, of the statute under consideration?"

[144] The words of Lord Rodger in the judgment of the House of Lords in *R (Al-Skeini) v Secretary of State* are also apposite:[94]

> [45] Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, 'so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law': *Maxwell on The Interpretation of Statutes* (12th edition, 1969) p 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within 'the legislative grasp, or intendment' of Parliament's

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92 At [79].

93 *Lawson v Serco Ltd* [2004] EWCA Civ12, [2004] 2 All ER 200.

94 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

> legislation, to use Lord Wilberforce's expression in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* ...

[145] Additionally, the fact that non-compliance with s 261 is an offence punishable by a potentially significant fine or imprisonment tells against the provision being interpreted to have extraterritorial application in the absence of a clear indication that is what Parliament intended. I note that the Supreme Court in *Poynter* agreed with the statement of Lord Reid in *Treacy v Director of Public Prosecutions* that:[95]

> It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England.

[146] The Court of Appeal in *Finnigan v Ellis* considered the fact that failure to comply with a liquidator's requirement under s 261 is an offence punishable by fine or imprisonment to be relevant when considering the breadth of those powers. (See above at [76]).

[147] I note also that there are established mechanisms for local liquidators to obtain the assistance of foreign courts. Many countries, including the United States of America, have adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL").[96] The Model Law facilitates the recognition of insolvency proceedings and insolvency administrators in other jurisdictions. New Zealand has adopted the Model Law in the Insolvency (Cross-border) Act 2006. Under Article 5, an insolvency administrator is authorised to act in a foreign State on behalf of a New Zealand insolvency proceeding, as permitted by the applicable foreign law. If the foreign State has adopted the Model Law, the administrator will have access to that State's courts under that country's equivalent of Article 9, which provides that a foreign representative is entitled to apply directly to the New Zealand High Court.

[148] The Model Law was only adopted in 1997. However there has for some time been a developing body of private international law concerned with the application of

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95 *Poynter v Commerce Commission*, above n 26, at [40] referring to *Treacy v Director of Public Prosecutions* [1971] AC 537 (HL) at 551.

96 See Chapter 11, Title 11 of the United States Code: 11 USC §1501.

insolvency law and procedures across more than one jurisdiction. In my view, the merits of this country's domestic insolvency legislation having extraterritorial effect must be considered in the context of this body of international law and that is appropriately left for Parliament.

[149] For the above reasons, and following the approach laid down by the Supreme Court in *Poynter*, I conclude that s 261, and consequently s 266(1), does not have extraterritorial effect against a person who is not a director or former director of a New Zealand company in liquidation.

Result

[150] I order that the liquidators' application to set aside the Appearance is dismissed.

[151] As to costs, I am of the preliminary view that, having succeeded, the respondents are entitled to costs, and on a 2B basis. If costs cannot be agreed, then the parties are to file written submissions within 14 days.

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Associate Judge Gardiner

Solicitors:

Simpson Grierson, Auckland
Waterstone, Auckland