IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-648
[2013] NZHC 2844

UNDER	Section 266 of the Companies Act 1993
IN THE MATTER OF	the liquidation of CAPITAL HOSPITALITY HOLDINGS LIMITED (In Liquidation)
BETWEEN	DAMIEN GRANT and STEVEN KHOV Applicants
AND	PRAKASH PANDEY First Respondent
	C P HOTELS LIMITED Second Respondent
	C P INVESTMENTS LIMITED Third Respondent
	C P CARPARKS LIMITED Fourth Respondent
	C P PROPERTY INVESTMENTS LIMITED Fifth Respondent
	C P ASSET MANAGEMENT LIMITED Sixth Respondent
	J D RAI & SONS LIMITED Seventh Respondent
	ASIA PACIFIC HOTEL INVESTMENTS LIMITED Eighth Respondent
	RAISONS PACIFIC INVESTMENTS LIMITED Ninth Respondent
	BABOO MAHENDRA PRATAP RAI Tenth Respondent

CAPITAL INVESTMENTS
CORPORATION LIMITED
Eleventh Respondent

Hearing:	On the papers
Counsel:	B J Norling and Alden Ho for Applicants R B Hucker for Tenth and Eleventh Respondents
Judgment:	29 October 2013

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on ***29 October 2013*** *at* ***5:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
Waterstone Insolvency (B J Norling) Auckland, for Applicants
Hucker Law, Auckland, for 10th and 11th Respondents

[1] This decision is on the protest by the tenth and eleventh respondents to this court hearing the liquidators' application for orders against them under s 266 of the Companies Act 1993. In my minute of 23 August 2013 I gave directions for the determination of this matter. I did not require a formal application under r 5.49 of the High Court Rules. I directed the parties to file memoranda. I am deciding the matter on the papers.

[2] The applicants are liquidators of Capital Hospitality Holdings Ltd (In Liquidation). They have applied for orders under s 266 of the Companies Act 1993 that the second to eleventh respondents produce books, records and documents relating to the business affairs of Capital Hospitality Holdings Ltd in their possession or control, and that the first respondent and the directors of the eleventh respondent attend the liquidators' offices to be interviewed under oath.

[3] This decision is being determined on assumed facts: Mr Baboo Mahendra Pratap Rai, the tenth respondent, is a director of Capital Hospitality Holdings Ltd. He is also said to be the director of Capital Investments Corporation Ltd, the eleventh respondent. He is said to be overseas, in India.

[4] The tenth and eleventh respondents' protest to jurisdiction is founded on the contention that as Mr Rai lives abroad, the rules as to service out of New Zealand, rr 6.27 to 6.31 of the High Court Rules, are engaged. Mr Hucker did not submit whether the application under s 266 of the Companies Act 1993 could be served overseas without leave. It is possible that this proceeding could come through the gateway in r 6.27(2)(h) as Mr Rai is a necessary or proper party to proceedings properly brought against the other respondents who are all within New Zealand, and there is a real issue between the applicants and the other respondents which the court ought to try. Rather than focus on whether leave is required or not, Mr Hucker's submission was that under r 6.29 the court should not assume jurisdiction because there was not a serious issue on the merits under r 6.28(5)(b). That test has to be satisfied under r 6.29, whether leave is required or not. Mr Hucker accepted that, but

for the *Seaconsar*[1] point under r 6.28(5)(b), the court would otherwise assume jurisdiction under r 6.29. That is, assuming that leave is required, the liquidators' proceeding has a real and substantial connection with New Zealand, New Zealand is the appropriate forum, and any other relevant circumstances support New Zealand assuming jurisdiction.

[5] For the *Seaconsar* point, that there is no serious issue to be tried on the merits, Mr Hucker's submission is that ss 261 and 266 of the Companies Act 1993 do not apply to persons outside New Zealand – these provisions do not apply extra-territorially. The protest to jurisdiction is to be determined according to whether ss 261 and 266 can apply to persons overseas.

Eleventh Respondent

[6] Seen in that light, the protest by the eleventh respondent can be disposed of quickly. It is a company incorporated under the Companies Act 1993 with a registered office in Queen Street, Auckland. Service of legal proceedings on the eleventh respondent can be carried out by leaving the proceedings at the company's registered office or address for service in New Zealand – s 387(1)(c). That is how the applicants served the eleventh respondent in this case. The question of service outside New Zealand does not arise. The eleventh respondent has no basis for contesting under r 5.49 and r 6.29 the jurisdiction of the New Zealand courts to determine applications against it under the Companies Act 1993.

[7] There is a separate question whether the court can make orders against the eleventh respondent under s 266 of the Companies Act 1993. Under s 266 the court can make orders only against persons to whom s 261 applies. Section 261 applies to the persons listed in s 261(2), namely:

> **261 Power to obtain documents and information**
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> ...
>
> (2) A liquidator may, from time to time, by notice in writing require
>
> (a) A director or former director of the company; or

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[1] *Seaconsar Far East Ltd v Bank Markazi Jonhouri Islami Iran* [1994] 1 AC 438 (HL).

(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 ...

...

[8] The people under this subsection appear to be natural persons rather than juristic entities. For example, a bank officer is a person within the section, but a bank is not. Capital Investment Corporation Ltd may have an argument that it is not a "person" within s 261(2) and therefore orders cannot be made against it under s 266. However, that is an argument as to the merits, not as to the court's jurisdiction. In this decision I am only concerned with jurisdiction, not with the substantive merits of the liquidators' application.

[9] Accordingly, under r 5.49 I set aside the eleventh respondent's appearance objecting to this court's jurisdiction.

Tenth respondent

[10] The tenth respondent's argument relies on the presumption that statutes are not to have extra-territorial effect. *Re Tucker*[2] was cited as a relevant insolvency case which applied that presumption so as not to require a British subject living in Belgium to produce documents and attend court to be examined under s 25 of the English Bankruptcy Act 1914. There is no general power to require witnesses abroad to attend a New Zealand court or to produce documents under a subpoena. While the court does not have jurisdiction over the tenth respondent under s 266 of the Companies Act 1993, the liquidators are not without a remedy, because they could seek the assistance of overseas courts under international cross-border insolvency legislation following the UNCITRAL model. Cases going the other way,

2 *Re Tucker* [1990] Ch 148 (CA).

Re Seagull Manufacturing Co Ltd (In Liquidation) and *Re International Direct Ltd*,[3] were distinguished or claimed to have been decided per incuriam.

[11] Mr Hucker is correct as to the presumption that statutes are not to have extra-territorial effect. In *Poynter v Commerce Commission*, the Supreme Court said:[4]

> 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.[5]

[12] Accordingly, the enquiry is whether the Companies Act is silent on the question of extra-territorial application, and if it is silent, whether the content and purpose of the Act overcome the presumption.

[13] While the parties' submissions focus on ss 261 and 266, it is helpful to put the matter into wider context. A company established under the Companies Act 1993 is able to carry on business inside and outside New Zealand. Section 16 expressly recognises this:

> **16 Capacity and powers**
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> (1) Subject to this Act, any other enactment, and the general law, a company has, *both within and outside New Zealand*,—
>
> (a) Full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and
>
> (b) For the purposes of paragraph (a) of this subsection, full rights, powers, and privileges.
>
> (Emphasis added)

[14] As a company established under the Companies Act is not a natural person but has a separate legal personality,[6] a company carries on business, undertakes activities and enters into transactions through agents. In particular, under s 128 of

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3 *Re Seagull Manufacturing Co Ltd (In Liq)* [1993] Ch 345 (CA), *Re International Direct Ltd (In Liq)* HC Wellington CIV-2006-485-2020, 17 November 2006.

4 *Poynter v Commerce Commission* [2010] 3 NZLR 300 (SC) at [15]. An early relevant bankruptcy case applying the presumption is *Re Sawers ex parte Blain* (1879) 12 Ch D 522 (CA).

5 For a wider discussion, see Daniel Greenberg (ed) *Craies on Legislation* (10th ed, Sweet and Maxwell, London, 2012) at [11.2.1] [11.2.9] and Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, 2008) at 371–378.

6 Companies Act 1993, s 15.

the Companies Act 1993 the business and affairs of the company must be managed by, or under the direction or supervision of the board of the company. The board comprises the directors of the company.

[15] As the company has capacity to carry on its activities outside New Zealand, it must be open to the board of a company to manage the business affairs of the company outside New Zealand. Subject to the restrictions in s 151, a person living overseas is eligible to be a director of a New Zealand company. Section 151(2)(eb) implicitly recognises this in providing that prohibitions under the laws of other countries may disqualify a person from becoming a director of a New Zealand company.

[16] As directors have the powers to manage the company, they also have accompanying responsibilities. By way of example only, these include the duties under Part 8 of the Companies Act. Just as directors can exercise powers of management under s 128 while outside the country, the duties attaching to those powers also apply outside New Zealand. A director is not relieved of his duties when he goes through passport control. It is accordingly clear that, notwithstanding the presumption against extra-territoriality, while a company carries on business, the duties imposed by the Companies Act 1993 on directors apply both inside and outside New Zealand.

[17] Under s 152 a person must not be appointed a director of a company unless he or she has consented in writing to be a director. That consent is an acceptance of not only the powers that go with the office of director, but also the responsibilities and duties that go with those powers. Those are the responsibilities and duties imposed by New Zealand's company law, including the duties imposed by the Companies Act 1993. When a person living outside New Zealand agrees to become a director of a company established under New Zealand's Companies Act, that person agrees to take office subject to the responsibilities that go with that office, including the duties imposed under the Companies Act 1993. To that extent, the person living overseas has submitted to that part of New Zealand law that applies to directorships. That voluntary submission to New Zealand law overcomes any objection that New Zealand law should not apply to foreigners living overseas. The

same consideration applies to a director who takes office in New Zealand but later leaves the country.

[18] The next step is to see whether this changes upon liquidation. Section 248 says:

> **248 Effect of commencement of liquidation**
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> (1) With effect from the commencement of the liquidation of a company,—
>
> (a) The liquidator has custody and control of the company's assets:
>
> (b) The directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part of this Act. ...
>
> ...

[19] The duties imposed by Part 16 of the Companies Act 1993 that apply to directors after liquidation include the duty to comply with notices issued by the liquidators under s 261 of the Companies Act 1993 and to comply with orders made by the court under s 266. That is because ss 261 and 266 apply to directors and former directors (s 261(2)(a)). There seems to be no reason in principle why directors who live outside New Zealand should be relieved from complying with the duties under s 261 and 266. Directors who have agreed to take office under s 152 have agreed to take office subject to the responsibilities and duties that go with that office. Those duties and responsibilities include the duties under the Companies Act 1993 that fall on directors once the company goes into liquidation. Directors living abroad cannot complain against New Zealand law being applied to them, because they agreed to submit to New Zealand's company law when they agreed to become directors of a New Zealand company.

[20] There is support for this approach in the dictum of Lord Wilberforce in *Clark v Oceanic Contractors Inc*:[7]

> It requires an enquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating.

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7 *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 (HL) at 152.

> Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration? The contention being that, as regards companies, the statute cannot have been intended to apply to them if they are non-resident, one asks immediately—why not?

[21] The policy of Part 16 of the Companies Act 1993 of ensuring that liquidators have effective powers to investigate the affairs of companies counts against applying any extra-territorial limitation to their powers. In *Re Seagull Manufacturing Co Ltd (In Liq)* the English Court of Appeal gave such policy reasons for holding that a director of an English company living in the Channel Islands could be subject to an order requiring him to be publicly examined under s 133 of the Insolvency Act 1986. Peter Gibson J gave the principal decision and set out the policy reasons more fully, but the judgment of Hirst LJ summarises those reasons:[8]

> The purpose of the public examination is to enable the official receiver in the fulfilment of his duty under section 132 to investigate, inter alia, the causes of failure of the company, and its business dealings and affairs, for which the officer in question is or may have been wholly or partly responsible, and therefore personally and directly accountable for what has gone wrong. The efficient and thorough conduct of such investigation by the official receiver is of great public importance, as several recent notorious cases have demonstrated. This process would be frustrated if, for example, a director, who had with the aid of modern methods of communication run the company entirely from abroad, was immune from public examination, as he or she would be, if Mr Teverson's submissions were correct. The same applies to a director who has defrauded a company in England and then absconded abroad shortly before the liquidation. These are by no means fanciful illustrations in the world of the 1980s and 1990s, and many similar ones could be given.

[22] In *Re International Direct Ltd (In Liq)*,[9] Associate Judge Gendall gave similar policy reasons in holding that the court had jurisdiction under s 266 for an application against a director living in Queensland.

[23] Mr Hucker's submission that any orders the court might make under s 266 will be ineffective is beside the point. In *Theophile v Solicitor-General*, Lord Porter said:[10]

> Any foreign nation of which the person affected is a member or with which such person is domiciled is free to disregard the provisions of the English

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8 *Re Seagull Manufacturing Co Ltd (In Liq)* [1993] Ch 345 (CA) at 360.

9 *Re International Direct Ltd (In Liq)* HC Wellington CIV-2006-485-2020, 17 November 2006 at [19]–[26].

10 *Theophile v Solicitor-General* [1950] AC 186 (HL) at 195.

> enactment, but the person concerned cannot himself take exception to it, though it may be he will escape from compliance with its terms because he is out of the jurisdiction and cannot be reached by English process.

Similarly in *Re Seagull Manufacturing Co Ltd,* Peter Gibson J said:[11]

> I would emphasise that the question before this court is one of the scope of the Act and we are not concerned with whether the order for public examination can be effectively enforced against a person out of the jurisdiction.

[24] *Re Tucker* does not assist Mr Rai. The English Court of Appeal held that there were particular provisions in the Bankruptcy Act 1914 that showed that s 25 could not be applied to a person living abroad. Sections 261 and 266 of the Companies Act are in different terms. The person sought to be examined in *Re Tucker* was a brother of the bankrupt and lived in Belgium. It was not a company director case. If the court has to consider a case under s 261(2)(e) of a "person having knowledge of the affairs of the company", *Re Tucker* may need consideration to see if such a person can be the subject of orders under s 266, but that is not this case.

[25] Mr Hucker's submission that the liquidators have an adequate alternative remedy under the cross-border insolvency legislation is beside the point. The provisions of the Companies Act under consideration were enacted in 1993 whereas the UNCITRAL Model Law on Cross-Border Insolvency was only approved by the General Assembly of the United Nations on 15 December 1997. It was not adopted into New Zealand law until the Insolvency (Cross-Border) Act 2006. The interpretation of ss 261 and 266 of the Companies Act 1993 cannot turn on the enactment of later cross-border insolvency legislation. Besides, only 20 countries have adopted the Model Law on Cross-Border Insolvency. India – where Mr Rai lives – is not one of them.

[26] For the above reasons I find that as a director of Capital Hospitality Holdings Ltd, Mr Rai is within s 261(2)(a) and this provision extends to him, even though he is outside New Zealand. Equally, because s 261 applies to him, the court may make orders against him under s 266 of the Companies Act 1993.

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[11] *Re Seagull Manufacturing Co Ltd (In Liq)* [1993] Ch 345 (CA) at 355.

[27] I emphasise that the basis for my decision is that 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. This decision does not address that question.

Outcome

[28] For the above reasons, under r 5.49 I set aside the appearances under protest to jurisdiction by the tenth and eleventh respondents. I award the applicants costs. I invite the parties to confer as to costs. If they cannot agree costs, memoranda may be filed. I observe that the tenth and eleventh respondents did not comply with directions as to submissions in time. That non-compliance may give grounds for increased costs under r 14.6(3)(b)(i).

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Associate Judge R M Bell