IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-0957
[2018] NZHC 2266

BETWEEN	SIMON DALTON and MATTHEW KEMP as liquidators of CHARMING GROUP (NZ) LIMITED (In Liquidation) Applicants
AND	BOON GUNN HONG Respondent

Hearing: 31 July 2018

Appearances: A Ho for the Applicants
Respondent in person

Judgment: 30 August 2018

JUDGMENT OF ASSOCIATE JUDGE SMITH

This judgment was delivered by me on 30 August 2018 at 11.30am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors / Counsel:
Martelli McKegg, Auckland
B G Hong, Auckland

[1] The applicants (the liquidators) are the liquidators of Charming Group (NZ) Ltd (Charming Group). Charming Group was put into liquidation by order of the Court on 13 December 2017.

[2] The respondent (Mr Hong) is a solicitor who conducts a general practice in Auckland under the name B G Hong Law Firm. Mr Hong represented Charming Group in a court proceeding before its liquidation, and he had also acted for Ms Chi Ying Cheng and Ms Ricki Li, who were the directors of Charming Group.

[3] The liquidators now apply for an order under s 266 of the Companies Act 1993 (the Act) that Mr Hong produce documents relating to the business, accounts and affairs of Charming Group.

The liquidators ask Mr Hong for documents

[4] On 13 December 2017 the liquidators sent a letter to Mr Hong, urgently requiring access to the records of Charming Group, including documents and records held by Mr Hong on its behalf. They also asked for contact details for Charming Group's directors. The request was made under s 261(1) of the Act, and compliance was required within seven days.

[5] When no reply was received by 19 December, Mr Francis, an insolvency manager employed by the liquidators' firm, sent a reminder email to Mr Hong. Mr Hong replied the following day, advising that he had only acted for Charming Group in certain litigation (the landlord litigation) in which damages had been sought against the landlord of certain restaurant premises Charming Group had occupied in Mairangi Bay. Mr Hong said that the only asset Charming Group had had was its restaurant business, but the landlord had terminated the relevant lease and sold all Charming Group's belongings.

[6] On 20 December 2017 Mr Francis acknowledged Mr Hong's response, but said that the liquidators would still need his files on the matter he had handled. Mr Hong replied immediately, saying: "Sorry on the litigation files such is legally privileged".

[7] Later the same day, Mr Francis responded by email, contending that any privilege would be owned by Charming Group, and would not prevent the liquidators compelling delivery of the file. Mr Hong replied, also on 20 December 2017, saying:

> Sorry, as you can get the file from the director or the Court or would you cover me for the costs incurred?
>
> Yes, otherwise serve me with any application …

[8] There was further correspondence later in the day on 20 December 2017. Mr Francis took the position that a person is not entitled to refuse to comply with a liquidator's request under s 261 because the liquidator declines to pay the costs of complying. He noted that failure to comply with the notice given under s 261(1) constitutes an offence. He said that if Mr Hong did not comply, a complaint would be lodged with the relevant authorities.

[9] Mr Hong stuck to his guns. In what appears to be the last of the emails sent on 20 December 2017 he said:

> Sorry as I see it you are acting on landlord's instructions and as with any application for access to client's files, these are questions that need to be asked:
>
> To what documents is access sought? Why? What is the nature of the proceeding? What particular interests and factors must be weighed, one against the other? For each access request these enquiries will inevitably differ.
>
> This file had nothing to do with property or company's assets and yes I will litigate over such if only to protect against the intentions for such a request as I have guessed …
>
> … Such intentions do not fall within the legislative provisions as you have cited.
>
> Sorry I do not have the time to go on & on … have far too many rush urgents to do b4 the year end break.
>
> B G HONG

The liquidators complaint to the Law Society

[10] When Mr Hong did not produce the documents requested by the liquidators under s 261 of the Act, the liquidators made a complaint to the New Zealand Law Society. The complaint itself was not produced, but it appears to have been made on

the basis that Mr Hong, who acted as a solicitor for Charming Group, failed to comply with a legitimate instruction from Charming Group (made through the liquidators) to deliver up to Charming Group documents (to which it was entitled as Mr Hong's former client).

[11] Mr Hong produced a copy of his response to the liquidators' complaint, which raised essentially the same matters now raised in opposition to the liquidators' application. Mr Hong also produced a copy of a reply letter sent by Mr Dalton to the Law Society on 20 February 2018. The letter contained the following statement:

> 3 The liquidator's intent [in requesting the documents from Mr Hong] was to obtain Company documentation and correspondence to enable our statutory investigations to be undertaken. Part of this investigation will involve an independent assessment as to whether the landlords have appropriately seized the Company assets. The information to conduct this assessment is contained within the company records held by Mr Hong.
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> 4 … Mr Hong purported to act for the Company and, as the Company (and not Ricki Li or Annette Cheng) were party to the court proceedings, Mr Hong's client was the Company. As such all privilege are owned by the Company and, consequently, its liquidators.

[12] As at the date of the hearing, it appears that there has been no decision on the liquidators' complaint.

The application

[13] On 18 May 2018 the liquidators applied for orders:

(1) That Mr Hong produce any books, records and documents relating to the business, accounts or affairs of Charming Group in his possession or under his control.

(2) Costs.

[14] The application was made under s 266 of the Act, the text and application of which is discussed later in this judgment.

Mr Hong's cross-application

[15] Mr Hong filed a notice of opposition dated 11 June 2018. At the same time he filed a document headed "Originating Cross-Application by Respondent for Directions/Declaratory Orders". That application came before Associate Judge Osborne on 22 June 2018, and the Associate Judge noted in his minute that the matters raised in the "cross-application" were exactly those relied upon by Mr Hong in opposition to the liquidators' application under s 266 of the Act.

[16] The Minute noted that Mr Hong withdrew his "originating cross-application".

Mr Hong's notice of opposition

[17] The notice of opposition was lengthy, and was accompanied by a lengthy affidavit by Mr Hong. I summarise the matters raised in the notice of opposition as follows:

(1) The liquidators already have a file of documents (described by Mr Hong as "the litigation file") relating to the landlord litigation. To the extent that the liquidators are seeking additional documents, the documents have no relevance to the liquidators' principal statutory functions. The liquidators must state their intentions and purposes for seeking the additional documents, and explain how the request for the documents is relevant to the discharge of their duties as liquidators.

(2) The documents sought are not in the exclusive possession of Mr Hong. The liquidators must first seek the documents from other sources that possess them (such as Charming Group's directors), and only come to Mr Hong if the documents cannot be obtained from the other parties.

(3) In circumstances where Mr Hong had adduced arguable grounds in support of his opposition to producing the documents, the liquidators' threat of a Police complaint, and their actions in filing a complaint to the Law Society against Mr Hong, constitute abuses of the legal process.

[18] Mr Hong said that in the landlord litigation Charming Group sought damages in respect of alleged wrongful seizure and conversion of its sole assets, being chattels or other assets at the Mairangi Bay restaurant. He said that he did not open his file in the landlord litigation until 2012 when he was asked to assist with the preparation of a damages claim, and that Charming Group had ceased trading (and its assets had been seized) some two years earlier. Although they have been made available to the liquidators, the documents in the litigation file cannot be construed as being "about the business, accounts or affairs of the company"; they had nothing to do with the assets of Charming Group, or the tracing of such assets.[1] Nor could the documents on the litigation file be regarded as necessary for the liquidators to comply with their duties under s 255 of the Act.

[19] Mr Hong said that the litigation file made available to the liquidators contains all of the documents that he drafted, filed, issued and received in the name of Charming Group, that were in his possession and that he held as agent of Charming Group. (He made the litigation file available to the liquidators in the course of proceedings in the liquidators' complaint to the Law Society, by providing the liquidators with an electronic link to a server (where the documents are held in "the Cloud").)

[20] Mr Hong said that, other than the litigation file, "I do not possess any books, records and documents relating to the business, accounts or affairs of [Charming Group]. [Charming Group] having had its restaurant belongings seized, such its only asset, it had ceased trading by the time I acted on the Litigation".

[21] Mr Hong explained that he was initially engaged by Ms Li to act on the potential sale of the restaurant business. At that stage, all of the correspondence was issued in the name of Ms Ricki Li and Mr Yeoh, a former director of Charming Group. (It was Mr Yeoh who had signed an agreement to lease the Mairangi Bay premises, and he later nominated Ms Li as tenant.) Mr Hong said that it was only in the course of issuing the landlord litigation in September of 2012 that he discovered the existence of Charming Group.

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1 Referring to s 253 of the Companies Act 1993, which defines the principal duties of a liquidator as including (a) "to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with [the Act]."

[22] Mr Hong appeared as counsel for Charming Group in the District Court in the landlord litigation, including on interlocutory applications made by the landlord for strike-out or security for costs orders. He was paid $10,000 for his services drafting documents and representing Charming Group in the landlord litigation. Mr Hong said that Ms Cheng paid him using her own funds, not Charming Group money.

[23] When the District Court dismissed Charming Group's claim against the landlord, Mr Hong also drafted appeal documents. However he did not appear at the hearing of the appeal: he was granted leave to withdraw, and Ms Cheng was permitted to make submissions on behalf of Charming Group.

[24] Mr Hong said that in the course of acting for his clients in the landlord litigation, he sent and received many other emails on unrelated personal matters, to and from both Ms Cheng and Ms Li. These could have been mixed in with documents relating to Charming Group; some correspondence may have "crossed over" with issues relating to the landlord litigation. He referred to one such "unrelated personal matter" as an issue with an employee. Another related to a lease of some other premises, and a third issue concerned a friend's dispute with a supplier. A fourth issue was concerned with a criminal matter relating to alleged illicit substances found in an apartment. There would also have been communications over a shareholder dispute that one of the directors was involved in. In respect of all these communications, Mr Hong asserted that the communications "are legally privileged to them [Ms Li and/or Ms Cheng], all of such also private and confidential."

[25] Mr Hong accused the liquidators of having ulterior motives in their pursuit of the documents. Charming Group has no assets or funds, and in those circumstances he contended that it is reasonable to infer that the liquidators must have had ulterior motives in attempting to gain access to the litigation file "at the behest of a creditor that must have funded them". He categorised the request for documents as a fishing expedition, and charged the liquidators with bias.

[26] Mr Hong also raised a number of other matters which he referred to as "public issues orders". He complained that the liquidators, as officers of the Court, had breached their duties by being discourteous, disrespectful and rude to him. He

characterised their "threats" against him as an abuse of the legal process. (Mr Hong characterised these concerns as "public issues" because the liquidators' behaviour may set a precedent, particularly in the intimidation of junior lawyers who will be exposed to Law Society complaints and/or Court costs if they do not meet the [unjustified] demands of liquidators.)

[27] Mr Hong raised an issue of alleged failure by the landlord to provide proper discovery in the course of the landlord litigation. The landlord's failure to disclose all documents, and in particular all emails, is said to have emerged in the course of the trial in the landlord litigation in the District Court. While it appears there would then have been an opportunity to seek an adjournment of the trial (if the landlord's alleged default would or might otherwise result in a miscarriage of justice), Mr Hong elected to take the issue no further at the time. He said that Ms Li (who resides in Hong Kong) had had to return to New Zealand to give evidence, and that he was instructed to complete the hearing "despite the perceived miscarriage of justice". He said that Ms Li and Ms Cheng had also wanted a decision, having waited a long time for the hearing.

[28] Mr Hong used his notice of opposition in this proceeding to refer the liquidators to the landlord's alleged failure to make full disclosure in the District Court proceeding as a "serious issue that merited, needs to be investigated by [the liquidators], as if there had been any impropriety on the part of the ex-landlord or its lawyers, the judgment against [Charming Group] can be overturned." He said that, if the liquidators are truly independent (of the ex-landlord) he would expect them to take up that investigation.

[29] Finally, Mr Hong objected to being put to the expense and further work that would be required if the Court were to order him to produce the documents.

Mr Hong's evidence and submissions

[30] In his affidavit, Mr Hong confirmed that he had acted for Charming Group in the landlord litigation, as "the clients" could not afford to retain litigation counsel. Mr Hong explained that he is not a litigation lawyer, but will occasionally assist in litigation matters where a client appears to have a genuine grievance or a meritorious case, and cannot afford counsel. He said that he was engaged by Ms Cheng and Ms Li

to assist them in the landlord litigation, and he confirmed that the fees were paid by the shareholder(s), not the company.

[31] Mr Hong said that he provided all of the documents drafted, filed, issued and received in the name of Charming Group (that he has held as agent for Charming Group) to the Law Society on 13 February 2018. The documents were provided by link to the Cloud, and in that manner they were also available to the liquidators. Since providing those documents, the liquidators have not asked him for anything specifically, but have persisted with the demand that he hand over further documents. He said in his affidavit that the liquidators had not approached the directors of Charming Group for additional documents.

[32] Mr Hong stated in his affidavit that he acted on the landlord litigation from about October 2012. He confirmed that he does not possess any books, records and documents relating to the business, accounts or affairs of Charming Group other than the litigation file. All of the Court documents he drafted for the landlord litigation that had to be signed were signed by Ms Cheng.

[33] Mr Hong confirmed that he had earlier been engaged by Ms Li personally, "to act on the potential sale of the Company's restaurant". That was in or about July 2010. At that stage documents relating to the restaurant were in the names of Ms Li and Mr Yeoh. Mr Yeoh and Ms Li later arranged for Ms Cheng to join the venture, and they agreed to form Charming Group to trade the restaurant. Mr Hong confirmed that it was only in September 2012, when Ms Li and Ms Cheng asked him to assist with drafting Court proceedings, that he discovered the existence of Charming Group.

[34] Mr Hong briefly traversed the landlord litigation in the District Court. He said that "the clients" had an offer of about $50,000 for the sale that could not be taken up because the landlord had forfeited the chattels and sold them for about $40,000. The clients claimed damages from the landlord of about $80,000. The intention of filing the landlord litigation was to require the landlord to account when it sold Charming Group's assets for more than was owed by Charming Group to the landlord (and in the hope that the landlord would settle with Charming Group).

[35] Mr Hong contended that the landlord took certain steps that had the effect of increasing the costs of the landlord litigation in the District Court (for example unsuccessfully attempting to strike out the claim, and applying for security for costs in a sum that was approximately twice the amount Charming Group was eventually ordered to be pay).

[36] In 2016 Mr Hong drafted a letter which Ms Cheng would be able to use to approach another solicitor to act for Charming Group in the (then pending) appeal to the High Court. The draft letter prepared by Mr Hong set out the background of the dispute with the landlord, and what Mr Hong considered to be a public issue, said to involve a loophole in the Property Law Act 2007 (the PLA) that could easily be taken advantage of and abused by landlords to deprive tenants of their assets.

[37] Mr Hong referred to the judgment of Toogood J dismissing Charming Group's appeal in the landlord litigation,[2] delivered on 6 June 2017. He noted that the judgment dismissing the appeal effectively ratified the District Court's finding that the landlord had not converted assets of Charming Group, as the landlord had been entitled to treat the assets as assets of Ms Li and Mr Yeoh, who were understood to be the tenants. The High Court upheld the District Court's finding that Charming Group was estopped from claiming that the assets forfeited by the landlord belonged to it. The effect of the High Court judgment was accordingly that Charming Group had no claim to the proceeds of sale of the assets left in the restaurant, and that the liquidators could have no interest in the landlord litigation – the High Court judgment is binding on the liquidators, and the issues determined in it are res judicata.

[38] Mr Hong confirmed that, in the course of acting for his clients (presumably a reference to Ms Li and Ms Cheng, and possibly Mr Yeoh) in their personal capacities, he has received and sent many emails on unrelated personal matters. These could have been mixed in with his folder on Charming Group. He also confirmed that he had been involved on the specific other matters, all unrelated to the landlord litigation, to which he referred in his notice of opposition.

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[2] *Charming Group (NZ) Ltd v Singh* [2017] NZHC 1217.

[39] Mr Hong raised a number of other matters in his affidavit which appeared to be either speculative or argumentative. For example, he queried whether the liquidators were being funded by the landlord, and he concluded that, because the liquidators have been seeking "what must be privileged private and confidential communications" they must have ulterior motives. He challenged the admissibility of evidence from Mr Francis denying that the liquidators were being funded by, or acting at the direction of, the landlord. He challenged the liquidators' independence.

[40] Mr Hong raised issues of client privilege, privacy and confidentiality, and said that he was not prepared to carry the onus of making decisions on such issues, by just passing all communications to the liquidators. He also contended that he should not be put to the trouble of having to filter through his communications (that having nothing to do with Charming Group or the landlord litigation). He said that he did not have the time.

[41] Mr Hong speculated that the liquidators' investigation might be to see if he had entered into a contingency fee arrangement with Charming Group over any damages that might be awarded, or whether he had a personal financial interest in the landlord litigation, or was the person who controlled the landlord litigation. Mr Hong's response is that he was "working on conscience". He does not take cases on a contingency basis if clients cannot afford to pay; clients pay him what their conscience is happy with. If counsel is retained counsel gets paid first; Mr Hong gets paid last (if there is anything left).

[42] Mr Hong said that he saw himself as a potential target of the investigation by the liquidators, which must be funded by the landlord or its nominees. Alternatively, Ms Li and Ms Cheng might be the targets. He raised again the question of legal privilege owned by the directors.

[43] Mr Hong addressed in his affidavit his "public issues orders", and his putting the liquidators on notice of what he now says was a potential miscarriage of justice in the landlord litigation (alleged failure by the landlord to disclose all relevant documents). He contended that the landlord's written records were clearly relevant to the determination of what was agreed when Ms Li voluntarily provided a set of keys

to the landlord's agent, and in particular whether she was agreeing to the landlord re-entering the premises.[3]

[44] Finally, Mr Hong deposed that he works without staff. Any administrative work such as printing he does himself (he does have the assistance of his wife on some matters, but only where a fee is available for the relevant work).

Mr Hong's submissions at the hearing

[45] Mr Hong told me that he did not take any file notes at all in the course of his meetings with the directors of Charming Group. He explained that he has a difficulty with a hand (which I understood to mean that writing was difficult for him), and everything (eg correspondence, draft documents) was done on the computer. For example, he would prepare a draft statement of evidence on the computer and email it to Ms Cheng. Such an email might include a request for Ms Cheng to check the facts stated in the document. Ms Cheng would then come back to Mr Hong (either by email, telephone or in the course of a meeting) and tell him what changes were required. The changes would then be made on the computer.

[46] Mr Hong told me that he had no physical copies of anything. Everything in writing came to him by email. He also told me that all material correspondence with the landlords' solicitors, being email correspondence, had been uploaded to the Cloud. The liquidators have these documents.

[47] Mr Hong told me that he had throughout acted for the directors, as opposed to Charming Group, although he accepted that in some instances he acted for the directors "in respect of the company". Most instructions received from Ms Li were oral.

[48] Mr Hong indicated that there would have been "a few hundred" emails since 2010 between himself and the directors. He submitted that it would be too onerous a task for him to go through these. Most of them would not relate to Charming Group.

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[3] A clause in the relevant lease provided that any chattels of the lessee which remained in the premises five days after re-entry could be forfeited to the landlord.

He reiterated that it was not until late September 2012, when the landlord litigation was commenced, that he became aware of Charming Group.

[49] He submitted that even if communications with Ms Li or Ms Cheng after September 2012 touched on Charming Group or its affairs, that would not mean that the communications are the property of Charming Group.

[50] Mr Hong submitted that it would be unreasonable, unnecessary, or oppressive to require him to produce the documents sought.[4] However, if the Court were minded to order production of the documents sought, it should ensure that the privacy of individuals is protected, if necessary by appointing an independent person to review disputed documents. However he said that he would need to obtain the authority of Ms Li and Ms Cheng before he could commit to any such process.

Liquidators' reply evidence

[51] In a reply affidavit, Mr Francis said that the reason for the complaint to the Law Society was not to put pressure on Mr Hong to hand over Charming Group documents, but because Charming Group was Mr Hong's client, and the documents belonged to Charming Group. Any privilege attaching to the documents would be held by Charming Group. Mr Hong was seen as having refused to hand over the documents for irrelevant reasons.

[52] In response to Mr Hong's evidence that the litigation file was made available to the liquidators (by link to the Cloud), Mr Francis said that the link was attached to a letter from one of Charming Group's directors to the landlord, and the liquidators were initially unaware of the existence of the link. While they have since accessed the documents, the litigation file contains only Court documents. It does not have any correspondence, or the evidence the company had to support its claim.

[53] On Mr Hong's contention that the liquidators should have approached the directors in the first instance, Mr Francis said that the liquidators did not have the directors' contact details until they were disclosed (inadvertently) in an email from

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4 Referring to *Grant v Peoples* [2016] NZHC 2611.

Mr Hong dated 13 June 2018. A letter was sent on 14 June 2018 to Ms Li and Ms Cheng asking for all of Charming Group's records held by them, including accounting records, staffing records, tax returns, copies of contracts, copies of bank reconciliations, cheque books and bank deposit books, and copies of all communications with Mr Hong. No reply to the letter had been received by the time Mr Francis swore his reply affidavit on 27 June 2018.

[54] Mr Francis also said that it is anticipated that, apart from the documents in the litigation file, there will be other documents, including file notes, court minutes, draft documents and various correspondence, which should have been provided to the liquidators. By way of example of further documents not produced by Mr Hong, Mr Francis referred to an exchange of email correspondence between the Registrar of this Court and Mr Hong regarding the security for costs which Charming Group had paid on the appeal from the District Court decision in the landlord litigation. Mr Francis said the liquidators were not aware of the status of the litigation, or that there were funds held as security, until they received the copy of the email from Mr Hong. He said that the liquidators have no present information on any litigation undertaken by Mr Hong aside from the matters referred to in his affidavit.

[55] Mr Francis denied that the liquidators are assessing a possible claim against the landlord for seizing the assets of Charming Group. The s 261 request sent to Mr Hong was a standard form request for documents under the Act. But even if Mr Hong's allegation was correct, the liquidators do not have any documents on the landlord litigation by Mr Hong, and are therefore unable to assess whether any possible claim might be available.

[56] Mr Francis denied that the liquidators have any ulterior motives for their documents request. He also stated that the liquidators have not received any instructions from any of Charming Group's creditors, or from any "third party nominee". If any such "instructions" had been received, they would have been declined.

Applications under s 266 of the Act – legal principles

Section 266(1)

[57] For the liquidators, Mr Ho relied principally on s 266(1) of the Act, under which the Court may order a person who has failed to comply with a notice given by a liquidator under s 261 to comply with that notice.

[58] Section 261(1) and (2) provide:

> **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—
>
> …

[59] Section 261(1) is concerned with documents "of the company" that are in the possession or power of the person served with the s 261(1) notice. This may extend to documents held by the company (including, for example, documents held by a parent company for a subsidiary company).[5]

[60] As Heath J noted in *ANZ National Bank Limited v Sheahan*, s 261(1) requires *delivery* of the books, records or documents to the liquidator, because those books,

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

records, or documents belong to the company and should be in the liquidator's custody.[6]

[61] In *Norrie v Sutich*,[7] Associate Judge Doogue noted the statutory provisions which require liquidators to retain the accounts and records of the company.[8] The books and records which the liquidator has authority to obtain must include the books, records and accounts which the law requires the company to maintain. The records will include those described in ss 189 and 194 of the Act, which relate to accounting records which must be kept.[9]

[62] The Associate Judge considered that the requirement to retain the company's accounts and records suggests that the liquidator, standing in the place of the directors from the point where liquidation occurred, has an obligation and right to take steps to obtain possession of the company's accounts and records. Without them, the liquidators cannot perform their functions.[10] That general statement of the function of the liquidator in relation to the company's books and records makes it plain that the liquidator does not have to demonstrate any particular purpose or objective when he/she takes steps to recover the documents and records of the company. The liquidator is the proper custodian of those documents from the time of liquidation.[11]

[63] Associate Judge Doogue also considered in *Norrie* that, given the circumstances in which liquidators frequently find themselves on taking possession of a company which they have known nothing about previously, the liquidator should not have to specify in advance the very documents he or she hopes to find by exercising the powers under ss 261 and 266 of the Act.

[64] However, the liquidator's powers in the Act to get in documents and examine individuals, while necessarily broad (and in the ordinary course should be given full effect to), are not to be exercised past the point where unfairness results.[12] The fact

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6 *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [38].
7 *Norrie v Sutich* [2013] NZHC 2495.
8 Including s 256 of the Act.
9 At [24] and [25].
10 *Norrie v Sutich*, above n 7, at [22].
11 At [23].
12 *Norrie v Sutich*, above n 7, at [37].

that the directors may be required to provide documents which are not theirs but the company's is part of the context in which the Court has to judge whether the liquidator's requirements are oppressive. The fact that such documents may indirectly lead to the liquidator on behalf of the company taking action against those required to produce the documents may be exactly in step with the legislative intent – it is not an uncommon occurrence that liquidators find themselves required to bring proceedings against former directors in order to vindicate the rights of other classes who have an interest in the company, such as creditors and shareholders.[13]

Section 266(2)(b)

[65] In the alternative, Mr Ho relied upon s 266(2)(b) of the Act.

[66] Section 266(2) of the Act materially provides:

> **266 Powers of court**
>
> …
>
> (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.
>
> …

[67] Subsection 266(2)(b) provides for the Court to order a person on whom a s 261 notice has been served to *produce* any books, records or documents "relating to the business, accounts, or affairs of the company, which are in that person's possession or control". Documents that are generated by third parties must be *produced*, because a liquidator has no right to retain them.[14]

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13 At [37].
14 *ANZ National Bank Ltd v Sheahan*, above n 6, at [38].

[68] The learned authors of *Company and Securities Law* note that it may be that an order for production of records under s 266(2)(b) will be preferred over an order for the "enforcement" of a liquidator's notice issued under s 261(1). Section 261(1) only obliges a person to deliver company records to the liquidator. By contrast, s 266(2) refers to any books, records or documents *relating to* the business, accounts or affairs of the company. Such books, records or documents will not necessarily be owned by the company. The authors of *Company and Securities Law* consider that the wider wording in s 266(2)(b) clearly encompasses records such as banker's diary notes, solicitors' trust account records, and other third party documents which do not fall within the description of "company records", but which could still clearly be relevant to a liquidator's enquiry.[15]

[69] Both Mr Ho and Mr Hong referred in their submissions to the following passage from the judgment of Megarry J in *Re Rolls Razor Ltd (No 2)*:[16]

> The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.

[70] The Courts have noted that the discretion to make an order under s 266 must be exercised after a careful balancing of the factors involved. On the one hand, the Court should consider the reasonable requirements of the administrator to carry out his or her task; on the other hand, there is a need to avoid making an order which would be wholly unreasonable, unnecessary, or oppressive to the person concerned.[17]

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15 Linda Howes and Stephen Revill *Company and Securities Law* (Thomson Reuters, online ed) at [CA 266.01].

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

17 *British Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)* [1993] AC 426 (HL) at 439.

The proper case is one where the administrator reasonably requires to see the documents to carry out his functions, and the production does not impose an unnecessary and unreasonable burden on the person required to produce the documents. There will be no unreasonable burden simply because it may be inconvenient for the addressee of the application, or cause him or her a lot of work, or even make him or her vulnerable to future claims, although those may be matters to take into account by the Court in the exercise of its discretion.

[71] The liquidator's entitlement to get the books and records of the company is sometimes described as the liquidator's entitlement to the "reconstitution" of the previous knowledge of the company. But the statutory powers extend beyond the mere reconstitution of the company's knowledge: it is a legitimate function of the liquidator to obtain documents and interrogate company officers to equip the liquidator to decide whether litigation may be appropriate. In *Re Northrop Instruments & Systems Ltd* McGechan J noted that the desirability of enabling a liquidator to confirm or dismiss information as a sufficient evidential basis for prospective proceedings, in a swift and economical way, has played some role in New Zealand decisions, without separate consideration of any "reconstitution" test.[18]

[72] Most of the cases appear to have been concerned with a liquidator's application for an order that a person attend for examination. In *Re Northrop*, McGechan J took into account when deciding whether to exercise his discretion to order an examination whether the proposed examination was a "genuine investigative step", as opposed to a "mere fishing expedition", or a case "where the liquidator is seeking to improve an already sufficient position, or is bringing pressure to bear for some ulterior purpose".[19]

[73] In *ANZ National Bank Limited v Sheahan*, Heath J also addressed the need for the Court to strike a balance between the liquidator's need to obtain information about a company and the prevention of oppressive conduct against an examinee, or possibly his or her principal. This balancing exercise will come into focus sharply in cases

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18 *Re Northrop Instruments & Systems Ltd* [1992] 2 NZLR 361 (HC).

19 *Re Northrop Instruments & Systems Ltd*, above n 18, at 364, cited by Associate Judge Doogue in *Grant v Peoples*, above n 4, at [28].

where a liquidator seeks to examine a personal litigation adversary to obtain admissions under a process that is not available in ordinary civil proceedings. [20]

[74] In *Sargison v McCabe* Wylie J also referred to *Re Northrop*, noting the view of McGechan J in that case that s 266 gives the Court a wide and unfettered discretion, involving the need to balance the desirability of facilitating the provision of information in company liquidations on the one hand, and fairness in proceedings on the other, so that there is no oppression of the person sought to be examined.[21] Wylie J also referred to the judgment of Heath J in *Carrow Holdings Ltd (in liq) v Sadiq*.[22] In *Carrow*, Heath J noted that the Court's "traditional approach" turns on whether the liquidator is taking a bona fide step in the liquidation to obtain information for genuine purposes. If the information is sought as a genuine investigative step to enable a liquidator to reach an informed decision on what to do, the examination and production of documents is likely to be approved. On the alternative "reconstitution of the company's knowledge" approach, the purpose of the production and/or examination is essentially to put the liquidator in the same position as the directors would have been in, as far as knowledge of the company's affairs is concerned. In *Carrow*, Heath J considered that, in reality, both approaches worked together. It is equally important for the liquidator to re-constitute the knowledge of the company's affairs that the directors had, as it is for him or her to make informed decisions about what steps to take for the benefit of creditors.[23]

Claims to privilege

[75] A company's solicitor cannot assert legal professional privilege in relation to information sought from him or her by a liquidator. Section 393 of the Act materially provides:

> **393 Privileged communications**
>
> (1) Subject to subsection (2), nothing in this Act requires a legal practitioner to disclose a privileged communication.

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20 *ANZ National Bank Ltd v Sheahan*, above n 6, at [52]. *Grant v Peoples*, above n 4, at [30].
21 *Sargison v McCabe* [2012] NZHC 3194 at [16].
22 *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008.
23 *Carrow Holdings Ltd (in liq) v Sadiq*, above n 22, at [29]–[32].

> (2) Nothing in subsection (1) applies to a communication made to or by a person referred to in section 261(2)(f) while acting or having acted as a solicitor for a company to which that section applies and which that person is required to disclose under section 261(3).
>
> (3) For the purposes of this section, a communication is a privileged communication only if—
>
> (a) it is a confidential communication, whether oral or written, passing between—
>
> (i) a legal practitioner in his or her professional capacity and another legal practitioner in that capacity; or
>
> (ii) a legal practitioner in his or her professional capacity and his or her client,—
>
> whether made directly or indirectly through an agent; and
>
> (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
>
> (c) it is not made or brought into existence for the purpose of committing or furthering the commission of an illegal or wrongful act.
>
> …
>
> (5) The court may, on the application of any person, determine whether or not a claim of privilege is valid and may, for that purpose, require the information or document to be produced.
>
> …

[76] The broad position, then, is that the liquidator stands in the position of the company, and cannot be denied the information to which s 393(2) applies. However, the position may be different where it is contended that the documents are not the property of the company but of its director, and/or that the solicitor's client was not the company but the director. A claim to legal professional privilege of that sort will be recognised so long as it can be shown that the documents were brought into existence for the purpose of obtaining or giving confidential legal advice or assistance.[24]

[77] In *Foley's Transport*, the files to which a claim of legal professional privilege was made on behalf of certain directors of the company were files which included documents that had been opened in the name of the company. Also, the solicitors had

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[24] *Re Merit Finance & Investment Group Ltd (in liq)* [1993] 1 NZLR 152 (HC). See also *Foley's Transport Ltd v Weddel NZ Ltd (in rec and in liq)* (1996) 9 PRNZ 392 (HC).

been paid by the company, and the relevant directors' duties were owed to the company. However the Court ruled on the facts of the case that the privilege applied, and that the privilege was owned by the directors, not the company.

The issues

[78] The following issues fall to be decided:

(1) Does Mr Hong have in his possession or control books, records, or documents of Charming Group, or books, records, or documents relating to the business, accounts or affairs of Charming Group, which he has not delivered or produced to the liquidators?

(2) If the answer to issue (1) is "yes", should the Court exercise its discretion against ordering production under s 266(1) or s 266(2)(b) because the liquidators have not shown that the documents sought are required for, or relevant to, the performance of their functions as liquidators under the Act?

(3) If the answer to issue (1) is "yes", should the Court exercise its discretion against ordering production because the liquidators have been motivated by some ulterior purpose in making their request for the documents, and/or have abused the Court process in requesting the documents or making the application?

(4) If the answer to issue (1) is "yes", should the Court exercise its discretion against ordering production, because to do so would be unnecessary, unreasonable, or oppressive to Mr Hong?

(5) If the answer to issue (1) is "yes" and the answers to issues (2) to (4) are all "no", how should the Court resolve the issues of legal professional privilege and confidentiality raised by Mr Hong?

[79] I will address each of the issues in turn.

Issue (1): Does Mr Hong have in his possession or control books, records, or documents of Charming Group, or books, records, or documents relating to the business, accounts or affairs of Charming Group, which he has not delivered or produced to the liquidators?

[80] The liquidators acknowledge Mr Hong has provided some documents through a cloud storage link. But they say the link only contains court documents. The liquidators accordingly submit Mr Hong likely holds additional documents, such as file notes, court minutes, draft documents and correspondence with various parties. Mr Hong's submissions on this ground are addressed below.

[81] I am satisfied Mr Hong does hold some documents of the company, or documents relating to its business, accounts or affairs, which he has not produced or delivered to the liquidators. I reach that view for the following reasons.

[82] First, it appears that Mr Hong has only shared what he considers the liquidators are entitled to. He narrowly defines their entitlement:

(1) he asserts some documents are irrelevant to the liquidators' duties because they have "nothing to do with the assets of [Charming Group] or the tracing of such";

(2) he says the documents in his (computer) file cannot come within the expression "about the business, accounts or affairs of [Charming Group]", because the business had ceased trading when he started acting; and

(3) he further submits "all of the documents drafted, filed, issued and received in the name of [Charming Group] that the Respondent was in possession of, that the Respondent have held as an agent" have been provided by link to the liquidators.

[83] But the categories of documents captured by s 266(1) and (2)(b) are wider than those described by Mr Hong. Section 266(1) captures documents *of* the company. There are no requirements that the documents must relate to the assets of the company, or originate from when the company was trading. Whether a document is a document

"of" the company will ultimately depend on the circumstances in which it was obtained or created, the nature of the document, and how the relationship between the parties was defined contractually. In the context of a solicitor-client relationship, documents of the company could be documents such as:[25]

> (1) correspondence written by the solicitor to third parties relating to the client's business, or correspondence received by the solicitor for the client;
>
> (2) the letter of instruction;
>
> (3) notes of instructions or information as to the basis on which the client has brought the matter to the solicitor; and
>
> (4) documents that have been created for the client's benefit.

[84] Section 266(2)(b) extends beyond documents that belong to the company. Any documents that relate to the business, accounts or affairs of the company will be captured. Documents such as file notes and correspondence would be captured as long as they fall within that definition. This sub-section is not, as Mr Hong appeared to believe, limited to documents that relate to the company's tangible assets. The Court of Appeal recently addressed s 266(2)(b) in *Finnigan v Ellis*, where one of the issues was whether a former director's financial position could be construed as a "matter relating to" the company's "affairs". The Court of Appeal held that it could not, but noted that information about a former director's acts or omissions while acting in his or her former office would fall into that category. The Court of Appeal said:[26]

> First, as a matter of statutory interpretation, in terms of the scheme and purpose of pt 16 of the Companies Act, we consider 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.
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> …

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25 *Foley's Transport Ltd v Weddel NZ Ltd (in rec and in liq)*, above n 24, at 397–398.

26 *Finnigan v Ellis* [2017] NZCA 488, [2018] 2 NZLR 123 at [38] and [41].

[85] I think Mr Hong has defined the liquidators' entitlement in an unduly narrow manner. For example, he does not appear to have regarded any claims the liquidators might be able to bring against the directors or third parties as "assets" of the company, when plainly any such claims would be (contingent) assets. The result of his narrow approach is that there are probably further documents relating to the affairs of Charming Group that he has not produced.

[86] Secondly, there must have been email communications between himself and Ms Li and/or Ms Cheng relating to the landlord litigation, and those communications would have related to the affairs of Charming Group. They are therefore caught by s 266(2)(b) of the Act (whether those might be communications protected by obligations of privilege or confidentiality owed to one or both of the directors is not something with which I am concerned on this issue). Similarly, if the chattels in the restaurant were indeed owned by Charming Group, any emails or other documents relating to the prospective sale of those chattels in 2010 would in my view be documents relating to the affairs of Charming Group, whether or not Mr Hong was aware of Charming Group's existence at the time. Nor would Mr Hong's ignorance of Charming Group's existence at that time necessarily mean that documents he may now hold from that period are not documents "of" Charming Group.

[87] Thirdly, Mr Hong told me that there would have been "a few hundred" emails since 2010 between himself and the directors. While he did say most of these would not have related to the company, it is a reasonable inference that some of them would have. The fact that he considers the task of searching through them too onerous a task is not relevant to issue (1).

[88] Fourthly, the liquidators have produced an email from Mr Hong to the Registrar of the High Court regarding funds held as security for costs which were apparently paid by Charming Group on its appeal from the District Court decision in the landlord litigation. The liquidators were not aware of these funds until they were copied into an email by Mr Hong.

[89] For all of those reasons my answer to issue (1) is "yes".

Issue (2): If the answer to issue (1) is "yes", should the Court exercise its discretion against ordering production under s 266(1) or s 266(2)(b) because the liquidators have not shown that the documents sought are required for, or relevant to, the performance of their functions as liquidators under the Act?

[90] As regards any documents "of the company" that are in Mr Hong's possession or control, the liquidators do not have to show any particular purpose or objective in requesting delivery of the documents. In particular, they do not have to show that the documents sought are required for, or relevant to, the performance of their functions as liquidators under the Act. The liquidators are entitled to such documents as the proper custodians of the company's documents from the time of liquidation.

[91] Turning to any documents captured by s 266(2)(b) (ie documents relating to Charming Group's business accounts or affairs), it is understandably difficult for the liquidators to demonstrate how these relate to the performance of their functions under the Act. That is because they do not know the details of any documents that are being withheld. It is, however, part of their function to obtain documents to equip them to decide what steps may be appropriate in the company's liquidation. As Heath J said in *ANZ National Bank Ltd v Sheahan*:[27]

> A liquidator will generally be permitted to examine if the information sought is a genuine investigative step to enable the liquidator to reach an informed decision on what to do, whether that involves reconstitution of knowledge or not.
>
> In reality, both approaches work together. It is equally important for the liquidator to reconstitute knowledge of directors of the company as it is for him or her to make informed decisions about what steps to take for the benefit of creditors. In that context, it must be remembered that a liquidator usually has limited funds with which to work and it is in the public interest that he or she obtains relevant information with as little expense as possible and in the most expeditious manner.

[92] In this case, the liquidators were unable to "reconstitute the directors' knowledge" because they did not know how to contact the directors until they learned their contact details in June of 2018. It appears that Mr Hong was unable or unwilling to provide the directors' contact details (presumably because he did not have their authority to do so). Particularly in those circumstances, I consider it entirely reasonable for the liquidators to have attempted to reconstruct the directors' knowledge

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[27] *ANZ National Bank Ltd v Sheahan*, above n 6, at [55]–[56].

by requiring a solicitor who had acted for the company to deliver any documents of the company that were in his possession, and assist by producing documents in his possession relating to Charming Group's business, accounts or affairs.

[93] Furthermore, one of the liquidators' functions under the Act is to get in any assets of Charming Group. That might involve pursuing litigation on the company's behalf against the directors, or against any other party who is considered to have a liability to the company. In this case, the documents in the landlord litigation showed an unusual situation, where chattels apparently owned by Charming Group were lost to the landlord on the basis that representations had been made to the landlord that the chattels were owned by others, and that the landlord was entitled to rely on those representations. I consider that the liquidators were perfectly entitled to look into the landlord litigation with a view to assessing whether any claims for damages might be made, whether in respect of the manner in which assets of Charming Group (the chattels in the restaurant) were apparently lost, or in respect of whether costs were improperly incurred in pursuing the landlord litigation. I accept that there could no longer be any claim against the landlord – the issues as between Charming Group and the landlord were finally resolved by the judgment of Toogood J given on the appeal in the landlord litigation. But the liquidators were in my view entitled to look into the possibility of claims against other parties, and to seek Mr Hong's assistance in that regard by producing any documents in his possession or control relating to that part of Charming Group's business, and affairs.

[94] For those reasons, my answer to issue (2) is "no".

Issue (3): If the answer to issue (1) is "yes", should the Court exercise its discretion against ordering production because the liquidators have been motivated by some ulterior purpose in making their request for the documents, and/or have abused the Court process in requesting the documents or making the application?

[95] Mr Hong has not produced any evidence to show the liquidators are motivated by some ulterior purpose. Rather, he reasons inferentially that because he considers the documents to which access is sought are irrelevant and confidential, the liquidators *must* be acting for an ulterior purpose. He argues, along the same lines, that the liquidators must be biased and must be acting at the behest of the landlord.

[96] The liquidators deny acting for ulterior purposes, and say they have not received any instructions from creditors. If such instructions had been received, they say they would have been declined.[28]

[97] The classic example of abuse in situations such as the present is where a liquidator seeks to use the s 266 process to pressure a potential litigation adversary.[29] Mr Hong argues the liquidators are trying to find information for a creditor to use against him. But there is simply no evidence of this. There is nothing to indicate the liquidators are attempting to use their powers to obtain any unfair or improper advantage in the course of or for the purpose of litigation.

[98] The complaint the liquidators made to the Law Society does not suggest that the liquidators were applying improper pressure, or that they had an ulterior motive in requiring delivery of the documents they had sought. Mr Francis' emails made the position clear – the liquidators viewed the situation as one where a solicitor who had acted for the company in the past was refusing to comply with a former client's instruction to deliver documents to which it was entitled. A complaint to the Law Society would not be an unusual response from a former client who was confronted with that situation. Mr Francis did refer in emails to Mr Hong dated 20 December 2017 to the penalties under the Act for non-compliance with a s 261 notice, and he said that in the event of non-compliance a complaint would be made to "the relevant authorities" (which could include the Law Society, the police, or an application to this Court). I accept Mr Hong's submission that any overbearing or threatening behaviour by an officer of the Court is likely to be improper, but in this case I do not consider the liquidators' correspondence crossed the line. It simply drew the attention of Mr Hong, a senior solicitor, to the range of possible consequences in the event he did not comply with the s 261 notice, and I do not think that was unreasonable or improper in the

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28 I do not think it matters that the affidavit deposing to those matters was provided by Mr Francis, a manager employed by the liquidators' firm, and not by one of the liquidators. In the ordinary course I think an insolvency manager working for liquidators could be expected to know how the liquidation was being funded, if only to assess how much time could reasonably be spent assessing prospective claims and pursuing those that appeared to have some merit. Also, the liquidators, as officers of the Court, are responsible to the Court for the information put by them before the Court. There is nothing before me to suggest that they have not discharged that obligation.

29 *ANZ National Bank Ltd v Sheahan*, above n 6, at [59].

circumstances of this case. In the event, it appears that the liquidators concluded that the Law Society was the appropriate "authority", at least in the first instance.

[99] Mr Hong complains that he has been treated discourteously by the liquidators, who, as officers of the Court, should be held to a higher standard than has been displayed in this case. I do not see that the emails from Mr Francis showed the level of discourtesy that might prompt the Court to intervene – the tenor of the communications appears to have been polite enough. And Mr Hong appears to have given as good as he got (for example, in accusing the liquidators (in an email of 20 December 2017 and subsequently) of "acting on landlord's instructions"). He did not then, and has not since, put forward any factual foundation for that allegation.

[100] Finally on this issue, my answers on issues (1) and (2) also point against the inferences of impropriety or ulterior motive that Mr Hong seeks to draw. There is nothing to indicate the liquidators have abused the Court process, or that they have been acting for an ulterior purpose, or that they are biased.

[101] In the absence of any evidence to support Mr Hong's claims, the answer to issue (3) is "no".

Issue (4): If the answer to issue (1) is "yes", should the Court exercise its discretion against ordering production, because to do so would be unnecessary, unreasonable, or oppressive to Mr Hong?

[102] I do not consider ordering production would be unnecessary. The liquidators are entitled to delivery of any documents *of* Charming Group, and (subject to any questions of privilege or confidentiality) I think it is reasonable for them to see any documents held by Mr Hong relating to Charming Group's business, accounts or affairs, to enable them to "reconstruct the knowledge of the directors" (who it appears have so far not been willing to assist), and to determine the appropriate steps to take in the liquidation. This ground has been covered.

[103] Mr Hong says it will be burdensome to locate further documents, such as correspondence, especially because these are or may be mixed up with documents that relate to the directors' personal affairs. He says:[30]

> I should also not be put to the onus of having to filter through our communications that has nothing to do with the Company or the Litigation. I just do not have the time.

[104] I do not accept that submission. There will not be an unreasonable burden simply because collating the documents may be inconvenient for Mr Hong, or because production will cause him significant work. As the House of Lords said in *British and Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)*:[31]

> An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others.

[105] In this case, I do not consider the burden of reviewing documents is a significant factor weighing against ordering production. Mr Hong says there may be a few hundred documents, which should be searchable (without limitation, by searching under the names of Charming Group and each of its directors), and that should be a manageable task. I do not think Mr Hong can complain if his own failure to keep the documents of one client separate from those of others makes the task take longer than might otherwise have been the case.

[106] Mr Hong also takes issue with the fact that the liquidators contacted him before exhausting other avenues. He said:[32]

> I object to being put to the expense and further work time stress, by being made the *Liquidators'* secretary. The *Liquidators* should have first approached the directors, they did not expecting me to. Sorry no can do.
>
> The only thing we lawyers have to sell is time and time is what I do not have enough of. I am also tied up with litigation … that requires a lot of my time. Our rights and as lawyers, must not be impugned on, our time must not be robbed of us UNLESS absolutely necessary, they could not get such

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30 Affidavit of Mr Hong, dated 11 June 2018, at [59].

31 *British and Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)*, above n 17, at 339–440.

32 Affidavit of Mr Hong, dated 11 June 2018, at [48]–[49].

> elsewhere. Such has been my annoyance at the outset, exacerbated by their authoritarian attitude in addition to being outright rude, disrespectful.

[107] The fact that other people may also hold some of the documents requested by the liquidators from Mr Hong does not make production oppressive. The liquidators are entitled to follow the statutory process. Nothing in that process requires them to exhaust all other avenues before requesting documents from the company's solicitor.

[108] In any event, the liquidators made the same requests of the directors when they discovered their contact information in June of 2018. No response had been received by the date of the hearing.

[109] There is nothing else to indicate that ordering production may be unnecessary, unreasonable or oppressive. It follows that the answer to issue (4) is "no".

Issue (5): If the answer to issue (1) is "yes" and the answers to issues (2) to (4) are all "no", how should the Court resolve the issues of legal professional privilege and confidentiality raised by Mr Hong?

[110] The Court generally places significant weight on an assertion of privilege by one of its officers. In *Foley's Transport Ltd v Weddel NZ Ltd (in rec and in liq)*, the Court held:[33]

> The question whether or not privilege or circumstances of privilege exist is a matter which has to be decided, in the first instance, on what is claimed by or on behalf of the person asserting the privilege and as Cross on Evidence (New Zealand loose leaf edition, para 10.28) says:
>
> > "If a lawyer swears that a question cannot be answered without disclosing lawyer-client communications his or her oath is conclusive unless it appears from the nature of the question that the privilege cannot be applicable."

[111] In the present case, however, Mr Hong essentially makes a blanket assertion of privilege without having reviewed all of the documents he holds. Notwithstanding the lack of any review of individual documents, he says the only documents which have not been produced are private and confidential communications with his clients, the shareholders, who engaged him and personally paid his fees. Mr Hong includes in the matters on which he was "engaged personally" by the shareholders the landlord

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33 *Foley's Transport Ltd v Weddel NZ Ltd (in rec and in liq)*, above n 24, at 396.

litigation, which was conducted in Charming Group's name. He also says he was instructed personally by a shareholder to act on the "potential sale of the Company's restaurant, on or about July 2010".

[112] Mr Hong further says that communications with the shareholders included issues that had nothing to do with the company such as, for example, a criminal matter or an employee issue.

[113] As in *Business Distributors Ltd v SIA Abrasives Australia Pty Ltd*,[34] however, Mr Hong has not adequately identified the documents in relation to which privilege and/or confidentiality is claimed. I think it was for him to identify the documents that are said to be confidential and/or privileged, and in each case state the basis for the claimed privilege or confidentiality. That will involve an assessment of whether each document was made or brought into existence for the purpose of obtaining or giving legal advice or assistance and, in respect of each document, consideration of who his client was (if the client was Charming Group, there would probably be no basis to resist production).

[114] Mr Hong submits that if the Court wants documents assessed for relevance, it should be done by independent counsel appointed by the Court. I do not consider the expense of involving independent counsel is warranted in this case. If necessary, the Court can inspect any disputed documents under s 393(5) of the Act.

[115] The Court can order, and has in fairly recent times ordered, the production of documents in a sealed envelope, for the Court to review if necessary. See for example the judgment of Heath J in *Petterson v Gothard*, where the learned Judge said:[35]

> If any questions of privilege or confidentiality arise that would affect the ability of the liquidator to see the documents, the receivers shall provide a list of those documents (explaining why privilege or confidentiality considerations apply) to the liquidator and file in this Court a sealed envelope containing copies of that list and the documents referred to in it. If asked to do so, I can review them and rule on any claims for confidentiality or privilege. That process will protect the receivers in the event that any privilege of those types exist.

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[34] *Business Distributors Ltd v SIA Abrasives Australia Pty Ltd* [2014] NZHC 3365 at [57]–[59].
[35] *Petterson v Gothard* (No 3) [2012] NZHC 666 at [66].

[116] See also the decision of Lang J at first instance in *Grant v Swan*, where the judge ordered Mr Swan to produce in a sealed envelope documents which were the subject of disputes over privilege or ownership, with those disputes to be resolved by the Court if necessary.[36]

[117] In this case Mr Hong clearly does hold some documents which relate to the business or affairs of Charming Group, but he has not identified them, or reviewed them individually to see whether claims to confidentiality or privilege, or ownership by the directors or some other party, can be made out. He must first undertake that task before the question posed by issue (5) can be finally resolved.

Orders

[118] After considering all of the evidence and submissions, I make the following orders:

(1) within 25 working days of the delivery of this judgment, Mr Hong is to review all documents on his computer(s) in the period from 1 January 2010 to 13 December 2017 (being the date of liquidation and the date of the liquidators' notice under s 261 of the Act), prepared for Charming Group or any of its directors, or passing between himself and Charming Group or any of its directors;

(2) any documents located as a result of the review in order (1) above that do not relate at all to Charming Group or its business, accounts or affairs will not be relevant and need not be produced under s 266 of the Act;

(3) any documents relating to Charming Group or its business, accounts or affairs that are documents *of* Charming Group (in the sense of being either owned by or held for Charming Group) are to be delivered forthwith to the liquidators within 35 working days of delivery of this judgment;

[36] *Grant v Swan* HC Auckland CIV-2015-404-254, 24 June 2015, referred to (on an appeal limited to the question of costs) in *Swan v Grant* [2016] NZCA 244.

(4) documents reviewed by Mr Hong that do not fall under either order (2) or order (3) above ("the remaining documents") should be documents that relate to the business, accounts or affairs of Charming Group. If and to the extent there is no claim to privilege or an entitlement to confidentiality asserted by one or more of the directors (or by any other party other than Charming Group itself) in respect of the remaining documents, the remaining documents are to be produced to the liquidators within 40 working days of the delivery of this judgment. It will be for Mr Hong to ascertain in respect of each of the remaining documents whether any claim to privilege or confidentiality is asserted by a director or directors of Charming Group (or by any other party);

(5) within 50 working days of the delivery of this judgment, Mr Hong is to file and serve a memorandum, listing all of the remaining documents for which a claim to confidentiality or privilege is made, identifying in each case the names of the parties and the date of the document, and stating the basis on which the document is said to be the subject of a privilege or entitlement to confidentiality which is not owned by Charming Group. At the same time Mr Hong is to file (but not serve) copies of these documents in a sealed envelope clearly marked "Not to be opened except by the Associate Judge – refer to paragraph [118](6) of the judgment of Associate Judge Smith dated 30 August 2018". In his memorandum, Mr Hong is to advise the Court whether any person who has asserted a claim to privilege or confidentiality in respect of any of the documents listed in his memorandum wishes to be heard in support of his or her claim to confidentiality or privilege, or wishes to file a memorandum making submissions in respect of any such claims.

(6) I will then give such further directions as may be appropriate, including (if necessary) arranging a further brief hearing (or telephone conference) to hear argument on any documents that are still in dispute. I will then inspect the disputed documents (if I consider it necessary to do so), and give a further judgment on the application.

(7) In the meantime, costs on the application are reserved.

Associate Judge Smith