PricewaterhouseCoopers LLP and others *v* Celestial Nutrifoods Ltd (in compulsory liquidation) [2015] SGCA 20

Case Number	: Civil Appeal No 132 of 2014
Decision Date	: 08 April 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Chan Sek Keong SJ
Counsel Name(s)	: Alvin Yeo, SC, Lin Wei Qi Wendy, Goh Wei Wei, Chong Wan Yee Monica and Jenny Tsin (WongPartnership LLP) for the appellants; Blossom Hing, Ang Yao Long Ronnie and Alphis Tay (Drew & Napier LLC) for the respondent.
Parties	: PricewaterhouseCoopers LLP — Tan Boon Chok — Tham Tuck Seng — Celestial Nutrifoods Ltd

Insolvency law – Winding up – Liquidator

8 April 2015

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 A liquidator of a company is duty-bound to determine the events that led to the company's demise, and has to take steps to maximise returns to the company's creditors. But he is often at a disadvantage in discharging these duties because he usually has no prior knowledge of the company's affairs and often has to contend with incomplete and unsatisfactory records and deal with uncooperative officers of the company, who may be wrongdoers themselves. Due to these difficulties and in the interest of expedience, s 285 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") was enacted to provide the liquidator with a unique procedure that allows him to get information on the insolvent company's affairs. Section 285 of the CA ("s 285") reads:

> **Power to summon persons connected with company**
>
> **285**.—(1) The Court may summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court considers capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company.
>
> (2) The Court may examine him on oath concerning the matters mentioned in subsection (1) either by word of mouth or on written interrogatories and may cause to be made a record of his answers, and any such record may be used in evidence in any legal proceedings against him.
>
> (3) The Court may require him to produce any books and papers in his custody or power relating to the company, but where he claims any lien on books or papers the production shall be without prejudice to that lien, and the Court shall have jurisdiction to determine all questions relating to that lien.
>
> (4) An examination under this section or section 286 may, if the Court so directs and subject to the Rules, be held before any District Judge named for the purpose by the Court, and the powers

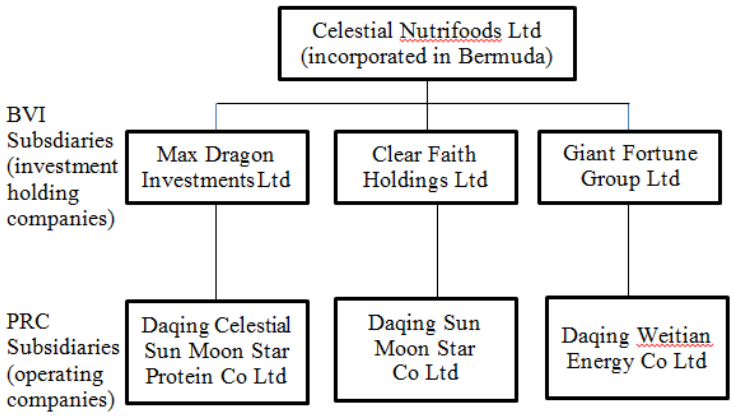
of the Court under this section and section 286 may be exercised by that Judge.

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

2 The Appellants are PricewaterhouseCoopers ("PwC") and two of its audit partners, Mr Tan Boon Chiok and Mr Tham Tuck Seng. They were the auditors of Celestial Nutrifoods Limited ("Celestial") for the financial years ("FYs") 2004 to 2009. Celestial is now in compulsory liquidation. The Respondent is Celestial's liquidator, Mr Yit Chee Wah. On 10 May 2013, the Respondent brought an application in the High Court under s 285 to compel the Appellants to disclose documents in their custody, power or control relating to Celestial's trade dealings, affairs and property (including those given to the Appellants by Celestial's subsidiaries in the British Virgin Islands ("BVI") and the People's Republic of China ("PRC")). The Respondent said that he needed the documents for a proper analysis of Celestial's consolidated financial statements and year-end balances. These documents would enable him to reconstruct the financial records of Celestial and investigate various suspicious transactions which he had uncovered. On 6 August 2014, the High Court granted the Respondent's application (see *BNY Corporate Trustee Services Ltd v Celestial Nutrifoods Ltd* [2014] 4 SLR 331 ("the Judgment")). Dissatisfied, the Appellants appealed. We heard and dismissed the appeal on 27 January 2015. We now give our reasons.

Background facts

3 Celestial was a company listed on the Singapore Exchange. It was incorporated in Bermuda in 2003 and wholly owns three subsidiaries (Max Dragon Investments Ltd, Clear Faith Holdings Ltd, and Giant Fortune Group Ltd) that were all incorporated in the BVI ("the BVI subsidiaries"). Each of the BVI subsidiaries is the investment holding company for each of the three subsidiaries incorporated in the PRC, namely, Daqing Celestial Sun Moon Star Protein Co Ltd, Daqing Sun Moon Star Co Ltd and Daqing Weitian Energy Co Ltd ("the PRC subsidiaries"). The operations of the group (comprising Celestial and the BVI and PRC subsidiaries) are conducted by the PRC subsidiaries. Thus the PRC subsidiaries owned the physical and financial assets of the group. The group's main business activity was producing soybean protein-based foods under the "Sun Moon Star" brand. We illustrate the relationship between Celestial, the BVI subsidiaries and the PRC subsidiaries with the following diagram:



4 On 12 June 2006, Celestial raised $235m from investors by issuing Zero Coupon Convertible Bonds ("the Bonds"). The bondholders were all granted put options which allowed them to compel

Celestial to redeem all or some of the Bonds at 116.5% of their face value.

5 On 23 May 2009, a majority of the bondholders exercised their put options and Celestial was required to redeem the Bonds on 12 June 2009. But Celestial failed to do so by the due date.

6 On 23 November 2010, BNY Corporate Trustee Services Ltd ("BNY"), the trustee of the Bonds, issued a statutory demand against Celestial for the amount due under the Bonds. When this was not satisfied, BNY commenced winding up proceedings, *via* Company Winding-Up No 195 of 2010, against Celestial.

7 On 24 December 2010, the Respondent was nominated by the creditors as Celestial's provisional liquidator. On 2 December 2011, the High Court granted a winding up order against Celestial and appointed the Respondent the liquidator.

8 After taking control of Celestial, the Respondent discovered that the group's operating companies, management and directors were all based in the PRC. Despite his efforts, he was unable to obtain any meaningful assistance from them with regard to the affairs of Celestial and of its subsidiaries.

9 Based on the information and documents he could obtain, the Respondent identified seven suspicious and/or irregular and/or undisclosed transactions undertaken by Celestial and the group which warrant further investigation. They were:

(a) Surreptitious disposal of substantially all of Celestial's assets on or around 4 December 2010 by way of an auction of the shares of the PRC subsidiaries which had been pledged to the China Construction Bank ("CCB") as security for certain loans apparently extended by CCB to the BVI subsidiaries. As a result, Celestial's shareholders and creditors were left holding shares or bonds in a worthless company;

(b) Cash payments totalling some $16.8m to Power Charm Group Ltd ("Power Charm"), a BVI company, made in December 2009, June 2010 and September 2010. Power Charm later became inactive on 1 December 2010 and was eventually struck off the BVI register of companies on 2 May 2011;

(c) Payment of some RMB 70m in or around December 2009 to purchase technical know-how in respect of a bio-diesel plant;

(d) The sale of returned goods. The value of goods sold but later returned amounted to RMB 254m in 2009 and RMB 437.1m in 2010. However, some of them were re-sold for only RMB 14.8m. This wiped out at least 50% of the revenue generated in one quarter in 2009 and more than 100% of the revenue generated in another quarter in 2010;

(e) Cash payments of some RMB 529m without written documentation in relation to the construction of a "Soybean Hi-Tech Industrial Zone" in Daqing, PRC;

(f) An undisclosed lease of a land to construct a hotel known as Daqing Manhatwen Hotel; and

(g) Suspicious transactions described in two anonymous letters.

10 As Celestial did not have the funds to enable the Respondent to investigate the suspicious transactions and/or to commence legal proceedings against other parties to recover money and

assets that were allegedly paid out wrongfully, the Respondent entered into a Funding Agreement with several creditors in 2012. These creditors were collectively referred to as the Blackrock creditors, as they are members of a group identified as the Blackrock Group. The Blackrock creditors held the majority of the Bonds. The Funding Agreement provided that the Blackrock creditors were to provide the Respondent with: [note: 1]

(a) US$507,122 as part payment towards his outstanding fees and costs (cl 3.1(a));

(b) US$230,000 for costs incurred in examination and discovery proceedings commenced by him (cl 3.1(b)); and

(c) US$507,122 as payment for his remaining outstanding fees and costs and additional funding to commence proceedings in relation to any potential claims identified by him and which the Blackrock creditors decide to pursue (cl 4.4).

The Funding Agreement was sanctioned by the High Court on 20 June 2012. [note: 2]

11 On 10 May 2013, after the Funding Agreement was sanctioned by the High Court, the Respondent filed Summons No 2473 of 2013 ("SUM 2473/2013") pursuant to s 285. The Respondent wanted the Appellants to disclose documents in their custody, power or control relating to Celestial's trade dealings, affairs and property (including those given to the Appellants by Celestial's subsidiaries in the BVI and the PRC), and also for the two audit partners, Mr Tan Boon Chiok and Mr Tham Tuck Seng, to be orally examined.

12 At the High Court, the Respondent submitted that the application was needed to enable him to discharge his statutory duty to:

(a) reconcile the accounts of Celestial;

(b) investigate the circumstances that led to Celestial's eventual collapse, including the suspicious transactions he had identified; and

(c) consider whether claims should be pursued to recover Celestial's assets and/or for breaches of duty by Celestial's officers.

13 The Respondent averred that the documents and information that he had already obtained came primarily from these sources: [note: 3]

(a) Celestial's corporate secretary;

(b) Celestial's registered agent in Bermuda;

(c) Celestial's independent directors in Singapore, Mr Lai Seng Kwoon (who is also Celestial's audit committee chairman) and Mr Loo Choon Chiaw;

(d) The corporate regulatory authorities in Daqing, PRC;

(e) KPMG Singapore, the independent accountants appointed by Celestial on 25 September 2009 that conducted an independent review of Celestial's financial position to facilitate a restructuring of the Bonds; and

(f) PwC, which provided three arch-lever files of documents.

14 The Respondent took issue with the documents provided by PwC. He expected that there would be more documents as PwC was Celestial's auditors for several years (FYs 2004 to 2009). Furthermore, those three files only contained high-level consolidation schedules, limited company and subsidiary level financial information, year-end balances and minutes of meetings which the Respondent had already recovered from other sources.

15 The Respondent said that he needed the disclosure of the following documents from PwC for a proper analysis of the consolidated financial statements and year-end balances. Those documents would allow him to reconstruct the financial records of Celestial and investigate the suspicious transactions. The documents included:

(a) General ledger and trial balance(s) of each entity in the group;

(b) Bank statements and bank reconciliations that would have been prepared by each entity in the group;

(c) A register of fixed assets of each entity in the group and evidence of the ownership of these fixed assets and land use rights;

(d) Copies of loan facilities documents for each loan facility operated by each entity of the group;

(e) Sales contracts, purchase contracts, supplier contracts, receipts and payment vouchers;

(f) Detailed creditors and debtors schedules; and

(g) Statutory documents filed by each entity of the group.

The Respondent also sought access to PwC's working papers.

16 PwC resisted the application. It argued that:

(a) The Respondent was not an objective liquidator. This was because:

(i) the Respondent was represented by the same solicitors who had acted for BNY in another suit; and

(ii) the Respondent was incentivised under the Funding Agreement to pursue a claim against PwC.

(b) The Respondent's true motivation in making this application under s 285 was really to obtain evidence for a negligence suit against PwC.

(c) To comply with the disclosure asked by the Respondent might require it to do acts that are illegal under PRC law resulting in the Appellants being exposed to civil and criminal sanctions under PRC law.

(d) In any event, the Respondent's request was too wide.

17 On 6 August 2014, the High Court Judge ("the Judge") granted the Respondent's application

and ordered that the costs of the application be paid out of the assets of Celestial.

18 Dissatisfied, on 18 August 2014, the Appellants filed a notice of appeal. Four days earlier, the Appellants also filed Summons No 4035 of 2014 ("SUM 4035/2014") for leave to appeal. When SUM 4035/2014 was heard by the Judge on 22 September 2014, the Appellants' counsel took the position that an appeal to this court lay as of right and that leave was not required. The Judge therefore did not grant leave to appeal. When the present appeal came before this court, the Respondent raised a preliminary issue of whether this court had the jurisdiction to hear the appeal. His point was that leave should have been obtained and without it no appeal could be filed. In other words, the Appellants were in error in not pursuing SUM 4035/2014.

19 Before considering this jurisdictional issue, we ought to mention an interlocutory matter which also came up to the Court of Appeal before the hearing of the present appeal, *ie*, the Appellants' application for a stay of the Judge's disclosure order. That application was first heard by the Judge, and later by another judge who sat as a single-judge of the Court of Appeal under s 36(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). Both the judges refused the stay application. When the matter came before a two-judge Court of Appeal, consisting of Sundaresh Menon CJ and Chao Hick Tin JA, that court eventually granted the stay as it thought that there was a need to hold the balance between the interests of the parties (pending the hearing of this appeal) to avoid any prejudice to any of the parties. As an essential component of the balance, in view of the Respondent's contention that he could face time-bar issues in pursuing claims if there was a delay in the disclosure of the requested documents, counsel for the Appellants gave the following undertaking on behalf of the Appellants (after obtaining instructions from clients):

> I confirm that if the appeal is dismissed, then in the intervening period between 6 August 2014 when [the Judge's] order was made and the date on which the appeal is so dismissed, time shall not run for that period of time in respect of any claim that may be brought by the Liquidator against PwC.

Issues before this court

20 There were two main issues arising in this appeal, namely:

(a) First, whether this court had the jurisdiction to hear the appeal ("Issue 1"); and

(b) Second, whether the Judge erred in granting the order under s 285 ("Issue 2").

Issue 1: Does this court have the jurisdiction to hear the appeal?

Arguments made

21 The Appellants first contended that this court should not hear the Respondent's objection on jurisdiction as the Respondent did not apply (when it could have) to strike out the Notice of Appeal under Order 57 r 16(10) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), which reads:

> **Applications to Court of Appeal (O. 57, r. 16)**
>
> **16**.—…
>
> …

(10) Any application to the Court of Appeal to strike out a notice of appeal must be made by summons supported by affidavit stating the grounds of the application.

22 The Appellants also argued that the disclosure order granted under s 285 in favour of the Respondent was not an interlocutory order in respect of which leave must be obtained before an appeal to this court could be brought. This was because the disclosure order was neither "peripheral to the main hearing determining the outcome" nor filed "between the initiation of the action and the final determination" (*The "Nasco Gem"* [2014] 2 SLR 63 at [14(b)]).

23 The Respondent submitted that the disclosure order under s 285 in the present case was an interlocutory order for which leave ought to have been sought before the Appellant could lodge an appeal. As leave was not sought, the appeal could not be brought. In this regard, the Respondent relied on the previous decision of this court in *Jumabhoy Asad v Aw Cheok Huat Mick and others* [2003] 3 SLR(R) 99 ("*Jumabhoy*") which held that a disclosure order under s 285 was an interlocutory order for which leave was required before an appeal could be lodged to this court.

Should this court hear the Respondent's objection on jurisdiction since he did not apply to strike out the notice of appeal?

24 On the Appellants' contention that this court should not hear the Respondent's objection on jurisdiction because he did not apply to strike out the notice of appeal under O 57 r 16(10) of the ROC, we noted that the Appellants were unable to cite any authority to support that argument. We were of the judgment that this argument was without merit for two reasons:

(a) First, there is nothing in the SCJA or the ROC which says that this court cannot hear objections on jurisdiction simply because the respondent has not applied to strike out a notice of appeal which was not filed in accordance with the statutory requirement.

(b) Secondly, while the ROC permits a respondent to apply to strike out a wrongly filed notice of appeal, it would be absurd to contend that a right of appeal therefore arises in favour of the Appellants just because the Respondent omits to do so. We could not see how the statutory regime could be altered merely by an act or omission of the parties. Moreover, the ROC is a subsidiary legislation which is subordinate to its parent act, the SCJA (*Au Wai Pang v Attorney-General and another matter* [2014] 3 SLR 357 at [33]), and it is the SCJA which prescribes that a dissatisfied party could appeal against such an interlocutory order only with leave of court.

Jurisdiction to hear the appeal

25 We now deal with the issue of whether this court has the jurisdiction to hear the appeal. This in turn depends on whether the appeal could properly be brought. It is a well-established principle that the Court of Appeal, being a creature of statute, is only seised of the jurisdiction conferred upon it by the statute which creates it or by such other statute which may confer upon it additional jurisdiction (*Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR(R) 529 at [23]). Section 34(2)(*d*), read with para (*e*) of the Fifth Schedule to the SCJA, provides that an appeal to the Court of Appeal in respect of an interlocutory orders cannot be brought unless leave is first obtained from a High Court Judge.

26 For ease of reference, we set out hereunder both s 34(2)(*d*) and para (*e*) of the Fifth Schedule to the SCJA (as of 18 August 2014, when the Notice of Appeal was filed). Section 34(2)(*d*) of the SCJA reads:

Matters that are non-appealable or appealable only with leave

34. —…

(2) Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:

…

(*d*) where a Judge makes an order specified in the Fifth Schedule, except in such circumstances as may be specified in that Schedule;

…

Para (*e*) to the Fifth Schedule goes on to provide:

FIFTH SCHEDULE

Sections 34(2)(*d*) and 83

ORDERS MADE BY JUDGE THAT ARE APPEALABLE ONLY WITH LEAVE

Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:

…

(*e*) where a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:

(i) for summary judgment;

(ii) to set aside a default judgment;

(iii) to strike out an action or a matter commenced by a writ of summons or by any other originating process, a pleading or a part of a pleading;

(iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;

(v) for further and better particulars;

(vi) for leave to amend a pleading;

(vii) for security for costs;

(viii) for discovery or inspection of documents;

(ix) for interrogatories to be varied or withdrawn, or for leave to serve interrogatories;

(x) for a stay of proceedings.

27 The disclosure order made under s 285 is undoubtedly an interlocutory order, it being an order made in the course of a winding-up proceeding. In *Jumabhoy*, the liquidators obtained an order from S Rajendran J under s 285 to examine an ex-managing director of an insolvent company. The ex-managing director applied to Tay Yong Kwang JC (as he then was) to discharge the order made by Rajendran J. The application, which was heard in chambers, was dismissed by Tay JC. Without writing to ask Tay JC whether he wanted to hear further arguments, the ex-managing director proceeded to file his notice of appeal to this court. The liquidators raised a preliminary issue as to whether this court had the jurisdiction to hear the appeal. This was because, under the previous s 34(1)(*c*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("old SCJA"), the judge had to certify that he required no further argument before an appeal could be lodged against an interlocutory decision of the High Court made in chambers. Section 34(1)(*c*) of the old SCJA read:

> **Matters that are non-appealable or appealable only with leave**
>
> **34.–**(1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> ...
>
> (*c*) subject to any other provision in this section, where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument;
>
> …

28 The liquidator there argued that this court had no jurisdiction to hear the purported appeal as Tay JC's order was interlocutory in nature and he was not asked, nor did he certify, that he did not want to hear further arguments. In essence, the liquidator argued that this court did not have the jurisdiction to hear the appeal because s 34(1)(*c*) of the old SCJA was not complied with by the ex-managing director. This court agreed with the contention that an order made under s 285 is of an interlocutory nature as it does not determine the substantive rights of the parties; it is of a procedural nature, akin to a *subpoena*. The court reasoned as follows at [15]:

> Obviously, in determining, in accordance with the *Bozson* test, whether an order is interlocutory or final, it is necessary to examine the nature and effect of the order. [Rajendran J's order] was made pursuant to an application by the liquidators in the course of their duties in winding up the company. The order did not determine the substantive rights of any party. It only required … the [ex-]managing director of the company, to appear before the court to be examined as to his knowledge of the affairs of the company and to [disclose] the relevant documents if they were in his possession. It is an order to assist the liquidators in discharging their functions of establishing the true state of affairs of the company. Such an order is clearly of a procedural nature and is similar in effect to a *subpoena* in other civil proceedings. We are unable to see how it could be said that this order affects substantive rights.

29 The *Bozson* test referred to in the passage above was laid down by Lord Alverstone CJ in the English Court of Appeal in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 at 548 as follows:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.

30 The *Bozson* test has been affirmed in many local cases (*eg*: *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1991] 2 SLR(R) 912; *Ling Kee Ling and another v Leow Leng Siong and others* [1995] 2 SLR(R) 36; *Aberdeen Asset Management Asia Ltd and another v Fraser & Neave Ltd and others* [2001] 3 SLR(R) 355; and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 ("*Wellmix Organics*")).

31 Although *Jumabhoy* was decided before the 2010 amendments to the SCJA, we do not think that this is a sufficient basis to reject *Jumabhoy's* application. That decision is consistent with the post-2010 authorities in how to determine whether an order is interlocutory in nature. The approach taken by the post-2010 authorities focuses on (1) whether the substantive rights of the parties have been determined (*OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [21], approved by *The "Nasco Gem"* at [14(b)]), or (2) whether the order disposes of everything in the proceeding (*Wellmix Organics* at [16] cited in *Dorsey James Michael v World Sports Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*") at [63], approved by *The "Nasco Gem"* at [13] and [14(b)]). This court in *The "Nasco Gem"* at [16] further emphasised that:

> … To determine whether an order made at an interlocutory application is final, the matter must be viewed in the context of the cause in the pending action. To reiterate, it is the cause of the pending *proceedings* in which the application is being brought which is significant, not the specific purpose of the *application*. [emphasis original]

32 The holding in *Jumabhoy* continues to apply even after the 2010 amendments to the SCJA. First, we agree that an order under s 285 does not determine the substantive rights of the parties as it merely requires a party to disclose documents or be orally examined. Secondly, an order under s 285 does not dispose of the entire subject matter in the proceedings. We therefore see no merit in the Appellants' argument that an order under s 285 is neither "peripheral to the main hearing determining the outcome" nor filed "between the initiation of the action and the final determination". On the contrary, an order s 285 is peripheral to the main action determining the outcome; it is merely an intermediate step in the entire winding-up proceedings.

33 We further wish to emphasise that an order under s 285 is not akin to pre-action interrogatories for which it was made clear by this court in *Dorsey* that leave need not be sought. In *Dorsey*, the appellant appealed against the order of the High Court Judge giving the respondent leave to serve pre-action interrogatories on the appellant. Before this court, the respondent applied to strike out the notice of appeal. The ground relied upon by the respondent in its striking out application was that the order of the High Court Judge was not appealable to this court by reason of s 34(1)(*a*) read with para (*i*) of the Fourth Schedule of SCJA. The said provisions had the effect of excluding the right to appeal to the Court of Appeal where a High Court Judge made an order "giving or refusing interrogatories" in a pending proceeding. However, this court agreed with the concession made by the respondent that an application for leave to serve pre-action interrogatories was not an interlocutory application. This was because such an application was not an application made between the time a party filed a civil case in court and when the case was finally heard for disposal. Rather, it was pertinent to note that the application for leave to serve pre-action interrogatories under O 26A r 1 of the ROC was made by way of originating summons. The sole purpose of the originating summons was to obtain discovery of information through the administration of interrogatories on the defendant to the originating summons. Once the application was determined, the entire subject matter of that originating summons was spent and there was nothing further for the court to deal with (at [57], [60] and [64]).

34 On the face of it, an application under s 285 may seem akin to an application for leave to serve pre-action interrogatories. After all, documents and information given under s 285, just like information given in pre-action interrogatories, may reveal potential causes of action against errant

parties. But there are significant differences. First, pre-action interrogatories are taken to seek relevant information for the *specific* purpose of commencing an action (GP Selvam, *Singapore Civil Procedure* vol 1 (Sweet & Maxwell, 2015) at para 26A/0/2). But s 285 serves a wider purpose in enabling liquidators to get documents and/or information for the purpose of determining the reasons for the company's demise. It applies irrespective of whether the liquidator is seeking information for the specific purpose of commencing an action (*Re Lion City Holdings Pte Ltd* [2003] 3 SLR(R) 493 ("*Re Lion City Holdings*") at [20]). Second, an application made under s 285, unlike that of an application under originating summons for leave to administer pre-action interrogatories, is made in the wider context of ongoing winding-up proceedings.

35 We therefore hold that the present appeal filed by the Appellants is not properly brought as leave was not first obtained. They were mistaken to have abandoned SUM 4035/2014, which was a leave application. Our decision on Issue 1 is sufficient to dispose of the matter. Nonetheless, as full arguments were advanced before us, we will deal with Issue 2 and take this opportunity to reiterate the principles that govern the exercise of the court's power to grant orders under s 285 and the procedure that should be adopted in relation thereto. Thus far, there has been no pronouncement by this court on s 285 although there have been four reported High Court cases on it (*Chi Man Kwong Peter and another v Lee Kum Seng Ronald* [1983–1984] SLR(R) 700; *Official Receiver of Hong Kong v Kao Wei Tseng and others* [1990] 1 SLR(R) 315; *Re Lion City Holdings;* and *Liquidator of W&P Piling Pte Ltd v Chew Yin What and others* [2004] 3 SLR(R) 164 ("*W&P Piling*")).

Issue 2: Whether the Judge had erred in the present case in granting the order under s 285

Arguments raised on appeal

Appellants' submissions

36 The Appellants submit that the Judge erred in ordering the disclosure of documents for a variety of reasons, namely:

(a) First, the court's powers under s 285 should be limited in light of the availability of pre-action discovery and interrogatories (referred to collectively as "pre-action procedures") in Singapore.

(b) Secondly, the Respondent is not an objective liquidator as (1) he is incentivised under the Funding Agreement to pursue a claim against PwC; and (2) he is focusing on claims which can be made to maximise recovery for Celestial's creditors, in particular, the Blackrock creditors.

(c) Thirdly, the Respondent did not give "full and frank disclosure of the documents which he already received or gathered since his appointment as provisional liquidator" [note: 4].

(d) Fourthly, the disclosure order is oppressive for reasons that will be elaborated on later.

Respondent's submission

37 The Respondent submits that this court should be slow in disturbing the Judge's exercise of discretion under s 285, in the absence of a clear error of law or principle on the part of the Judge.

The law

38 Section 285 is not peculiar to Singapore. It has its roots in the s 117 of the Bankrupt Law

Consolidation Act 1849 (12 & 13 Vict c 106) (UK), a statute of Victorian vintage which provided a *sui generis* process whereby a bankrupt could be examined by the court:

> touching all matters relating to his trade, dealings or estate, or which may tend to disclose any secret grant, conveyance or concealment of his lands, tenements, goods, money or debts …

39 That provision was later adopted in s 115 of the Companies Act 1862 (c 89) (UK), conferring on liquidators the extraordinary right to apply to court *ex parte* for leave to query persons on oath. However the old cases on this area of the law decided during the Victorian era should be viewed with circumspection because they were decided at a time when there was a high premium on privacy competing with an indeterminate threshold for disclosure (*W&P Piling* at [24]). The judicial disdain then for this provision is neatly encapsulated by Chitty J's description of it as a "Star Chamber" clause in *In re Greys Brewery Company* (1884) 25 Ch D 400 at 408, in reference to a hated court used in the Elizabethan and Stuart times where prisoners were forced, sometimes by torture, to answer self-incriminating questions (Andrew R Keay, *McPherson's Law on Company Liquidation* (Sweet & Maxwell, 3rd Ed, 2013) at para 15-039). Times and attitudes have changed, and there is today a much stronger emphasis on corporate governance (*W&P Pilin*g at [24]). The power under s 285, if wielded judiciously, could promote corporate governance.

40 Provisions similar to s 285 may also be found in other jurisdictions, such as in England (currently it is s 236 of the Insolvency Act 1986 (c 45) (UK) ("the UK Insolvency Act")), Australia (s 597 of the Corporations Act 1989 (No 109 of 1989) (Cth)) and Hong Kong (s 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (HK)). Caution should be exercised in relying on foreign cases as public interest considerations may not always be congruent and the relevant legislation, particularly those in England and Australia, have been radically overhauled. But so long as that caveat is borne in mind, foreign cases are still relevant to us (*W&P Piling* at [23]–[24]).

41 Section 285 is couched in very generous terms and should not be interpreted in a restrictive manner (*W&P Piling* at [27]). The order under s 285 is not limited to eliciting such information as would reconstitute knowledge which the company once had or had been entitled in law to possess. It can be used to assist the liquidator in gathering information that would aid him in discharging his duties.

42 There are two conflicting approaches on the scope of the English-equivalent of s 285. The constricted view is that its purpose is restrained by reference to what is needed for reconstituting the knowledge of the company (see, *eg*, *In Re Rolls Razor (No 2)* [1970] Ch 576 at 591–592, and *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90 ("*Re Cloverbay (No 2)*")). This has the effect of confining its use to gathering information that the company once had or had been entitled in law to possess. The expansive view is that the power may be invoked to assist in the accumulation of facts, information and knowledge that would enable or facilitate a liquidator to better discharge his statutory function (*Re Gold Co* (1879) 12 Ch D 77). This includes information that the company may not have been apprised of prior to the onset of insolvency. In assessing the merits of the two conflicting approaches, the House of Lords in *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer and Oppenheim* [1993] AC 426 ("*British & Commonwealth Holdings*") came down in favour of the expansive view. We agree with the observations of V K Rajah JC (as he then was) in *W&P Piling* that the expansive view should be the law in Singapore (at [29]).

43 A two-stage test should be used in deciding whether to make an order under s 285:

> (a) First, as a threshold, the liquidator has to show that there is some reasonable basis for his belief that the person can assist him in obtaining relevant information and/or documents, and that

they are reasonably (and not absolutely) required. The inclusion of the words 'suspected' and 'capable of giving information' in s 285 is pertinent for it signifies that the hurdle to be crossed by the liquidator is not high (*W&P Piling* at [21]). In determining whether this threshold is met, there is a general predisposition in favour of the liquidator's views. This is because he, being an officer of the court, is presumed to be neutral, independent and acting in the best interest of the company. However, deference to the liquidator's views should not be equated with unquestioning acceptance of his opinion as the court must still police his conduct to ensure that he does not go overboard (*W&P Piling* at [29(a)]). This formulation is slightly different from the usual statements in English cases that 'great weight' ought to be given to an office-holder, who will have detailed knowledge of the problems which exist in relation to the affairs of the company and the information required (see *eg*: *Re Norton Warburg Holdings Ltd* (1983) 1 BCC 98907 at 98913; *Re Cloverbay (No 2)* at 107). The court will not generally require the liquidator to specify the information/documents which are required to be produced with great precision, because the liquidator is ordinarily a stranger to the company and to do so will reduce the utility of the statutory provision (Sir Gavin Lightman & Gabriel Moss, *The Law of Administrators and Receivers of Companies* (Sweet & Maxwell, 5th Ed, 2011) at para 8-031).

(b) Secondly, once the first stage is satisfied, the courts will have to decide if the order under s 285 should be granted. At this stage, there is a need to balance conflicting interests. On the one hand, the liquidator is usually a stranger to the affairs of the company, and he may be unable to obtain information which he needs from persons connected with the company such as officers and directors of the company. Persons involved with the company, even where they are totally innocent, may have motives for concealing what they have done. It is also to be expected that those who have breached their duties or engaged in serious wrongdoing would put up a determined and sophisticated resistance to any inquiry into their conduct. A liquidator thus requires a strong and cost-effective mechanism to enable him to discharge his functions, including determining the cause of the company's insolvency, and whether to commence legal proceedings against the wrongdoers. Society has an interest in maintaining public confidence in the integrity and effectiveness of the legal mechanisms by which corporate behaviour is regulated (Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) at para 1732). Insolvency is undoubtedly a critically important event giving cause to investigate possible corporate wrongdoings. The power conferred under s 285 enables investigations to be carried out, and where necessary, for action to be taken. On the other hand, in view of the inquisitorial power conferred by the provision, the court should be careful not to make an order that is wholly unreasonable, unnecessary or oppressive to the person(s) concerned (*W&P Piling* at [3]; *In Re North Australian Territory Company* (1890) 45 Ch D 87 at 93*; In Re Castle New Homes Ltd* [1979] 1 WLR 1075 at 1089-G).

44 The following propositions are relevant to the balancing exercise in the second stage:

(a) No distinction should be made in the exercise of the power against officers of the company and third parties. It is obvious that officers of the company, such as directors, are duty-bound to cooperate with liquidators, but the absence of a fiduciary or contractual relationship with the company in the case of third parties should not fetter the exercise of that power *vis-à-vis* those third parties so long as the third party is able to provide relevant information and/or documents. The lack of a direct relationship between the company and the respondent is nonetheless a pertinent factor that would be considered in evaluating whether the application should be granted (*W&P Piling* at [29(c)]).

(b) While the risk of a respondent being exposed to liability is a matter which is relevant to determining whether there would be oppression, it is merely a factor, and does not present a bar

against the making of an order (*Re Chesterfield United Inc; Akers v Deutsche Bank AG* [2013] 1 BCLC 709 ("*Re Chesterfield*")). This is because the purpose of the power under s 285 is to enable the liquidator to obtain not only general information about the company's affairs but also to discover facts and documents relating to specific claims against specific persons. He is entitled to do so with as little expense as possible and with as much ease as possible. Nevertheless, the closer a proposed respondent is to being a defined target, the more oppressive an order for examination is likely to be (*Re Bank of Credit and Commerce International SA (No 12)* [1997] 1 BCLC 526 ("*Re BCCI (No 12)*") at 539).

(c) Although the provision does not differentiate between the production of documents and the oral examination of witnesses, an order for oral examination is much more likely to be oppressive than an order for the production of documents. An order for the production of documents involves only advancing the time of discovery if an action ensues; the liquidator is getting no more than any other litigant would get, save that he is getting it earlier. But oral examination provides the opportunity for pre-trial depositions which the liquidator would never otherwise be entitled to: the person examined has to answer on oath and his answers can both provide evidence in support of a subsequent claim brought by the liquidator and also form the basis of later cross-examination. There is therefore a greater risk of oppression when examination of witnesses is ordered (*Re Cloverbay (No 2)* at 103).

(d) The risk of exposure to a claim for serious wrongdoing/fraud carries with it an element of oppression. It is oppressive to require someone suspected of serious wrongdoing/fraud to prove the case against himself on oath before proceedings are brought. But it is not a conclusive factor as there is a public interest in the investigation of fraud (*Shierson and another v Rastogi and others* [2003] 1 WLR 586; *Daltel Europe Ltd (in liquidation) v Makki (No 1)* [2005] 1 BCLC 594; and *Woon's Corporation Law* (Walter Woon and See Mun Yee gen ed) (Lexis Nexis, 2005) at para 2952).

(e) Attempts to gain undue advantages in the litigation process will also be closely scrutinised to prevent abuse (see, *eg*: *Re PFTZM Ltd (in liquidation)* [1995] BCC 280; *Re Atlantic Computers plc* [1998] BCC 200; *Re Sasea Finance Ltd* [1998] 1 BCLC 559 ("*Re Sasea Finance*")). For example, in *Re Sasea Finance*, Sir Richard Scott VC refused the application under the English equivalent of s 285 as the liquidators already had information as to what happened within the company, and was merely seeking to use the provision to extract "damaging admissions or unconvincing justifications" for use in a prospective negligence suit against the auditors (at 572).

(f) The court will give weight to the risk that compliance might expose the respondent to claims for breach of confidence, or criminal penalties in the jurisdiction in which the documents are situated. Where there is a real risk, the court will be slow to order production (*In Re Mid-East Trading Ltd* [1998] BCC 726 at 754).

(g) The practical burden imposed when a great deal of time and expense is required to comply with an order for disclosure of documents (*British & Commonwealth Holdings*; *Re BCCI (No 12)*).

Procedure

45 The procedure for a s 285 application and examination is provided for under rr 49, 52, 55, 56 and 57 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed). *W&P Piling* made the following three points regarding procedure which should be borne in mind:

(a) First, the word "shall" under r 49 does not mandate that applications must be made *ex*

parte. In the normal course of events, applications should be made through an *inter partes* summons. But the court would be pragmatic if the liquidator is able to adduce some evidence that prior notice of such an application might result in a redefining or massaging of facts, or the concealment or destruction of documents (at [32]–[34]).

(b) Secondly, generally and in the absence of special considerations, a liquidator ought to elicit the co-operation of a proposed examinee before invoking s 285. It is sound practice for a liquidator to first make a written request for the documents he seeks or to submit a list of questions to the proposed respondent (or both) (at [32]).

(c) Thirdly, ideally, a liquidator should place his reasons for the application on record and on oath and this should be disclosed to the proposed respondent. But instances might well arise where, because of public interest considerations or a certain measure of sensitivity involving informants, the confidentiality of communications with the court might have to be strictly preserved. The court would in such cases be prepared to maintain the confidentiality of such information (at [35]).

Application of the law to the present case

46 We now deal with the application of the relevant principles to the present case.

Is the court's powers under s 285 limited in light of the availability of pre-action procedures?

47 We first deal with the Appellants' submission that the court's powers under s 285 should be limited in light of the availability of pre-action procedures. The Appellants argued:

(a) First, the Judge ought not to have relied on English cases decided before 26 April 1999 such as *British & Commonwealth Holdings* and *In Re Rolls Razor Ltd (No 2)*. Before 26 April 1999, pre-action discovery in England was limited to cases involving personal injury and death. The courts in those cases could not at the time avail themselves of pre-action discovery and had to resort to s 236 of the UK Insolvency Act.

(b) Secondly, a liquidator is not permitted to use s 285 if he already contemplates litigation but does not yet have sufficient information to frame/plead his claim. Instead, he should resort to pre-action procedures.

48 We rejected the Appellants' submission for the following reasons:

(a) First, s 285 does not provide that it should be restricted by pre-action procedures, nor does it state that it cannot be used once a liquidator contemplates litigation. As mentioned, s 285 is couched in very generous terms and should not be interpreted in a restrictive manner (*W&P Piling* at [27]).

(b) Secondly, s 285 can still be resorted to even if the liquidator contemplates litigation. For example, the court in *Re Chesterfield* observed that it was not a bar to an order under the English equivalent of s 285 that a liquidator has in mind the possibility of litigation as it is legitimate for him to investigate whether a claim exists.

(c) Thirdly, s 285 should not be restricted by pre-action procedures as s 285 applies irrespective of whether or not legal action could be commenced (*Re Lion City Holdings* at [20]). On the other hand, pre-action procedures are only used when an action could not be

commenced: they allow potential plaintiffs to seek relevant information and documents for the specific purpose of commencing an action.

(d) Fourthly, there do not appear to be any cases that stand for the proposition that the court's powers under s 285 should be limited in light of the availability of pre-action discovery procedures. It is true that pre-action discovery was confined to death and personal injury claims before 26 April 1999 (Paul Matthews & Hodge M Malek, QC, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) at para 3.31). But the English authorities pre-dating 26 April 1999 remain good law. They continue to be endorsed by the courts in Singapore (*eg*, *W&P Piling* and *Re Lion City Holdings*), England (*eg*, *Re Chesterfield*) and Hong Kong (*eg*, *Re Kong Wah Holdings Ltd (in liquidation)* [2004] 2 HKC 255 ("*Re Kong Wah*") and *Re New China Hong Kong Group Ltd (in liquidation)* [2003] 3 HKC 252) even though these jurisdictions have in place codified pre-action procedures. There is no indication in the cases that the power under s 285 (or its foreign equivalents) ought to be curtailed in light of the availability of pre-action procedures. While there is a degree of overlap between the objects of s 285 and the pre-action discovery procedures, the former being applicable in the specific context of the winding-up of a company, and the latter being of general application, there is nothing in logic or in general principles of statutory interpretation to suggest that just because of the overlap, the scope of the former should thereby be curtailed when its plain words are clearly wide.

Stage 1: Threshold requirement

49 We were satisfied that the Respondent had shown that there was a reasonable belief that the Appellants were able to assist him, and that the documents he sought were reasonably required.

50 The Appellants submitted that PwC would not be able to provide the Respondent with useful information and documents. This was because the suspicious transactions that the respondent was particularly concerned with, namely, the payments made to Power Charm, the loans made to the BVI subsidiaries by CCB and the auction of the shares of the PRC subsidiaries were all done in FY 2010, and by then, PwC was no longer Celestial's auditors. We were unable to accept this argument. The Appellants were the auditors of Celestial for several years (FYs 2004 to 2009) before these suspicious transactions happened. They were likely to have with them documents that could shed light on the circumstances of the suspicious transactions. Yet, the Appellants have only provided three arch-lever files of documents, which contain only high-level consolidation schedules, limited company and subsidiary level financial information, year-end balances and minutes of meetings which the Respondent had already recovered from other sources.

51 The Appellants relied on *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset*") to assert that any liquidator making an application under s 285 should be objective. They argued that the Respondent could not be an objective liquidator for two reasons:

(a) First, he was incentivised under the Funding Agreement to pursue a claim against PwC. The Funding Agreement provided that the Respondent would be paid the other half of his outstanding fees of US$507,122 in the event that, *inter alia*, he "identifies potential [c]laims that may be available … against third parties as a result of the Examination and Discovery Proceedings or otherwise" [note: 5] ; and

(b) Secondly, he focused on claims which could be made to maximise recovery for Celestial's creditors, and in particular, the Blackrock creditors, and sought to achieve this by applying pressure on Mr Ming Dequan (Celestial's ex-chairman) and other parties using s 285 so as to

obtain more reasonable settlement offers.

52 We could not accept these two reasons advanced by the Appellants because:

(a) First, we saw nothing objectionable about the Funding Agreement. Even though the Respondent might have stood to recover half of his outstanding fees if he could identify potential claims, it was also in the interest of all the creditors that a proper investigation be done to determine whether there were any viable claims against third parties. If the Respondent could find such claims, it would benefit the general unsecured creditors. As liquidator, the Respondent was duty-bound to identify potential claims to maximise recovery for Celestial's creditors. The Respondent should not be hindered by allegations of bias merely because he too may benefit from the same. The Respondent, as liquidator, is an officer of the court. Further, apart from carrying out his statutory duties, he has his own professional reputation to protect. The Appellants had not contended that the Respondent would pursue frivolous proceedings that would bring no benefit to the creditors in general, nor did they allege that the creditors would not support such actions. In any event, should the Respondent act unreasonably in pursuing frivolous claims, the court could sanction him by ordering personal costs against him. This should be sufficient disincentive for him to act irresponsibly.

(b) Secondly, the second objection was unsustainable as one of the Respondent's duties as a liquidator was precisely to maximise recovery for Celestial's creditors. The fact that these creditors include the Blackrock creditors who agreed to fund the investigation and pursue potential claims was irrelevant. The Respondent would be a breach of his duties as liquidator if he did not seek to determine whether there were claims that could be pursued for the benefit of the creditors in general despite being put in funds to do so by some creditors.

53 We were of the view that *Korea Asset* did not assist the Appellants. The facts of *Korea Asset* were very different from those in the present case. In *Korea Asset*, the majority creditors of a company sought to obtain a compulsory winding up order when voluntary winding up proceedings had already been commenced by the company's directors. The company's directors appointed liquidators for the voluntary winding up. The liquidators objected to the application made by the majority of creditors. The court found that the majority of creditors were not comfortable with, or confident in the liquidators' ability to discharge their duties even-handedly. The liquidators had also not been able to adequately satisfy the majority of creditors or the court how layer upon layer of intricate transactions between the company and related entities could be satisfactorily accounted for. There was therefore a real cause for the majority of creditors to perceive that the liquidators might not be able to discharge their duties objectively and fairly. The present case is completely unlike that in *Korea Asset*. The Respondent was appointed by creditors in a compulsory winding up and all his actions thus far have been to further the interests of the creditors rather than those of Celestial or its shareholders and directors.

Stage 2: Balancing exercise

(1) Reasons raised by the Appellants in saying that the grant of the disclosure order by the Judge would be oppressive

54 The Appellants submitted that the disclosure order granted by the Judge would be oppressive because:

(a) The Respondent's true motivation in bringing SUM 2473/2013 was to seek discovery from the Appellants to bolster his case in respect of a potential claim against them.

(b) It required PwC to submit its working papers.

(c) There was a real risk that the Appellants would be exposed to civil and criminal sanctions in the PRC.

(d) The order granted by the Judge was too wide as it covered all documents in the Appellants' possession, custody or control relating to Celestial and spanned the entire period during which PwC was engaged as Celestial's auditors, *ie*, FYs 2004 to 2009.

(2) Was the Respondent's true motivation in bringing SUM 2473/2013 to bolster his case in respect of a potential claim against the Appellants?

55 In relation to this allegation the Appellants accused the Respondent of a "deliberate lack of candour" [note: 6] in refusing to "provide the [c]ourt with full and frank disclosure of the extent and nature of the information and documents which he already received or gathered since his appointment as provisional liquidator" [note: 7] to date. The Appellants said that the Respondent had already obtained substantial documents and information from various sources, such as two of Celestial's independent directors (Mr Lai Seng Kwoon and Mr Loo Choon Chiaw) and therefore needed no further information and documents. The Appellants submitted that if the Respondent had made full disclosure of the information that he already had, it would have exposed his true motives for the application, namely, to fish for more information in order to bolster a claim against them.

56 We could not accept the Appellants' objection. First, it was not true that the Respondent had not been forthright in providing full and frank disclosure. In his affidavit of 10 May 2013, he set out the information he had obtained and the sources thereof. [note: 8] Even then, there were significant gaps in the information which he had obtained relating to Celestial's insolvency and the suspicious transactions. Second, the assertion that the Respondent's true motive in the application was to find fault with the Appellants' audit work, and unfairly obtain evidence in advance to substantiate a claim against them, was completely baseless. The Respondent had never said anything about the quality of the Appellants' audit work or suing them. Furthermore, the Respondent's evidence was that he was keeping an open mind as to whether there were any claims that might exist against the Appellants. His object then was simply to try and obtain as much information as possible in relation to Celestial's affairs.

57 In any event, it is legitimate for a liquidator to avail himself of s 285 to investigate whether a claim exists, and if so, to sue the party responsible. It would be a breach of a liquidator's duty if he does not sue when there is a legitimate claim against a third party. It is not a bar to an examination order being made that a liquidator has in mind the possibility of litigation and that it is legitimate for the liquidator to seek relief under s 285 with a view to investigate whether a claim exists (*Re Cloverbay (No 2)* at 103; *Re Chesterfield*).

(3) Is turning over working papers oppressive?

58 The Appellants submitted that asking them to turn over PwC's working papers, which contained its proprietary information, is oppressive.

59 It is true that the working papers belong to the Appellants and contain proprietary information meant for internal use in preparing audit reports. But this does not mean that the disclosure of these documents cannot be ordered. There are precedents where working papers were ordered to be turned in.

60 In *British & Commonwealth Holdings*, the auditors of the company concerned were ordered to disclose their working papers because they included "information of relevance". The applicant in that case was the administrator of an insolvent company. The insolvent company had earlier acquired a target company. It acquired the target company in part because of a report by the target company's auditors that the target company had sufficient working capital for its operations. It was later found that the target company's assets were insufficient for operations. The administrator of the insolvent company then applied for and obtained an order for the auditors of the target company to disclose "all books, papers or other records … relating to or having any connection" with:

(a) The target company's year-end audit report immediately before the acquisition;

(b) The target company's year-end audit report immediately after the acquisition; and

(c) The acquisition of the target company, including but not limited to the working capital review.

The disclosure order was challenged on the ground that it was so wide that it included the working papers of the target company's auditors other than the papers of the target company itself. The House of Lords upheld the order on the basis that these papers could contain information of relevance to the administrator's investigation.

61 In *Re Kong Wah*, the liquidator relied on a statutory power in Hong Kong's equivalent of s 285 to compel the disclosure of the auditors' "internal review" papers in addition to its audit working papers. The court stated that the fact that the documents were internal documents did not necessarily mean that they should be excluded from disclosure and that this was merely a factor to be taken into account (at [53]). In that case, the auditors did not suggest that the internal review documents did not contain pertinent information. The court took the view that the risk of oppression to the auditors was outweighed by the reasonable requirements of the liquidator to have access to them in order to discharge his statutory duties.

62 Therefore, the mere fact that the working papers are PwC's property cannot, in and of itself, form a basis for resisting the liquidator's application. The papers should be disclosed so long as they contain information that is of relevance to the liquidator's investigation.

(4) Civil and criminal liabilities in the PRC

63 The Appellants submitted that there was a risk that that they would be exposed to criminal liability under the Law of the People's Republic of China on Protecting the State Secrets ("State Secrets Law"). It is common ground that the State Secrets Law applies to the Appellants. The Appellants said that the PRC subsidiaries had significant dealings with the Daqing Provincial Government, and they could be made to hand over documents concerning those dealings under the Judge's disclosure order. This could run afoul of the State Secrets Law as the authorities in the PRC have a wide discretion in determining whether a document contains "State Secrets" under the State Secrets Law. Article 9 of the State Secrets Law broadly and vaguely defines "State Secrets" to include "other confidential issues which are recognised by the State-secret protection administration" or "classified as State Secrets by the State-secret guarding department".

64 The Appellants also argued that it was common ground that the Appellants owed a duty of confidentiality to the PRC subsidiaries. The Appellants said that they might be forced to breach their duty of confidentiality by disclosing documents or information obtained from the PRC subsidiaries. This could render the Appellants liable to compensate the PRC subsidiaries for losses incurred as a result.

65 We were not convinced that the Appellants would, as a result of complying with the disclosure order, expose themselves to civil and criminal sanctions under PRC law for the following reasons:

(a) First, it was likely that there were no state secrets in those documents because:

(i) The Appellants had not shown that the documents contain state secrets; and

(ii) The Appellants were based outside of the PRC. As such, it was highly unlikely that as foreigners they would be permitted to be in possession of documents containing PRC state secrets.

(b) Secondly, even if there were state secrets in the documents, Article 20 of the State Secrets Law provides that parts of the documents not containing state secrets could still be disclosed.

(c) Thirdly, the Appellants would not be in breach of their duty of confidentiality owed to the PRC subsidiaries. Mr Gao Jun, the Respondent's PRC law expert, testified before the Judge that there was unlikely to be liability if the Appellants disclosed documents and information pursuant to a court order. [note: 9] The Judge did not believe the Appellants' experts, Mr Zhang Zhonggang and Mr Lin Lei, who disagreed with Mr Gao. [note: 10] This was because Mr Zhang and Mr Lin failed to give examples where the PRC courts have imposed liability on a foreign entity acting in accordance with an order of a foreign court of competent jurisdiction (the Judgment at [50]).

(5) Is the order granted by the Judge too wide?

66 The Appellants argued that the order granted by the Judge was too wide as it covered all documents in the Appellant's possession, custody or control relating to Celestial spanning the entire period during which PwC was engaged as Celestial's auditors, *ie*, FYs 2004 to 2009.

67 We saw no merit in the Appellants' objection. It was not uncommon for courts to grant orders compelling parties to disclose all documents in their possession, custody or control relating to the insolvent company in question. This was done in *British & Commonwealth Holdings* and *Re BCCI (No 12)* at 544d. *British & Commonwealth Holdings* was itself a case where auditors were ordered to disclose all documents they had in relation to an insolvent company. We further noted that PwC was a respected and large audit firm. It should have kept proper records in relation to Celestial and should have the means to retrieve and disclose them expeditiously.

Conclusion

68 We therefore dismissed the appeal. We also made the following additional orders:

(a) The costs of the appeal as well as of the previous stay applications be fixed at a grand total of $60,000 plus reasonable disbursements.

(b) The order for disclosure should be complied with within three weeks from the date of judgment (27 January 2015), with liberty to apply.

(c) Time shall not run against the Respondent for the period of three weeks mentioned in (*b*).

[note: 1] Para 28 and Tab YCW 2 in affidavit of Mr Yit Chee Wah dated 31 May 2012 in Originating

Summons 526 of 2012.

[note: 2] Order made in Chambers (Originating Summons 526 of 2012) dated 20 June 2012.

[note: 3] Affidavit in support of application for order for examination by Mr Yit Chee Wah dated 10 May 2013 at para 24 (Core Bundle, vol 2, p 15 – 16).

[note: 4] Appellants' Case at para 47.

[note: 5] Clause 4.1 of the Funding Agreement in Tab YCW 2 in affidavit of Mr Yit Chee Wah dated 31 May 2012 in Originating Summons 526 of 2012.

[note: 6] Appellants' submissions dated 27 October 2014 at para 52.

[note: 7] Appellants' submissions dated 27 October 2014 at para 47.

[note: 8] Affidavit in support of application for order for examination by Mr Yit Chee Wah dated 10 May 2013 at para 24 (Core Bundle, vol 2, p 15 – 16).

[note: 9] Para 44 and 58 of Expert report of Gao Jun in DD-1 to affidavit of Mr Gao Jun dated 16 July 2013.

[note: 10] Para 26 of Joint expert report of Zhang Zhonggang & Lin Lei in ZL-1 to affidavit of Mr Zhang Zhonggang and Mr Lin Lei dated 14 June 2013.

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