IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 96

Civil Appeal No 188 of 2019

Between

Sinfeng Marine Services Pte Ltd

… *Appellant*

And

(1) Joshua James Taylor
(2) Yit Chee Wah

… *Respondents*

In the matter of Originating Summons No 419 of 2019

Between

(1) Joshua James Taylor
(2) Yit Chee Wah

… *Applicants*

And

Sinfeng Marine Services Pte Ltd

… *Respondent*

Civil Appeal No 189 of 2019

Between

Cosco Petroleum Pte Ltd

… *Appellant*

And

(1) Joshua James Taylor
(2) Yit Chee Wah

… *Respondents*

In the matter of Originating Summons No 421 of 2019

Between

(1) Joshua James Taylor
(2) Yit Chee Wah

… *Applicants*

And

Cosco Petroleum Pte Ltd

… *Respondent*

Civil Appeal No 190 of 2019

Between

Costank (S) Pte Ltd

… *Appellant*

And

(1) Joshua James Taylor
(2) Yit Chee Wah

… *Respondents*

In the matter of Originating Summons No 420 of 2019

Between

(1) Joshua James Taylor
(2) Yit Chee Wah

… *Applicants*

And

Costank (S) Pte Ltd

… *Respondent*

JUDGMENT

[Insolvency Law] — [Winding up] — [Creditors' appointed liquidators] — [Order for examination] — [Application to Court to have questions determined or powers exercised] — [Costs of compliance] — [ss 285 and 310 of the Companies Act (Cap 50, 2006 Rev Ed)]

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Sinfeng Marine Services Pte Ltd
v
Taylor, Joshua James and another and other appeals

[2020] SGCA 96

Court of Appeal — Civil Appeal Nos 188, 189 and 190 of 2019
Tay Yong Kwang JA, Belinda Ang Saw Ean J and Woo Bih Li J
11 June 2020

9 October 2020 Judgment reserved

Belinda Ang Saw Ean J (delivering the judgment of the court):

Introduction

1 Coastal Oil Singapore Pte Ltd ("the Company") was placed in a creditors' voluntary winding up with 13 December 2018 being the commencement date of the creditors' voluntary winding up pursuant to s 291(6) of the Companies Act (Cap 50, 2006 Rev Ed) (effective prior to 30 July 2020) ("CA"). The respondents are the current joint and several liquidators of the Company. The appellants in CA/CA 188/2019, CA/CA 189/2019 and CA/CA 190/2019 ("CA 188", "CA 189" and "CA 190" respectively) seek a discharge of the orders for the production of documents made against each of them pursuant to s 285 of the CA. Besides examining the appellants' contention that the orders for production were, in the circumstances unreasonable and oppressive, this judgment will consider the anterior question of whether an application under s 310(1)(*b*) of the CA is required to extend the powers of

examination of persons and production of documents under s 285 of the CA to a creditors' voluntary winding up. To the appellants, the anterior question on s 310(1)(*b*) is an important issue that would determine the appeals *in limine*. The respondents disagree as their stance in opposition, amongst other things, is that as liquidators, they have a right to directly apply for an order for examination and/or production of documents under s 285 alone. This judgment will examine the competing views outlined here.

Events leading to the s 285 applications made by the respondents

2 We begin with a brief narration of facts relating to the Company and the appellants before highlighting the main events that led to the respondents' applications made under s 285 of the CA by way of HC/OS 419/2019, HC/OS 420/2019 and HC/OS 421/2019 ("the s 285 applications").

3 The Company was incorporated in Singapore on 28 October 2004 and was, at all material times, in the business of wholesale distribution of petroleum and petroleum products. As a bunker supplying company, it also traded in marine fuel and related products. The directors of the Company were Mr Tan Sin Hwa ("Mr Tan") and Mr Yeung Wing Sing ("Mr Yeung") who each held 50% of the shares in Coastal Holdings Ltd, the parent company of the Company.

4 The appellant in CA 188 is Sinfeng Marine Pte Ltd ("Sinfeng"). Sinfeng was one of the Company's main trading partners between 2012 and 2018. Sinfeng is engaged in the supply and trading of marine fuel and related products. Cosco Petroleum Pte Ltd ("Cosco"), the appellant in CA 189, was one of the Company's main customers from late 2015 to around April 2017. Cosco and Sinfeng are subsidiaries of Cosco Shipping International (Hong Kong) Co. Ltd ("Cosco (HK)"). The appellant in CA 190 is Costank (S) Pte Ltd ("Costank").

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Costank is in the business of trading and supplying oil bunkers and was one of the Company's main suppliers from 2012 to 2018. Mr Tan is a director and a 49% shareholder in Costank.

5 The Company owed US$357m to 79 companies, of which US$354m was owed to major banks. Saddled with hefty debts, the Company was placed in a creditors' voluntary winding up. Mr Abuthahir Abdul Gafoor was appointed as its provisional liquidator on 13 December 2018. On 28 December 2018, Mr Andrew Grimmett and Mr Lim Loo Khoon ("Mr Lim") were appointed the joint and several liquidators of the Company. During a creditors' meeting on 28 December 2018, Mr Haridass Ajaib ("Mr Haridass"), the Company's legal advisor, notified the parties present that Mr Tan had admitted to him, sometime in early December 2018, that Mr Tan had prepared fraudulent documents "purportedly for trades carried out by the Company and these documents were used for bank financing" ("the Admission").[1] On 8 January 2019, Mr Haridass informed Mr Lim that Mr Tan had "began entering into fraudulent transactions since 2013/2014" and that the fraudulent documents referred to were "contracts for the sale of oil cargoes". Mr Tan did not give details of these transactions though he had identified some of the creditor banks involved.[2] Mr Tan has since remained uncontactable. On 10 January 2019, a creditors' meeting was convened to approve a change in liquidators. Pursuant to this meeting, the respondents were appointed and took over as the joint and several liquidators of the Company and learnt of the circumstances mentioned here.

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1 ROA Vol III Part A (CA 189) (Taylor's 1st Affidavit in OS 419) at pp 4 and 22.

2 ROA Vol III Part A (CA 189) (Taylor's 1st Affidavit in OS 419) at p 29.

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6 On 4 January 2019, Cosco (HK) issued a public announcement on the Hong Kong Stock Exchange ("the Announcement"). The Announcement stated that a number of commercial banks had claimed payment of assigned receivables due from Sinfeng to the Company ("the assigned receivables"). The Announcement also stated that Sinfeng's management was of the preliminary view that the "documents in relation to almost all of the [assigned receivables were] not genuine".[3] In the light of the Announcement, the respondents requested full details of all the documents and transactions that had been identified as "not genuine". Sinfeng provided the documentation on 29 January 2019. The documents that Sinfeng provided were ostensibly created between August and November 2018 and they included invoices, sale contracts, notices of assignment, bunker delivery notes, bills of lading and certificates of quality.

7 From the respondents' interviews with two of the Company's main suppliers of bunker, Arkananta Yasa Pte Ltd ("Yasa") and Mewah Logistics Pte Ltd ("Mewah"), the respondents learnt that there were tripartite trading loops involving entities such as Sinfeng/Cosco, the Company and Yasa and in other trade loops, entities such as Costank, the Company and Mewah. In those tripartite trading loops, the same goods were sold by the appellants to Yasa/Mewah, then to the Company, and then back to the appellants. Following the interviews, in February 2019, the respondents requested the appellants' records and documents in relation to its trading relationship, transactions and payment invoices with the Company for the period between 1 January 2016 and 31 December 2018. The appellants refused the respondents' requests, generally on the basis that the documents sought were not necessary or reasonable.

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[3] Core Bundle Vol II (CA 189) at pp 17–18.

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8 In April 2019, the respondents filed the s 285 applications. The respondents applied for examination of persons and the production of a whole range of documents (hereafter collectively referred to as "the Third Party Documents"):

(a) a general description of the trading relationship between the Company and the appellants, including the nature of the trading activities, periods of time of the relationship, and any other information relevant to explain the relationship and business dealings with the Company;

(b) copies of sales contracts between the Company and the appellants with respect to trading or other activities;

(c) copies of invoices issued by the Company to the appellants and the accompanying delivery documentation, *eg*, Bill of Lading, Bunker Delivery Note;

(d) copies of debit or credit notes issued by the appellants to the Company evidencing adjustments to the amount due per invoice issued by the Company;

(e) copies of the appellants' proof of payment which show the payments the appellants made to the Company and/or monthly or any other periodic summary of payments made by the appellants to the Company;

(f) documentation, including invoices, debit notes, credit notes, contracts, delivery documents and payment proof relating to the onward

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buyer(s) of products supplied by the Company to the appellants during the period; and

(g) documentation, including invoices, debit notes, credit notes, contracts, delivery documents and payment proof relating to the initial supplier(s) of products supplied by Sinfeng and Costank to the Company.

The respondents sought the Third Party Documents at (a)–(f) above against Cosco (for the period 1 July 2012 to 13 December 2018), and all of the Third Party Documents listed above against Sinfeng (for the period 1 January 2012 to 2 April 2019) and Costank (for the period 1 July 2012 to 13 December 2018).

The decision below

9 On 12 July 2019, the High Court judge ("the Judge") substantially ordered production of the Third Party Documents sought. The Judge accepted the respondents' contention that the bulk of the Third Party Documents was reasonably required as the respondents were duty-bound to determine the events that led to the Company's demise. The Judge held that the respondents could not solely rely on the records kept by the Company, and ascertaining whether there were any discrepancies between the records kept by the Company and the appellants would be helpful in identifying any fraudulent transactions in the light of Mr Tan's admission that he had perpetrated fraud in relation to the Company's trades since 2013 or 2014. Accordingly, the order to produce, directed at third parties, was for the period between 1 July 2012 and 13 December 2018, except for "copies of debit or credit notes issued by the [appellants] to the Company" (see [8(d)] above) ("the Production Orders"). As

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regards the excluded documents, the Judge accepted that the expense of producing them outweighed their utility.

10 The Judge made no order on the prayer for an examination of persons. However, the Judge granted the respondents liberty to re-apply for an examination order in the future.

Main issues in the three appeals

11 The appellants appealed against the Judge's decision to grant the Production Orders. Before the hearing of these appeals in June 2020, the respondents, on 16 March 2020, applied in CA/SUM 37/2020, CA/SUM 38/2020 and CA/SUM 39/2020 for leave to adduce the statutory declarations of Mr Lim Pong, a director of Mewah, dated 19 August 2019 ("Mr Lim Pong's Statutory Declaration") and of Mr Ong Ah Huat ("Mr Ong"), the former Chief Financial Officer of the Company, dated 26 June 2019 ("Mr Ong's Statutory Declaration"). Mr Lim Pong and Mr Ong's Statutory Declarations were obtained pursuant to the respondents' application for them to be examined on oath under s 285(1) of the CA in Originating Summons No 562 of 2019 and Originating Summons No 411 of 2019 respectively. On 3 April 2020, the respondents were granted leave to adduce both statutory declarations.

12 There are two broad issues in these appeals. The first issue covers the thrust of the questions raised by this court at the hearing of the appeals, and the parties have tendered their written submissions addressing the questions. In the main, this pertains to the query on whether the Production Orders, granted under s 285 of the CA in a creditors' voluntary winding up, were made outside the court's statutory power. If the first issue is determined in the affirmative, the

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Production Orders would have to be set aside for want of statutory power. Related to the first issue are two sub-questions on s 310(1)(*b*) of the CA:

(a) whether an application under s 310(1)(*b*) is required to extend the court's power under s 285 to a creditors' voluntary winding up; and

(b) if so, whether the respondents' omission to make an application under s 310(1)(*b*) can be remedied as a formal defect or irregularity.

13 Section 310(2) becomes a necessary consideration if both sub-questions (a) and (b) above are resolved in the respondents' favour. Be that as it may, we have touched on s 310(2) in the course of discussing the sub-questions. Our discussion of the second issue assumes that liquidators appointed in a creditors' voluntary winding have obtained an order under s 310 for an examination and/or production of document orders pursuant to ss 285(1) read with 285(2) and/or 285(3), as the case may be. Upon such an assumption, the second issue is whether the Production Orders made pursuant to s 285 are, in the circumstances unreasonable and/or oppressive.

14 Finally, the two subsidiary questions that arose at the hearing of these appeals are: (a) whether an order for production of documents under s 285(3) of the CA is conditional upon the court granting an examination order under s 285(2); and (b) whether the court is empowered to award costs of complying with a production order made under s 285(3). For convenience, these subsidiary questions are discussed under the heading "Miscellaneous issues" below.

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Whether the Production Orders were made outside the court's power

15 Sections 285 and 310 of the CA are provisions from different divisions of the CA. Section 285 is placed under Division 2 – "Winding up by Court" whereas s 310 is placed under Division 3 – "Voluntary winding up". This legal framework is important as the modes of winding up reflect the policy distinction between voluntary and compulsory liquidations and with this distinction comes the scope of the statutory powers of the court and the liquidators.

16 Section 285 provides as follows:

> **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.
>
> …
>
> [emphasis in original]

17 Section 310 provides as follows:

> **Application to Court to have questions determined or powers exercised**

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> **310.** (1) The liquidator or any contributory or creditor may apply to the Court –
>
> (*a*) to determine any question arising in the winding up of a company; or
>
> (*b*) to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court.
>
> (2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.
>
> [emphasis in original].

The arguments

18 The respondents submit that ss 285 read with 310(1)(*b*) of the CA permit a liquidator in a creditor's winding up ("CVL liquidator") to seek and compel production of documents and to examine persons for information on the affairs and dealings of the company. When a CVL liquidator takes out a s 285 application, so the argument develops, in effect, he does it through s 310(1)(*b*) without any application under the latter provision or requirement to make any specific reference to it. The court simply decides an application made under s 285 on its merits. Alternatively, the respondents argue that s 305(1)(*b*) allows a liquidator in a creditors' voluntary winding up to exercise any of the powers given to court-appointed liquidators, and this provision includes the power to make an application under s 285. We set out this provision at [38] below.

19 The appellants submit in opposition that a court cannot exercise a statutory power that it otherwise does not have. Section 285 resides in the division governing compulsory winding up and the provision is available to court-appointed liquidators only. Therefore, a CVL liquidator cannot invoke the court's statutory powers of examination under s 285 without first making an

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application under s 310(1)(*b*). If an application is made under s 310(1)(*b*), then under s 310(2), the court has the full discretion on whether it would accede to the CVL liquidator's request to exercise such power. If the court is satisfied that it is just and beneficial for an examination of persons in a creditors' winding up, the court may accede to the CVL liquidator's application on terms and conditions as it thinks fit. The appellants conclude that the Production Orders should be discharged since they were granted only under s 285 and were clearly outside of the court's statutory power.

20 This is a convenient juncture to mention the respondents' undertakings given during the hearing of the appellants' application to stay execution of the Production Orders (see *Taylor, Joshua James and another v Sinfeng Marine Services Pte Ltd and other matters* [2019] SGHC 248 at [45]). The undertakings are to apply pending the conclusion of these appeals. The respondents have undertaken, *inter alia*, that should the appeals succeed, to return or destroy the documents (including any derivative or secondary materials which arise from the primary documents and/or information) provided by the respective appellants and would not rely on such documents without leave of court.

*Whether an application under s 310(1)(***b***) is required to extend the court's statutory powers of examination under s 285 to a creditors' voluntary winding up*

21 We note that the Insolvency, Restructuring and Dissolution Act 2018 (No 40 of 2018) ("IRD Act") came into operation on 30 July 2020. However, it is clear from the transitional provisions that the insolvency regime under the CA remains the applicable statutory framework to be applied in Singapore in relation to any voluntary winding up that commenced before 30 July 2020 (see ss 526(1)(*h*) and 526(8) of the IRD Act read with s 291(6) of the CA). As earlier

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stated (see [1] above), the Company was placed in a creditors' voluntary winding up with 13 December 2018 as the commencement date.

22 Section 285 deals with the court's statutory power to examine persons in a compulsory winding up. This is evident not only from the legislative history of s 285 but its deliberate placement in the CA under Division 2 – "Winding up by Court" and Subdivision 4 – "General powers of Court". The legislative history of s 285 of the CA was recently summarised by Audrey Lim J in *Ang Chek Chin v ANS Import & Export Pte Ltd (formerly known as Ang Ngee Seng Import & Export Pte Ltd)* [2020] SGHC 177 at [27]–[31] as follows:

> 27 … In gist, s 285 of the CA has its origins in s 117 of the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict c 106) (UK), which was later adopted into s 115 of the Companies Act 1862 (25 & 26 Vict c 89) (UK) ("1862 UK Act"), then s 174 of the Companies (Consolidation) Act 1908 (c 69) (UK), s 214 of the Companies Act 1929 (c 23) (UK) ("1929 UK Act"), and s 268 of the Companies Act 1948 (c 38) (UK) ("1948 UK Act"). This was then enacted in Singapore as s 211 of the Companies Ordinance (Cap 174, 1955 Rev Ed) ("Companies Ordinance"). Section 115 of the 1862 UK Act initially only allowed the court to invoke the power to summon a person after a winding-up order had been made, but this was expanded in the 1929 UK Act to also allow the power to be invoked after the appointment of a provisional liquidator ([*Re China Underwriters Life and General Insurance Co Ltd* [1988] 1 SLR(R) 40 ("*Re China Underwriters*")] at [42]). It was this expanded version which was enacted in Singapore, and s 211(1) of the Companies Ordinance provided that the court's power to summon a person to be examined and to produce documents *etc*, may be made "at any time after the appointment of a provisional liquidator or the making of a winding-up order" ("the Phrase"). Hence, this made clear when the power could be invoked.
>
> 28 However, the Phrase in s 211(1) of the Companies Ordinance was removed when s 211 was re-enacted as s 249 of the Companies Act (Act 42 of 1967) ("Companies Act 1967"). Instead, s 249 of the Companies Act 1967 was remodelled to be identical to s 249 of the Companies Act 1961 (Aus), which had likewise been derived from s 268 of the 1948 UK Act. Section 249(1) of the Companies Act 1967 read:

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> 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 deems capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company.
>
> 29 Whilst the removal of the Phrase may suggest that the powers under s 249 were no longer restricted to situations of winding up or where a provisional liquidator had been appointed, legislative material suggests that there was no intent to make such a substantive change. The Explanatory Statement to the Companies Bill (Bill No 58/1966) stated that the clauses in Part X of the Companies Bill (which included what was eventually s 249 of the Companies Act 1967) "more or less reproduce[d] the provisions of the existing [Companies] Ordinance". A similar point was made in *Re China Underwriters* (albeit in the context of whether the court could exercise its jurisdiction in relation to a foreign company not wound up in Singapore) where the court noted (at [42]) that the removal of the Phrase was probably because it was thought to be superfluous.
>
> 30 *As such, the omission of the Phrase from s 249 of the Companies Act 1967 (and maintained as such in s 285 of the CA) did not change the original intent that the powers under that section could only be invoked where a winding up order has been made or a provisional liquidator had been appointed.*
>
> 31 This is further supported by r 49 of the [Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed)], which provides that if a s 285 application is made by a creditor or contributory, the summons and affidavit in support of the application shall be served on the liquidator – this requirement can only be fulfilled if the company has been wound up or a liquidator appointed. …
>
> [emphasis added]

23 It is also clear from the legislative framework that s 285 may be invoked by a court-appointed liquidator but not a CVL liquidator who is not court-appointed. For a CVL liquidator to invoke s 285, the CVL liquidator has to apply under s 310(1)(*b*) for an examination and/or production of document order pursuant to ss 285(1) read with s 285(2) and/or s 285(3). Pausing here on the

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phrasing of s 285(1), it is evident that while a liquidator may, in his application, seek only an order for the production of document under s 285(3), this must be made with reference to s 285(1). We will discuss this point at a later stage in this judgment. Notably, s 310 falls under Subdivision 4 – "Provisions applicable to every voluntary winding up", and this provision acts as a gateway for a CVL liquidator to request the court's *assistance* to extend the statutory powers generally afforded in a compulsory winding up to a creditors' voluntary winding up. In this context, absent the requisite application under s 310(1)(*b*) in a creditors' voluntary winding up, s 285 cannot be relied upon.

24 Each of the respective modes of winding up reflects the policy distinction between voluntary and compulsory liquidations. The policy distinction is employed in ss 285 and 310. Depending on the mode of winding up, the two provisions demonstrate the degree of control by the court in the conduct and supervision of the winding up. In a compulsory winding up, the liquidator is appointed by the court and is an *officer of the court* (see s 288 of the CA). In addition, the winding up by the court is conducted under the court's direct supervision. On the other hand, a liquidator in a non-compulsory winding up, although under the court's general supervision and control (see ss 313(2)–(4) of the CA), is appointed by the members or creditors of the company as the case may be, and is an agent of the company in a private arrangement (see generally *Re Supreme Tycoon Ltd (In Liq)* [2018] 2 HKC 485 at [14]). Notably, in a creditors' voluntary winding up, the company is insolvent, and the parties primarily interested are the creditors who are in control through the creditors' committee of inspection. In a voluntary winding up – members' and creditors' – the court is in the background to be referred to (for instance via s 310) if the necessity should arise.

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25 *In re Phoenix Oil and Transport Co Ltd (No. 2)* [1958] Ch 565, Wynn-Parry J, in a classic statement explaining the policy distinction between voluntary and compulsory liquidations said (at 570):

> A study of the relevant sections of the Companies Act, 1948, dealing with winding up shows clearly that as regards voluntary winding up the legislature has followed (in pursuance of the policy of previous Companies Acts) a different policy from that laid down in the case of compulsory winding up. The reason is not far to seek. *In the case of voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditors' liquidation, the creditors, through their committee of inspection, are in control as against the contributories*; while in the case of a members' voluntary winding up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that *in both forms of voluntary winding up the court is in the background to be referred to if the necessity should arise*. In the case of a winding up by the court, however, different considerations arise. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control.
>
> [emphasis added]

26 In addition, these two modes of liquidation also have a bearing on the powers of the liquidators as observed by Vinodh Coomaraswamy J in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 ("*Petroships*") at [139].

27 Returning to the matter of examination of persons and for production of documents, our views on ss 285 and 310 are consonant with the equivalent insolvency framework in England and Australia that *preceded* the current English and Australian insolvency schemes, specifically, the Insolvency Act

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1986 (C 45) (UK) ("IA") and the Companies Act 2001 (Aus) ("2001 AusCA") respectively. Section 285 of the CA is *in pari materia* with s 268 of the Companies Act 1948 (c 38) (UK) ("1948 UKCA") and s 249 of the Companies Act 1961 (Vic) ("1961 AusCA") (see [22] above). Section 310 of the CA is *in pari materia* with s 307 of the 1948 UKCA and s 274 of the 1961 AusCA. English and Australian cases, insofar as they relate to the relevant provisions under the 1948 UKCA and the 1961 AusCA remain relevant and helpful in our analysis.

28 We first turn to the appropriate Australian statutory framework in relation to the court's powers of examination in a voluntary liquidation. The court's powers of examination under s 249 of the 1961 AusCA could only be exercised by the court in a voluntary liquidation if the Australian court was satisfied that the exercise of the power would be just and beneficial pursuant to s 274 of the same act (see the Supreme Court of Western Australia's decision in *Saraceni v Jones (as rec and mgr of Newport Securites Pty Ltd and as agent of the Mortgagee in Possession of 3517 Road, Wilyabrup) and others* [2012] 287 ALR 551 at [131]). In short, the position, as enunciated by Greenwood J in *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (in Liq)* [2016] FCA 1048, is that there must first be proper conferment of powers of examination upon a court in a voluntary liquidation. To be properly conferred, an application to the court for an appropriate order must be first obtained (at [46]):

> It is perfectly clear that historical powers of examination were conferred upon Courts in Court ordered winding up proceedings and in relation to voluntary liquidations. Those powers came to be understood as powers properly conferred upon a Court because they *necessarily engaged first, an application to the Court for an appropriate order upon the*

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> *satisfaction of the judicial officer* and second, the continuing supervision of the examination process according to law. …
>
> [emphasis added]

29 The philosophy that in a voluntary winding up the court is in the background to be referred to (for instance via s 310 of the CA) if the necessity should arise is similar to the Australian position. Section 249 of the 1961 AusCA was part of a legislative scheme to reduce the work of the court in voluntary winding up proceedings to the minimum supervision necessary to ensure that the proceedings were conducted justly and beneficially. It also ensured that applications were not made to the court to transform a voluntary winding up into a compulsory winding up for the sole purpose of accessing the powers conferred upon the court in a compulsory winding up (see *Handberg (in his capacity as liquidator of S & D International Pty Ltd (in liq) and Another v MIG Property Services Pty Ltd and Others* [2010] 79 ACSR 373 at [13]–[14]).

30 We now turn to the English framework under 1948 UKCA. Section 268 was embedded under the heading – "General Powers of Court in case of Winding up by Court" and was a power available only in a court-winding up. The court's powers of examination under the 1948 statute was available only in the case of companies wound up by the court. Robert Walker J in *Re James McHale Automobiles Ltd* [1997] 1 BCLC 273 at 276 said:

> It is quite plain, and common ground, that important changes in the law have been made by the Insolvency Act 1986. The position before that was regulated by the Companies Act 1985 (the 1985 Act) which was not in force for long as regards its insolvency provisions, and before that by the Companies Act 1948 (the 1948 Act). The equivalents – and they were precise equivalents – of s 112(1) were s 602(1) in the 1985 Act and s 307(1) in the 1948 Act. Both the earlier statutes also had provision both for the public examination of officers of a company in some circumstances and for the summoning of persons for private examination. *Public examination was*

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> *provided for in s 563 of the 1985 Act and s 270 of the 1948 Act. The summoning of persons for private examination was governed by s 561 and s 268 respectively. It is important to notice that both those provisions were available only in the course of a compulsory winding up (or, I should add, after the appointment by the court of provisional liquidators) and neither section prescribed who could apply.* That point is essential to the understanding of *Re Embassy Art Products Ltd* [1988] BCLC 1, a decision of Hoffmann J on s 561 of the 1985 Act which was cited to me by Miss Kyriakides.
>
> [emphasis added]

31 As stated earlier, s 310 of CA is *in pari materia* with s 307 of the 1948 UKCA. Section 307 was placed under the heading – "Provisions applicable to every Voluntary Winding Up". On the question of whether an application under s 307 is necessary to confer examination powers on the court in a creditors' voluntary liquidation, the respondents referred us to the English decisions of *In Re Rolls Razor Ltd (No. 2)* [1970] Ch 576 ("*Razor*") and *Re Norton Warburg Holdings Ltd and Norton Warburg Investment Management Ltd* [1983] BCLC 235 ("*Norton*"). According to the respondents, the two cases stood for the proposition that an application under s 307 of the 1948 UKCA was not necessary for a CVL liquidator to extend the court's powers of examination under s 268 of the 1948 UKCA so long as the court was satisfied that it was just and beneficial to have granted the orders sought under s 268. The respondents relied heavily on these decisions to submit that an application under s 310(1)(*b*) is not required and an application under s 285 alone is sufficient.

32 We do not accept the respondents' arguments outlined in [18] given our views on ss 285 and 310. Furthermore, *Razor* and *Norton* do not support the respondents' case as they do not stand for the proposition advanced by them.

33 In *Razor*, the Registrar of the Companies Court ("the Registrar") granted an *ex parte* application by creditors-appointed liquidators for an order under

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s 268 of the 1948 UKCA to investigate certain transactions by examining the former director and general manager of the company. The applicants in *Razor* appealed against the Registrar's decision and sought an order to discharge the Registrar's order. The summons before the Registrar was plainly made under s 268 of 1948 UKCA with no reference at all to s 307. Whilst Megarry J observed that s 307 enabled the court to make an order under s 268 in a voluntary winding up, the main issue in that case had nothing to do with how s 307 is to be engaged in a voluntary winding up. The procedural issue was whether an *ex parte* order made by the Registrar should be discharged by the Registrar or a judge in the appellate court. Megarry J opined that the Registrar's order should be modified or discharged by a judge and the appropriate method of procedure would be by way of a motion to discharge. On the hearing of the motion, the discretion to be exercised would be that of the judge unfettered by the decision of the Registrar. Megarry J commented on the nature of the process under s 268 and opined that the facts were overwhelming in favour of the order. He therefore upheld the Registrar's order seeing that it was "just and beneficial for the purposes of the winding-up that this order should be made" (at 595). Even if the reference to the phrase "just and beneficial" had been a quote from s 307 and not s 268, Megarry J *did not* squarely deal with the issue as to whether an application under s 307 was required to confer or extend the court's powers of examination under s 268 to a creditors' voluntary liquidation. Put simply, the point was not raised by the applicants in *Razor* as a ground for setting aside the Registrar's order and the respondents' reliance on *Razor* is misplaced.

34 In *Norton*, the companies were placed in a creditors' voluntary winding up. The joint liquidators and receiver of the companies sought an examination order under s 268 of the 1948 UKCA for, among others, an order for the production of documents against one Mr Gillett. The Registrar granted the

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orders as requested, and Mr Gillett applied to the Chancery Division to have these orders varied. Counsel for the applicant criticised the form of the applications to the Registrar and the orders made by him, insofar as they referred only to s 268 but not to s 307. Vinelott J held that the court could only make an order under s 268 in a voluntary winding up if it was satisfied that it was "just and beneficial to do so". Vinelott J found no force in counsel's criticisms of the form of the applications because the applications and orders were to him "clearly founded on s 307(2)". He reasoned this from counsel's reference to s 307(2) as the "gateway through which s 268 was reached…" (at 238). It is apposite to set out this explanation (at 237):

> The orders made by the Registrar were sought and made pursuant to s 268 of the [1948 UKCA]. That section, of course, applies after the appointment of provisional liquidator or the making of a winding-up order. However, under s 307(2) of the [1948 UKCA]the court can make an order under s 268 where there has been a voluntary winding up if the court is satisfied that it is 'just and beneficial' to do so. *Some criticism has been made by counsel for the applicants (Mr Heslop) of the form of the applications to the Registrar and of the orders made by him, insofar as they refer to s 268 but not to s 307. I do not think that there is any force in those criticisms. The applications and the orders were clearly founded on s 307(2) which, as counsel for the respondents (Mr Howell) expressed it was the gateway through which s 268 was reached, and the Registrar must have been satisfied, whether rightly or not, that it was just and beneficial to make the orders.*
>
> [emphasis added]

35 Vinelott J accepted s 307(2) as a "gateway" to s 268 and this role was captured in the headnote of that case in the sentence "… an examination ordered under s 307(2) of the [1948 UKCA], and made pursuant to s 268 of that Act…". In our view, *Norton* does not stand for the proposition that an application under s 307 was not required and as such, it does not assist the respondents' case. On the contrary, *Norton* explained that s 307 was the *enabling provision,* the

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gateway to an application for an examination under s 268 in a voluntary winding up. The English framework under the 1984 UKCA is consonant with the insolvency regime in Singapore under the CA.

36 Before us, there is no dispute that the applications below were made under s 285 of the CA alone. At no time were the s 285 applications made in conjunction with s 310 of the CA. Neither did the respondents, as CVL liquidators, refer the Judge to s 310(1)(*b*). Indeed, counsel for the respondents confirmed at the hearing of the appeals that the respondents had relied instead on s 305(1)(*b*) of CA to bring the s 285 applications. Plainly, the Production Orders were not founded on s 310, which we accept is the gateway through which s 285 is to be reached.

37 For completeness, we turn to the Singapore High Court decision in *Interocean Holdings Group (BVI) Ltd v Zi-Techasia (Singapore) Pte Ltd (in liquidation)* [2014] 2 SLR 485. The respondents said that that case supports its proposition that an application under s 310 of the CA is not required. In that case, the defendant company was put into a members' voluntary winding up. The members changed their mind and passed a special resolution to withdraw the winding-up petition. The plaintiff, being the holding company beneficially entitled to all the issued shares of the defendant thereafter applied for a stay of the winding-up proceedings under s 279 of the CA. Edmund Leow JC opined that although s 279 applies only in a court winding up, it would also apply in a voluntary winding up due to s 310 (at [9]–[10]). Insofar as Leow JC's finding was based on the combined effect of ss 279 and 310, no reason was given as to why they had such an effect. In particular, Leow JC did not consider whether an application under s 310 was required. In fairness, this was not a contested issue and we propose to treat this matter as *res integra*.

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38 As mentioned in [18] above, counsel for the respondents also relied on s 305(1)(*b*) of the CA. This section is again raised in the respondents' written submissions as their alternative stance that s 305(1)(*b*) allows a CVL liquidator to exercise any of the powers given to a court-appointed liquidator and such powers include the power to make an application under s 285 of the CA. Section 305(1)(*b*) provides as follows:

> **305**. – (1) The Liquidator may –
>
> …
>
> (*b*) exercise any of the other powers by this Act given to the liquidator in a winding up by the Court.

39 We do not agree with the respondents' submission. Section 305(1)(*b*) provides that a CVL liquidator may exercise any powers afforded to a liquidator in a court-ordered liquidation under the CA. This is clear in plain and simple terms. Section 285 of the CA is a power that is *not* conferred on court-appointed liquidators, but one that is *conferred on the court* to exercise in the course of the compulsory winding up of a company (see *Liquidator of W&P Piling Pte Ltd v Chew Yin What and others* [2004] 3 SLR(R) 164 ("*W&P Piling*") at [21] and [28]; *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 ("*Celestial*") at [43]). To borrow the words of Cotton LJ in *In re North Australian Territory Company* (1890) 45 Ch D 87 at 91:

> The Court may, if it has made an order for winding-up, summon before it any officer or any other person; but *then that is in the discretion of the Court*, and … *it is not at all the right of the applicant*; it is the Court which may, if it thinks it right, order the person to attend and be examined and give any information he can with reference to the interests of the company being wound up …
>
> [emphasis added]

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As such, the respondents' reliance on s 305(1)(*b*) as an enabling provision to invoke s 285 is erroneous and in a voluntary winding up, the correct way is an application under s 310 of the CA.

Whether the respondents' omission to make an application under s 310(1)(b) can be remedied as a formal defect or irregularity

40 The respondents submit that any omission to make an application under s 310(1)(*b*) is merely a formal defect or irregularity that can be cured pursuant to r 191(1) Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) ("CWU Rules"). Rule 191(1) of the CWU Rules provides that no proceedings shall be invalidated by any formal defect unless there is substantial injustice caused:

> 191. (1) No proceedings under the Act or these Rules shall be invalidated by any formal defect or by any irregularity, unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

41 Rule 1(2) of the CWU Rules provides that the CWU Rules "shall apply to the proceedings in every winding up under the [CA] of a company which commenced on or after 29th December 1967". "Proceedings" is defined under r 2 of the CWU Rules to mean "proceedings in the winding up of a company under the [CA]". As an application under s 285 is an application for the examination and/or production of documents in the winding up of a company, such an application falls within the ambit of "proceedings in the winding up of a company under the [CA]". The procedure for a s 285 application and examination is provided for under rr 49, 52, 55, 56 and 57 of the CWU Rules (see also *W&P Piling* at [32]–[35]). Under r 49, an application under s 285 shall be made by way of an *ex parte* summons and may be made by the liquidator or any creditor or contributory. If the application is made by a creditor or contributory, the summons and affidavit must be served on the liquidator. Non-

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compliance of r 49 is capable of remedy under rule 191. It is considered a formal defect of a prescribed procedure. However, non-compliance with s 310(1)(*b*) may be a different matter altogether.

42 In *United Overseas Bank Ltd v Bombay Talkies (S) Pte Ltd* [2015] SGHC 142 ("*Bombay Talkies*") for example, the affidavit of service for a winding up application erroneously stated the unit number of the Official Receiver as #06-11 instead of #06-01. This error was treated as a formal defect and procedural irregularity that was remedied under s 392(2) of the CA and r 191(1) of the CWU Rules (at [50]). In *Pan-Asian Services Pte Ltd v European Asian Bank AG* [1987] SLR(R) 6, the creditor's statutory demand had not been served at the company's registered office as required under s 254(2)(*a*) of the CA before a company shall be deemed unable to pay its debts. This was treated as an irregularity that could not be remedied due to the serious consequences of founding a petition on the deeming provision under this provision (at [15]).

43 The High Court in *Bombay Talkies* also referred to s 392(2) of the CA. Sub-sections (1) and (2) of s 392 provide as follows:

> (1) In this section, unless the contrary intention appears a reference to a procedural irregularity includes a reference to -
>
> > (*a*) The absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and
> >
> > (*b*) a defect, irregularity or deficiency of notice or time.
>
> (2) A proceeding under [the CA] is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
>
> …

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44 We note that the respondents had relied on r 191 of the CWU Rules and had not referred to s 392(2) even though the sub-section is similarly worded to r 191(1) of the CWU Rules. Section 392(1) provides a non-exhaustive definition of what constitutes a "procedural irregularity"; generally, the "absence of a quorum" or a "defect, irregularity or deficiency of notice or time". In this case, the respondents' omission to make an application under s 310(1)(*b*) is clearly of a different genre of procedural irregularities from that set out in s 392(1). Notably s 392(2) regulates corporate proceedings which are presumptively valid unless the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court and by order declares the corporate proceedings to be invalid. Importantly, s 392(2) is not engaged here having regard to our conclusion that the respondents' omission to make an application under s 310(1)(*b*) is not a procedural irregularity. The omission here concerned a substantive prerequisite for the exercise of the court's statutory power, and was not merely a procedural defect.

45 Returning to r 191(1) of the CWU Rules read with r 2 on the definition of proceedings, r 191(1) does not allow the court to confer statutory power on itself retrospectively. To repeat, the respondents' omission to make an application under s 310(1)(*b*) cannot be characterised as a formal defect or irregularity within the meaning of r 191. Section 310 of the CA does not merely prescribe the manner in which an application has to be made. As stated, s 310 is an important provision where a company is in voluntary liquidation. It is necessary to have recourse to s 310(1)(*b*) in order to extend or confer power on the court to grant orders of examination under s 285 of the CA as if the company were in compulsory liquidation. Absent such an application, the court has *no statutory power* to exercise the statutory powers that are automatically afforded in a compulsory liquidation, including its powers of examination under s 285.

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Conclusion on the first issue

46 In this case, the respondents did not make an application under s 310(1)(*b*) to extend the statutory provision (and power) that is applicable to a company in compulsory winding up to a company in voluntary liquidation. As the court is asked to exercise powers under s 285 to order an examination and production of documents as if the Company were in compulsory liquidation, the respondents have to explain and justify why the court should assist them in obtaining the Third Party Documents in a creditors' voluntary winding up which is essentially a private arrangement. Given the omission, it is not necessary to deal with s 310(2) at length. Suffice to say that an applicant has to satisfy the court that it is just and beneficial to extend the powers available to a company in compulsory winding up to a company in voluntary liquidation. The focus starts with an inquiry of the essential character of the law as to why a statutory provision (or power) that is applicable to a company in compulsory winding up should be extended to a company in voluntary liquidation. The inquiry would not be the same as the two-stage test applied to a s 285 application that was enunciated in *Celestial* at [43]–[44].

47 We therefore cannot accept the respondents' proposition that an application under s 285 alone is enough. This proposition implies that the court, in determining the substantial merits of the s 285 application under the two-stage test in *Celestial*, would similarly be satisfied that it is just and beneficial to make that order. Insofar as there may be some overlap in the "just and beneficial" inquiry and the two-stage test in *Celestial*, the considerations are distinct at each stage of the inquiry and it would be artificial to collapse them into a single inquiry. As stated, in the former, besides the focus on the essential character of the statutory provision, the respondents have to also explain *why*

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they require the court's assistance in a creditors' voluntary liquidation and the overriding consideration is whether the proposed course of action is of *advantage* to the winding up of the company (see *Dean-Willocks v Soluble Solution Hydroponics Pty Ltd* [1997] 42 NSWLR 209 at 212). At this stage, the court need not delve into the scope and nature of the documents sought, and the court may decline to exercise its powers of examination if the proposed course of action is clearly of no advantage to the winding up of the company. In the latter, *after* the court is satisfied that the exercise of such powers is of advantage to the liquidation, in the application of the two-stage test, the court will analyse the scope and nature of the documents in considering the reasonableness of the documents sought, and consider the extent to which the production order should be granted by balancing the conflicting interests involved (see *Celestial* at [43]).

48 Absent an application under s 310 of the CA in a voluntary liquidation, the court is seized of power to grant orders under s 285 of the CA in the course of a compulsory winding up but not in a voluntary winding up. The court cannot on its own motion retrospectively or otherwise, empower itself to exercise the powers granted under a compulsory winding up. This will defeat the purpose of an application under s 310 of the CA.

49 In summary, the respondents' omission to make the s 310(1)(*b*) application is not a formal defect or irregularity that can be cured under r 191(1) of the CWU Rules. For this reason, the court has no statutory power to grant any order under s 285 in a creditors' voluntary liquidation without a s 310 application. Consequently, the Production Orders fell outside the ambit of the court's power and we allow the appellants' appeals and set aside the Production Orders accordingly.

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Whether the Judge erred in granting the Production Orders sought

50 Having allowed the appeals, it is not necessary to deal with the second issue. However, as we heard lengthy submissions on the issue, we will briefly consider the second issue as well. Our discussion of the second issue assumes that liquidators appointed in a creditors' voluntary winding up have obtained an order under s 310 for an examination and/or production of document orders pursuant to ss 285(1) read with 285(2) and/or 285(3), as the case may be. Therefore, it is the two-stage test in *Celestial* that is relevant.

The parties' cases

51 Sinfeng and Cosco submit that the respondents failed to explain why and how the Third Party Documents were necessary to carry out their functions. The respondents had already interviewed Yasa and were granted a disclosure order against Mr Ong. The respondents did not explain how, in view of the information and documents already collected, it was reasonable for them to seek extensive documents over a long period of time from Sinfeng and Cosco, which imposes an onerous burden on them. In the same vein, Costank submits that a mere declaration that the investigations relating to fraud are being carried out cannot suffice. The respondents must, at the very least, explain what the gaps in their investigation are, why these gaps need to be filled and how the Third Party Documents will assist them in filling these gaps. Besides, compliance with the Production Orders will be an onerous task.

52 As against this, the respondents submit that none of the Judge's findings were plainly wrong or against the weight of the evidence, and therefore, the Production Orders should be affirmed. The respondents assert that they had stated on affidavit that the Third Party Documents were reasonably required to

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investigate the true extent of the fraud and whether there was any impropriety or misfeasance by other third parties. According to the respondents, they require the appellants' assistance because: (a) they are in the process of interviewing the Company's employees and there is no legal requirement that the liquidators must exhaust all other avenues of information before making a s 285 application; (b) Mr Tan is uncontactable; (c) Mr Yeung is based in Hong Kong and has limited involvement in the transactions; and (d) they cannot rely solely on the Company's own documents in light of the Admission.

53 In addition, the respondents submit that the Production Orders are not oppressive or unduly onerous. The respondents assert that they are not acting at the behest of the creditors but sought the Third Party Documents for the purpose of their investigations into the Company's affairs and in particular, the alleged fraud in relation to the trading loops. The respondents emphasise that they are currently not in a position to determine if there are any causes of action against other parties.

Whether the Production Orders are unreasonable and/or oppressive

54 Section 285 of the CA is one way to obtain information about the company which is being wound up with the court's assistance. This statutory provision is regarded as a strong and cost-effective mechanism to aid liquidators to determine the cause of the company's insolvency and whether to commence legal proceedings against potential wrongdoers (*Celestial* at [43]). And because it is a valuable weapon in the hands of the liquidators, they must be careful not to use it oppressively, especially when an order is sought, as in this case, against third parties. It is not surprising that a case for making an order against a former officer or employee of the company would usually be stronger than it would

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against a third party. The two-stage test in *Celestial* guides the court in deciding whether an order under s 285 of the CA should be made (at [43]):

> (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 98,907 at 98,913; [*Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90] 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 (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

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> 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).

55 Generally, under the first stage, the respondents have to show that the Third Party Documents are reasonably required. Ordinarily, the reasonableness of production (including the extent of production) is assessed against a variety of factors such as its effectiveness in assisting the respondents in the carrying out of their duties, whether it is to ascertain the events that led to the Company's demise, to maximise returns to the creditors (see *W&P Piling* at [1]) or to "uphold standards of commercial morality by identifying 'improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action'" (see *Petroships* at [138]). In circumstances where there is evidence of impropriety, the liquidators assume the "role of a *hound dog* [emphasis from original]", sniffing out the parties involved and the extent of such impropriety. This is however, not *carte blanche* for liquidators to do as they please. The court has to ensure that the actions of the liquidators are ultimately beneficial to the winding up of the company and not undertaken for improper third party collateral interests or personal considerations. This caution was astutely put by V K Rajah JC (as he then was) in *W&P Piling* at [27]:

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> Section 285 is couched in extremely generous terms. It should not therefore be interpreted in a constricted manner by reference to any apocryphal purposes. *It clearly cannot be used for any collateral purpose that affords no benefit to the company*. Other than that, it may be invoked for any proper purpose that can benefit the company and which is within the statutory powers of the liquidator and the scheme of the companies legislation … *Where there is evidence of impropriety, the liquidator will have to shift gears. He then assumes the role of a hound dog. The court will, however, have to be astute to ensure that the liquidator does not use the insolvency scheme for improper third party collateral interests or personal considerations*; in other words, he must not become a lapdog held thrall to improper considerations. …
>
> [emphasis from original omitted; emphasis added in italics]

56 The respondents submit that the Third Party Documents would assist them in investigating the extent of the fraud and whether there was any impropriety or misfeasance by any third parties in relation to the trading loops amongst the appellants, Yasa, Mewah and the Company. According to the respondents, these documents are reasonably required in the light of Mr Tan's admission to having fraudulently prepared documents to obtain bank financing, and the appellants' records will assist the respondents in ascertaining if there were actual deliveries of bunkers under those trading loops and how they are related to the fraud.

57 On the facts, we doubt the reasonableness of the Third Party Documents sought under the Production Orders. First, the respondents had already obtained information in relation to the trading loops, in particular, whether there were actual shipment or delivery of goods and the appellants' role in the trading loops. This is borne out by the information provided in Mr Ong's Statutory Declaration (see [11] above) which in fairness to the Judge, was not available

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in the proceedings below. Mr Ong's Statutory Declaration is informative on the specific queries of the respondents and they are as follows:[4]

> 3.3 Did every trading transaction engaged in by [the Company] always result in actual delivery of goods to its customers or ultimate customers? If no, explain the relevant situations.
>
> *Response:*
>
> *After joining [the Company] in May 2016, I realized that prior to my joining [the Company] it had been an ongoing practice that* ***prior to repaying the loan bank to banks,*** *[the Company] would structure a trade flow involving two sleeve traders; starting with [the Company] sold to sleeve trader A (Sinfeng or Costank, the pre-sold buyers approved by banks, as the case maybe), trader A then onsold to sleeve trader B (Yasa, Mewah, or YongYu, as the case maybe) and trader B finally sold back to [the Company] …* ***For payment of this trade flow, [the Company] would firstly pay to trader B (Yasa, Mewah or YongYu, as the case maybe), trader B then paid to trader A, and trader A finally paid to [the Company's] designated account with the bank [the Company] needed to repay the loan (i.e. the financing bank). No actual delivery of goods took place****, as trader A was named the 'pre-sold buyer' when [the Company] initially applied for the loan, and by arranging repayment from trader A (Sinfeng or Costank, as the case maybe) to [the Company's] designated bank account served as a proof to the bank on the sale to pre-sold buyer and the subsequent repayment (i.e. the sale proceed[s] assigned to the bank) received from the pre-sold buyer.*
>
> …
>
> [4.1] (6) The Company's accounting records show that [the Company] reported negative margin on the majority [i]f not all of trading transactions with Sinfeng and Costank. What were the reasons for [the Company] to enter into these transactions when [the Company] did not benefit from it financially?
>
> *Response:*
>
> *For those deals that described in the response to Question 3.3, [the Company] did not benefit financially as the* ***chain of transactions were meant to repatriate the loan repayment***

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4 Joshua James Taylor's 1st affidavit dated 16 March 2020 filed in CA/SUM 39/2020 ("Taylor's SUM 39 Affidavit") at pp 16 and 17.

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> ***back to financing bank through the previous named 'pre-sold buyer'***.
>
> [Emphasis in italics in original; emphasis added in bold italics]

58 The respondents accept that the trading loops are not illegal *per se* but may be used to perpetuate fraud. However, at the hearing of the appeals, the respondents stated that they consider the information provided in Mr Ong's Statutory Declaration to be inconclusive as he did not explain why funds flowed from the Company to third parties through the trading loops. We are not persuaded. The information provided in Mr Ong's Statutory Declaration clearly answered the respondents' query. The crux of Mr Ong's Statutory Declaration is that the trading loops he described were devices deployed to obtain from a financing bank funds to repay outstanding loans, and hence they were not genuine trades. As such, there would be *no actual delivery of goods* to the participants in the trading loops. At the hearing of the appeals, the respondents asserted that it was imperative for them to obtain the source documents that resulted in the trading loops as they were not prepared to accept Mr Ong's Statutory Declaration at face value. However, the respondents did not explain why that was the case, especially when Mr Ong had exposed himself to potential liability via his admission to having knowledge of the transactions within the trading loops. We accept that had Mr Ong claimed ignorance as to the Company's affairs, the respondents would have been entitled to challenge his professed lack of knowledge (see *Re Lion City Holdings Pte Ltd* [2003] 3 SLR(R) 493 at [18]). But this is not the case here.

59 Secondly, the respondents had also learnt, from the information provided in Mr Lim Pong's Statutory Declaration, of Mewah's role as an intermediary in the trading loops involving the Company, Mewah and Costank (see [11] above). According to Mr Lim Pong, after the bunkers had been

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delivered, "Costank would send to Mewah its invoices and credit notes … together with the delivery documentation" and Mewah in turn, issued "*its own* invoices and credit notes to [the Company] [emphasis added]". As to the flow of funds, the Company remitted funds to Mewah in settlement of Mewah's invoices and Mewah in turn, remitted funds to Costank in settlement of Costank's invoices after retaining a sum for its fees.[5] In the light of Mr Lim Pong's description of the trade flow, the respondents would not reasonably have obtained: (a) copies of debit or credit notes *issued by Costank to the Company*; and (b) copies of Costank's proof of payment in relation to *payments made to the Company* (see Third Party Documents at [8(d)–8(e)] above). This is because according to Mr Lim Pong, Costank had issued its debit or credit notes and made payments directly to Mewah and not to the Company. This information, in fairness to the Judge, was not available in the proceedings below. The respondents did not question the accuracy of Mr Lim Pong's Statutory Declaration. Separately, we note that the Judge had refused to order production of the debit or credit notes issued by the appellants to the Company for the reason explained in [9] above.

60 Thirdly, the relevant question is whether the respondents' application is reasonably required for "preserving, collecting, managing or distributing the [C]ompany's assets" (see *W&P Piling* at [29(b)]). In this creditors' voluntary liquidation, there is little connection between the Third Party Documents sought and the goal of maximising the returns to the creditors of the Company. We are not persuaded by the respondents' submission that their investigation into the fraud, in particular, the trading loops between the appellants and the Company

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5 Taylor's SUM 39 Affidavit at p 20.

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would assist them in identifying the parties involved or complicit in the fraud, and whether there are any possible causes of action against third parties. We accept that *if* the investigations reveal any possible causes of action against third parties *by the Company*, the pursuit of civil remedies against these parties, if successful, could lead to an increase in the Company's assets and hence, maximise the returns to the creditors. At the very least however, the court must be satisfied that there is some possibility of civil remedies being pursued. In the light of the fact that the *Company was a knowing party involved in the trading loops*, we do not see how it can sustain any claim against third party co-conspirators in the same trading loops. To illustrate, one difficulty the Company might face in a claim for unlawful means conspiracy against the appellants is that it was *part of the conspiracy* aimed at defrauding, or injuring the financing banks (for the elements required to sustain a claim in unlawful means conspiracy, see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [310]). It is also unclear what loss (if any) the Company had suffered as a result of the trading loops.

61 Section 285 is designed, among other reasons, to assist liquidators in pursuing wrongdoers on behalf of the Company. It is not designed for liquidators to investigate causes of action that the creditors or members may wish to take up personally.

62 We turn to the nature and scope of the Third Party Documents sought. The respondents had requested documents in relation to Sinfeng and Costank's "initial suppliers" and the appellants' "onward buyer(s)" (see [8(f)] and [8(g)] above). We do not see how these documents are relevant as they have *no relation* to the Company and in no way assist in the preservation of the Company's assets. We also note that the scope of the documents requested is

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extensive. In February 2019, the respondents initially restricted its request in relation to the Third Party Documents to the period between 1 January 2016 and 31 December 2018 (see [7] above). When this request was made, the respondents had been aware of the Admission. Approximately two months later, in the respondents' s 285 applications, the respondents significantly expanded the scope of Third Party Documents sought to approximately six to seven years, between 1 July 2012 and 13 December 2018 in relation to Cosco and Costank, and between 1 January 2012 to 2 April 2019 in relation to Sinfeng (see [8] above). It is only fair as it goes towards the reasonableness of the application, that the respondents explain and give good reasons for departing from a position taken pre-litigation as compared to the relief prayed seeking the aid of the court.

63 The respondents had explained that they required documents from 1 July 2012 as Mr Tan had admitted to fraudulently preparing documents since 2013, and the Company's financial year ending 2013 includes part of 2012. But this was information that the respondents had already been privy to (the Admission and the Announcement) when they requested two years' worth of documents in February 2019, and this argument therefore did not explain why, within a short span of two months, the respondents required an additional four to five years' worth of documents. This, in our view, suggests that the scope of the Production Orders, in so far as it covered six to seven years' worth of documents may have been oppressive.

64 For these reasons, *even if* the court had the power to grant the Production Orders, we would have been inclined to set it aside. We now turn to the two miscellaneous issues that arose during the hearing of the appeals.

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Miscellaneous issues

Whether an order for production of documents under s 285(3) of the CA is conditional upon the court granting an examination order under s 285(2) of the CA

65 The first miscellaneous issue is whether an order for production of documents under s 285(3) of the CA is contingent on the grant of an order of examination under s 285(2). The relevant provisions have been set out at [16] above.

66 The parties are in agreement that an order for the production of documents under s 285(3) is not premised on the court's grant of an oral examination pursuant to s 285(2). We agree. Our reasoning begins with the related question of whether an application for production of documents should be made together with an application for examination even if the court may order the production of documents without ordering an examination. Section 285(1) empowers the court to *summon* before it any person that either has possession of any property of the company, or is indebted to the company, or is capable of giving information concerning the affairs of the company. Notably, r 49 of the CWU Rules only provides for an application to the court to order an examination of a person. There is no reference to an application for the production of documents. This contrast may suggest that an application for the latter is to be made together with an application for an examination. However, we are of the view that a literal and purposive interpretation of s 285 suggests that it is not necessary to combine an application for production of documents under s 285(3) with an application for examination of a person under s 285(2). A proper application for an order for the production of documents may be made pursuant to s 285(1) read with s 285(3). We elaborate.

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67 From the structure of s 285, it is clear that s 285(3) confers upon the court the statutory power to order the production of documents, while s 285(2) *separately* confers upon the court the statutory power to order oral and/or written examination. It is only *after* a person identified in s 285(1) has been summoned pursuant to s 285(1) that the court may either examine him on oath pursuant to s 285(2), or require him to produce documents pursuant to s 285(3), or both.

68 Further, allowing liquidators to seek only an order for the production of documents serves a practical necessity as it prevents the court from making oral or written examination orders when all that may be required in the discharge of the liquidators' duties is simply an order for the production of documents, which is less oppressive (see *Celestial* at [44(c)]). As enunciated by Judith Prakash J (as she then was) in *BNY Corporate Trustee Services Ltd v Celestial Nutrifoods Ltd* [2014] 4 SLR 331 at [82] (affirmed by this court in *Celestial* at [68]), an order for discovery without examination allows the liquidator to first consider whether his questions are adequately answered, before making a further application to court for an oral examination.

Whether an examined party is entitled to its costs of complying with a production order under s 285(3) of the CA

69 The second miscellaneous issue contested at length at the hearing of the appeals is whether the appellants are entitled to costs of complying with an order for the production of documents under s 285(3). The appellants submit, both below and in the appeals, that they should be entitled to costs of complying with the Production Orders, including their manpower and legal costs. Sinfeng and Cosco submit that s 285(5), which refers to a summoned person being "tendered a reasonable sum for his expenses", provides expenses for an oral examination

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order. In the same vein, Sinfeng and Cosco argue that a person subject to a production order under s 285(3) should similarly be entitled to a reasonable sum for his expenses and this includes compliance costs. As against this, the respondents submit that such costs are not legislatively provided for and are inimical to the objective of s 285 which is to allow liquidators to swiftly obtain documents for their investigations without further straining the company's limited resources.

70 The Judge declined to grant costs to the appellants. According to the Judge, unlike O 24 r 6(9) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which expressly provides for compliance costs in pre-action discovery, s 285 of the CA does not suggest that the person against whom the order is sought will generally be entitled to the costs of compliance with the order. The Judge nevertheless allowed Sinfeng and Cosco to be reimbursed for the photocopying charges incurred in respect of the Production Orders.

71 We are not persuaded by Sinfeng and Cosco's argument that s 285(5) provides for the expenses of complying with examination and/or production orders. The provision states as follows:

> 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.

72 From a plain reading of section 285(5), it is clear that this provision empowers the court to cause a person so summoned to be apprehended and brought before it, in the absence of a lawful excuse, for examination. There appears to be two requirements before s 285(5) applies. First, the person

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summoned must have refused to come before the court at the appointed time without any lawful excuse. Second, a reasonable sum ought to have been tendered for his expenses. Read in context, "expenses" refers to expenses in relation to *appearance before the court* (for example, transport expenses), and clearly do not relate to legal or other expenses incurred to comply with an order pursuant to s 285(2) or s 285(3).

73 That said, apart from the arguments on s 285(5) above, we observe that the parties' brief arguments do not address at all a fundamental consideration of statutory interpretation which is whether it is legitimate and proper to find within the express words of s 285, an implication of an ancillary power to order costs of compliance. In contrast, the express wording of s 310(2) allows the court to "accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just". This wording, in our view, explicitly empowers the court to make an order for costs of compliance in relation to the production of documents since the court may impose conditions on how the s 285 examination power is to be exercised. In an application under s 310 to request the court's assistance in exercising its powers of examination in s 285, the "wider the range of issues or persons [sought] to be examined, the more circumspect the court has to be in ensuring that the power is *invoked and utilised appropriately* [emphasis added]" (see *W&P Piling* at [29]). The court, in considering whether to grant leave to liquidators in a voluntary liquidation for the exercise of its powers of examination, may as a condition to the grant of such leave, impose compliance costs in favour of the examined party. This will of course, depend on the overall circumstances of the case.

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74 Separately, we also note that whilst the appellants assert that they are entitled to manpower and legal costs involved in complying with the Production Orders, they had neither adequately explained the nature of such costs incurred, quantified the costs involved, nor provided any estimate of the costs to be incurred. The appellants failed to discharge their burden to show that manpower and legal costs would be incurred and were demonstrably reasonable, necessary and proportionate (see generally *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [56]).

75 The Judge granted Sinfeng and Cosco reimbursement for photocopying charges incurred in respect of the Production Orders. One way of rationalising the Judge's decision and to justify this reimbursement for photocopying charges is from the viewpoint of the obligation to produce originals under s 285(3) and not photocopies. Any photocopies would be for the respondents' convenience and were to be reasonably paid for by them. In any event, the respondents had agreed for these photocopying charges to be reimbursed.

Conclusion

76 In conclusion, we allow these appeals. The Production Orders are set aside. The respondents are to abide by their undertaking to return all the documents and information produced by reason of the Production Orders. In respect of any documents that had been voluntarily provided, the respondents ought to be able to retain and make use of them. As costs follow the event, the respondents are to pay costs below and in the respective appeals as follows:

(a) To the appellants in CA 188 and 189 (Sinfeng and Cosco) costs and disbursements in the total sum of $40,000.

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(b) To the appellants in CA 190 (Costank) costs and disbursements in the total sum of $30,000.

77 The usual costs consequences in respect of security for costs are to follow.

Tay Yong Kwang Judge of Appeal	Belinda Ang Saw Ean Judge	Woo Bih Li Judge

Kenneth Tan *SC* (instructed counsel), Tan Poh Ling Wendy and Carl Lim Kok Wee (Morgan Lewis Stamford LLC) for the appellants in CA 188 and 189;
Jude P. Benny and Mary-Anne Chua (Joseph Tan Jude Benny LLP) for the appellant in CA 190;
Sim Kwan Kiat, Timothy Ang Wei Kiat, Chow Jie Ying and Leonard Huo (Rajah & Tann Singapore LLP) for the respondents.

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