Islam v Gagudju Charitable Association Inc [1999] NTSC 114
No. 8 of 1998

PARTIES:	Re: GAGUDJU CHARITABLE ASSOCIATION INCORPORATED (IN LIQUIDATION) AND: THE CORPORATIONS LAW BETWEEN: AMINUL ISLAM v STEPHEN DUNCAN as Liquidator of GAGUDJU CHARITABLE ASSOCIATION INCORPORATED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	8 of 1998 (9800440)
DELIVERED:	27 October 1999
HEARING DATE:	7 October 1999
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Corporations – liquidators – powers – eligible applicant – examinable affair – examination summons concerning incorporated association – whether examinee allowed access to affidavit of liquidator.

Corporations – liquidators – powers – production of documents relating to affairs of incorporated association – production sought prior to examination.

Corporations – liquidators – powers – examination summons - obligation to make full disclosure to the court when seeking examination summons.

Corporations – liquidators – powers – examination summons – whether recipient of summons is correct examinee – conduct money – costs associated with compliance with summons.

Corporations Law (Cth), ss 9, 57A, 66A(6), 582(1), 583, 596B, 596C, 596F and 597(9)
Associations Incorporation Act 1963 (NT), s 20
Supreme Court (Companies) Rules 1986 (NT), r 59 and 62

Re Southern Equities Corporation Ltd (In Liq); Bond & Another v England (1997) 25 ACSR 394, approved.
Re BPTC Ltd (In Liq) (1992) 29 NSWLR 713, considered.
Re BPTC Ltd (In Liq) (No 5) (1993) 10 ACSR 756, considered.
Re Brash Holdings & Anor (1995) 15 ACSR 755, referred to.
Flanders v Beatty & Anor (1995) 16 ACSR 324, referred to.
Re South Pacific Energy Trading Pty Ltd (In Liq) (1996) 21 ACSR 435, considered.
Ex parte Merrett; Re ACN 072 081 111 Pty Ltd (1997) 25 ACSR 146, considered.
Re Excel Finance Corporation Ltd; Worthley v England (1994) 52 FCR 69, considered.
Simionato v Macks (1996) 19 ACSR 34, referred to.

REPRESENTATION:

Counsel:

Applicant:	M. Hoffman
Respondent:	D. de Zwart

Solicitors:

Applicant:	De Silva Hebron
Respondent:	David de L Winter

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Islam v Gagudju Charitable Association Inc [1999] NTSC 114
No. 8 of 1998

RE: GAGUDJU CHARITABLE ASSOCIATION INCORPORATED (IN LIQUIDATION)

AND:

THE CORPORATIONS LAW

BETWEEN:

AMINUL ISLAM
Applicant

AND:

STEPHEN DUNCAN as Liquidator of GAGUDJU CHARITABLE ASSOCIATON INCORPORATED
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 27 October 1999)

[1] This is an interlocutory application made by the applicant, Aminul Islam, seeking the following orders:

> "1. That the Order of Her Honour Justice Thomas made 13 September 1999 for the examination of Aminul Islam on 8 November 1999 and production of documents by him by 4 October 1999 be stayed pending hearing and determination of this application.

2. That the Order of Her Honour Justice Thomas made 13 September 1999 for the examination of Aminul Islam on 8 November 1999 and production of documents by him by 4 October 1999 be set aside.

3. That the affidavit of the Liquidator sworn 3 September 1999 and sealed pursuant to Section 596C of the Corporations Law be made available for inspection by the examinee or alternatively so much of the affidavit as relates to the examination of Aminul Islam.

4. That the order for production of documents by Aminul Islam be set aside.

5. In the alternative to paragraph 4 above, that the order for production be varied so as to be narrowed such as to require prosecution only of documentation relevant to the matters to which the examination of Aminul Islam will relate.

6. That the Liquidator pay Aminul Islam's costs and expenses associated with compliance with the summons.

7. That the Liquidator provide a list of topics the subject of the examination.

8. That in any event, the examination be set for such date subsequent to 24 November 1999 as shall be convenient to the Court.

9. That the Liquidator pay Mr Islam's costs of and incidental to this application."

[2] In support of the application the applicant relies on the affidavits of Jason Demetrios Karas sworn 1 October 1999 and 6 October 1999. These were formally tendered and marked Exhibit 1 and 2.

[3] On 13 September 1999, this Court made a number of orders on an ex parte application made on behalf of the liquidator of Gagudju Charitable Association Incorporated (In Liquidation).

[4] These included orders that the applicant, Aminul Islam, be examined before the Court pursuant to s 596B of the *Corporations Law*. The date for examination was to be 8 November 1999 and Aminul Islam was ordered to produce to the Court certain documents relating to the affairs of Gagudju Charitable Association Incorporated (In Liquidation) on or before 4 October 1999.

[5] The applicant, Mr Islam, is a partner in the firm Ernst & Young, who were engaged as the auditors of the Gagudju Charitable Association Inc (In Liquidation) when it was established in 1996.

[6] Mr Hoffman, counsel for the applicant, made a number of submissions which I will deal with.

[7] Mr Hoffman made some general submissions concerning s 596B of the *Corporations Law* which provides for a discretionary examination. The relevant provisions state as follows:

> "596B (1) [Where court may summon for examination] The Court may summon a person for examination about a corporation's examinable affairs if:
>
> (a) an eligible applicant applies for the summons; and
>
> (b) the Court is satisfied that the person:
>
> (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or
>
> (ii) may be able to give information about examinable affairs of the corporation.
>
> 596B (2) [Effect of section] This section has effect subject to section 596A.

[8] It is Mr Hoffman's submission that the Liquidator of the Gagudju Charitable Association Incorporated (In Liquidation), is not an eligible applicant under s 596B(1)(a). Eligible applicant is defined in s 9 of the *Corporations Law* as:

> "'eligible applicant', in relation to a corporation, means:
>
> (a) the Commission; or
> (b) a liquidator or provisional liquidator of the corporation; or
> (c) an administrator of the corporation; or
> (d) an administrator of a deed of company arrangement executed by the corporation; or
> (e) a person authorised in writing by the Commission to make:
> (i) applications under the Division of Part 5.9 in which the expression occurs; or
> (ii) such an application in relation to the corporation;"

Section 57A gives the meaning of corporation as follows:

> "57A (1) [Definition] Subject to this section, in this Law, "corporation" includes:
> (a) any body corporate, whether incorporated in this jurisdiction or elsewhere; and
> (b) a company; and
> (c) a recognised company; and
> (d) an unincorporated body that;
> (i) is formed outside this jurisdiction; and
> (ii) under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
> (iii) does not have its head office or principal place of business in this jurisdiction.
> 57A (2) [Exception to definition] Neither of the following is a corporation:
> (a) an exempt public authority;
> (b) a corporation sole.
> 57A (3) ["financial institution"] A financial institution (as defined in section 111AZA):

(a) is a corporation for the purposes of Parts 7.11 and 7.12; but
(b) is not a corporation for the purposes of the other provisions of this Law.

57A (4) ["exempt body"] An exempt body in relation to this jurisdiction (as defined in section 66A) is not a corporation."

[9] Section 66A(6) provides:

"66A (6) [Northern Territory] Each of the following is an exempt body in relation to the Northern Territory:
(a) a society within the meaning of the Building Societies Act of the Northern Territory that is not a financial institution;
(b) [Repealed]
(c) a society registered under the Co-operative Societies Act of the Northern Territory;
(d) an association, society, institution or body incorporated under the Associations Incorporation Act of the Northern Territory;
(e) a corporation constituted under the Unit Titles Act of the Northern Territory."

[10] It is Mr Hoffman's submission that an association incorporated under the Northern Territory *Associations Incorporation Act* is expressly excluded from the definition of a corporation and therefore the liquidator is not an eligible applicant as he is not a liquidator of a "corporation". The Northern Territory *Associations Incorporation Act* s 20 provides as follows:

" Subject to sections 21, 22 and 22A, the provisions of the Corporations Law relating to the winding-up of Part 5.7 bodies apply, so far as applicable and with such modifications as are prescribed, to and in relation to the winding-up of incorporated associations and, in that application –
(a) a reference in the Corporations Law to a Part 5.7 body shall be read as a reference to an incorporated association;

(b) a reference in the Corporations Law to the directors of a company shall be read as a reference to the members of the committee of an incorporated association;

(c) a reference in the Corporations Law to the secretary of a company shall be read as a reference to the public officer of an incorporated association; and

(d) a reference in the Corporations Law to the principal place of business of a company shall be read as a reference to the place where the public officer of an incorporated association resides."

[11] Section 596B is within Part 5.9 of the *Corporations Law*. This is a machinery provision relating to matters arising out of the winding up of a company, or a Part 5.7 body under Chapter 5 of the *Corporations Law*. The Gagudju Charitable Association Incorporated (In Liquidation), was placed into liquidation pursuant to s 20 of the *Associations Incorporation Act* of the Northern Territory by order of the Supreme Court on 30 April 1998. Section 20 of the *Associations Incorporation Act* of the Northern Territory enables the winding up provision of the *Corporations Law* to be applied to the Gagudju Charitable Association Incorporated.

[12] Section 9 of the *Corporations Law* gives a definition of a Part 5.7 body which includes an Association or other body (whether a body corporate or not) that consists of more than five members. Mr de Zwart submits that s 20(a) of the *Associations Incorporation Act (NT)* is the connecting link between a Part 5.7 body and the application of Part 5.9 of the *Corporations Law*. Mr de Zwart further submits that Part 5.9 of the *Corporations Law* and the examining of a person about a corporation applies to an incorporated

association, just as it does to a company. It is also relevant to note the provisions of s 582(1) which states as follows:

> "582 (1) [Effect of Part] This Part has effect in addition to, and not in derogation of, sections 601CC and 601CL and any provisions contained in this Law or any other law with respect to the winding up of bodies, and the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that might be exercised or done by him, her or it in the winding up of companies."

[13] My conclusion on this issue is as follows: Section 20(a) of the *Associations Incorporation Act* enables the winding-up of a corporation under Part 5.7 of the *Corporations Law*. The Gagudju Charitable Association Incorporated is a Part 5.7 body having been wound up under the provisions of s 20 of the *Associations Incorporation Act*.

[14] Section 583 of the *Corporations Law* reads:

> "Subject to this Part, a Part 5.7 body may be wound up under this Chapter and this Chapter applies accordingly to a Part 5.7 body with such adaptations as are necessary, including the following adaptations: …"

[15] I interpret this to mean that Chapter 5 which includes both Part 5.7 and Part 5.9 applies to a Part 5.7 body.

[16] From this must follow that the provisions of Part 5.9 can be applied to a Part 5.7 body.

[17] Chapter 5 deals with "External Administration". The outline at the commencement of Chapter 5 states as follows:

> "Chapter 5, "External Administration", deals with the different means of reorganising the manner in which a company is controlled, or arranging for a company to cease functioning altogether. Usually these changes will occur because the company is no longer producing a profit or is having liquidity problems. However the company may just wish to cease operations. These measures generally involve administration of a company by persons other than the company's officers.
>
> A company may be reorganised by an alteration of its capital structure or the appointment for a period of receivers and other controllers of the property of corporations. When it is considered most appropriate for the company to cease functioning altogether it may be wound up, either on the order of the court or through a decision by the members or creditors of the company."

All the Parts of Chapter 5 deal with "External Administration".

[18] Part 5.9 is not in itself limited to a corporation which has been wound up. However, it is within the chapter covering "External Administration". The provisions within Part 5.9 are provisions enabling a liquidator or other eligible applicant to inquire into the examinable affairs of the corporation.

[19] With respect to the matter before this Court it is the machinery provisions which enable the liquidator to perform his duties following the winding-up of a corporation under Part 5.7.

[20] I am satisfied that it was the intent of Parliament as expressed in s 583 to enable Part 5.9 to be applied to a Part 5.7 body.

[21] The alternative would mean that under the provisions of the Northern Territory *Associations Incorporation Act* a corporation could be wound up under Part 5.7 of the *Corporations Law* but following the winding up the

liquidator would have no powers to inquire into the corporations examinable affairs. This cannot be the intention of the law.

[22] I have concluded that the provisions of s 57A(4) read with s 66A(6)(d) do not mean that the Gagudju Charitable Association Incorporated (In Liquidation) is an exempt body for the purposes of Chapter 5 of the *Corporations Law*.

[23] Accordingly, I reject the submission made on behalf of the applicant that the respondent is not an eligible applicant for the purpose of the provisions of s 596B of the *Corporations Law*.

[24] I accept the submission made by Mr Hoffman that there is a strong obligation on the applicant to make full disclosure both favourable and unfavourable, to the exercise of the Court's discretion when making an ex parte application to the Court (*Re Southern Equities Corporation Ltd (In Liq)*; *Bond & Another v England* (1997) 25 ACSR 394 at 422):

> "An application for an examination summons is made ex parte. Consequently there is a heavy obligation upon the person applying for the examination summons to make full and frank disclosure of all matters which may impact upon the decision to summon a person for examination about a corporations examinable affairs.
>
> There can be no doubt, in my opinion, that a person who makes an application of this kind is under an obligation to bring all facts and material to the court's attention which might bear upon the order to be made. The applicant has no lesser obligation than that imposed upon a party seeking an injunction ex parte. Indeed, in my opinion, the obligation for frankness and candour is even greater in an application of this kind. That is because, unlike on the return of an interlocutory injunction obtained ex parte, on the return of an examination summons the material supporting the application is not ordinarily made available to the proposed examinee.

> Because the proposed examinee, ordinarily, is not privy to the information or material which was used to support the application for the examination summons, the person applying for the examination summons has the very highest obligation relating to frankness and candour and any breach of that obligation, in my opinion, ought to be viewed very seriously by the court.
>
> The obligation is to provide to the court all material which might impact upon the order sought, including all material which might lead the court to refuse the application. The applicant must act in the place of the proposed examinee and therefore draw to the attention of the court anything which might lead the court to refuse the application."

[25] I agree that s 66A(6)(d) of the *Corporations Law* should have been brought to the Court's attention. A winding-up order under Part 5.7 of the *Corporations Law* was made by the Master of the Supreme Court on 30 April 1998. There has not previously been a challenge to the powers of the liquidator to conduct the winding-up under the Northern Territory *Associations Incorporation Act* and the *Corporations Law*. There is a letter dated 15 May 1998 from James Noonan solicitors to the liquidator Gagudju Charitable Association Incorporated (In Liquidation) (Exhibit 3). In paragraph 9 on page 2 Mr Noonan draws the attention of the liquidator to the provision of s 66A(6)(d). However, this was in the context of an authority to enter a contract not in the context of the liquidator's powers following a winding-up order. In view of my finding that s 66A(6)(d) does not mean the Gagudju Charitable Association Incorporated (In Liquidation) is an exempt body for the purpose of Chapter 5 of the *Corporations Law*, I do not consider the non disclosure of s 66A(6)(d) is a matter that affects my discretion to order an examination under s 596B.

[26] Mr Hoffman's next submission is that the subject matter of the inquiry is not an examinable affair of the corporation as defined in s 596B of the *Corporations Law* . Mr Hoffman referred to a submission made by Mr de Zwart on behalf of the liquidator which is set out on p 12 of the transcript of proceedings on 10 September 1999 when the application for ex parte order was made. The submission related in essence to the tracing of the payment of $800,000 which had to do with the connection between the Gagudju Association Incorporated and the Gagudju Charitable Association Incorporated. The transcript of these proceedings is annexure JDK1 to the affidavit of Jason Demetrios Karas sworn 6 October 1999. Mr Hoffman then referred to paragraph 7 of the affidavit of Mr Karas and the relevant annexures, including bank statement JDK2, letter from the Northern Land Council dated 11 February 1998 annexure JDK3. It is submitted on behalf of Mr Islam that the $800,000 payment was made to a completely different entity the Gagudju Association Incorporated, also referred to on the Westpac bank statement as the Gagudju Association Inc Charitable Trust, and not Gagudju Charitable Association Incorporated (In Liquidation). Accordingly, Mr Hoffman argues this is not an examinable affair in respect of Gagudju Charitable Association Incorporated (In Liquidation). Mr Hoffman submits the payment of $800,000 cannot be a preference claim or a cause of action that the liquidator seeks to inquire into.

[27] Mr Hoffman further argued that the failure by the liquidator to disclose to the Court the fact that the $800,000 had been paid to a completely different

corporation was again a failure to disclose a matter which affected the discretion of the Court in deciding whether or not to grant the ex parte application.

[28] At the time I made the ex parte order I had the benefit of reading the affidavit in support of Liquidator's Application for Examination sworn by the liquidator Stephen James Duncan on 2 September 1999. In particular, paragraphs 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28 and 29 which deal with matters to do with the relationship between the Gagudju Charitable Association Incorporated and the Gagudju Association Incorporated and other entities included in the Gagudju Group. It is the liquidator's wish to unravel the association between these various incorporated associations in an attempt to trace the movement of funds. The scope of the examination is not limited to the reason put forward by Mr de Zwart as set out on p 12 of the transcript of proceedings before the Court on 10 September 1999 (see *Re BPTC Ltd (In Liq)* (1992) 29 NSWLR 713 at 720(E)).

[29] The liquidator in making an application to the Court for an examination summons has to satisfy the Court that the person can provide information about the examinable affairs of the Corporation. I am satisfied the liquidator has discharged this onus in respect of Mr Islam and that there are a range of matters the liquidator wishes to investigate which are examinable affairs of the Corporation.

[30] The liquidator in making the application for an ex parte summons made a full disclosure relating to the payment of the $800,000 into the bank account of Gagudju Association Incorporated. There is no basis for finding that there had not been a full disclosure of matters relevant to the discretion to be exercised by the Court.

[31] The next topic addressed by Mr Hoffman related to his submission that there is no power to order production of documents other than at an examination. This submission is relevant to Order 3 and 7 of the ex parte orders made on 13 September 1999 which were:

> "3. That Aminul Islam and James Noonan produce to the Court before the date for the examination all books, papers, deeds, files, writings, working papers, accounts information and other documents in their possession, custody, power or control relating to the affairs of Gagudju Charitable Association Incorporated (In Liquidation)
>
> .....
>
> 7. That Aminul Islam and James Noonan produce to the Court on or before 4 October 1999 all of the documents mentioned in the Schedule hereto and all other books, papers, deeds, files, writings and other documents in their possession, custody, power or control relating to the affairs of Gagudju Charitable Association Incorporated (In Liquidation)."

[32] Mr Hoffman referred the Court to s 597(9) of the *Corporations Law* which provides as follows:

> "[Direction to produce relevant books] The Court may direct a person to produce, at an examination of that or any other person, books that are in the first-mentioned person's possession and are relevant to matters to which the examination relates or will relate."

[33] It is Mr Hoffman's argument that there is no power in the *Corporations Law* to make an order for production other than at an examination. In this matter the examination in respect of Mr Islam has been listed for 8 November 1999 and the order was for production of documents on 4 October 1999.

[34] Mr Hoffman made reference to the authorities relied on by Mr de Zwart being *Re BPTC Ltd (In Liq)* (1992) 29 NSWLR 713 McLelland J at p 718:

> "In my opinion this rule confers ample power on the court to make orders for the production of documents by an intended examinee or by any other individual or corporation, for the purpose of use in an examination under s 597, in advance of the attendance of the examinee for examination."

I note that the rule to which McLelland J was referring was Part 36, Rule 12(1) of the *Supreme Court Rules* 1970 (NSW).

See also *Re BPTC Ltd (In Liq) (No 5)* (1993)10 ACSR 756).

[35] It is Mr Hoffman's submission that since these decisions the *Corporations Law* has been amended. Prior to the 1993 amendment s 597(9) provided as follows:

> "[Failure to produce books] A person attending before the Court for examination pursuant to an order made under subsection (3), if directed by the Court to produce any books in his or her possession or under his or her control relevant to the mattes on which he or she is to be, or is being, examined, shall not refuse or fail to comply with the direction."

[36] It is Mr Hoffman's submission that the authorities referred to by Mr de Zwart are no longer to the point in respect of the existing provisions of

s 597(9) which is in entirely different terms. Mr Hoffman referred to *Re Southern Equities Corporation Ltd (In Liq); Bond and Another v England* (1997) 25 ACSR 394 Landers J at 399:

> "The court is empowered to direct a person to produce at an examination of that or any person books that are in the first mentioned person's possession and are relevant to matters to which the examination relates or will relate:…."

[37] See also *Re Brash Holdings & Anor* (1995) 15 ACSR 755 Hayne J at 765 and *Flanders v Beatty & Anor* (1995) 16 ACSR 324 Ormiston J at 332:

> "…. However, what remains of s 597 and what is contained in the new ss 596A to 596F and ss 597A and 597B, as amended and inserted (respectively) by the Corporate Law Reform Act 1992, has radically altered the scope of, and procedure relating to, examinations, albeit that the subject matter of an examination is little altered so far as the company itself is concerned. …."

See also *Re South Pacific Energy Trading Pty Ltd (In Liq)* (1996) 21 ACSR 435 McLelland J at 437 - 438

> "It is common ground that the directions in the present case required documents to be produced at a time and place at which no examination of any person was to occur. It was said for the liquidator that the purpose of that requirement was to enable the liquidator or his representatives to have access to the documents for the purpose of, and prior to, an examination or examinations to commence on a later occasion. The convenience of such a course may be readily conceded. But a requirement for production in advance of the relevant examination is not authorised by s 597(9). Reliance was sought to be placed on the phrase 'matters to which the examination relates *or will relate'* at the end of the subsection, and to what was said by Nicholson J in *Re Rothwells (No 2)* (1989) 15 ACLR 168; 7 ACLC 576 at 593 in relation to the phrase 'matters on which he *is to be*, or is being, examined' in s 541(9) of the Companies Code. However, all that his Honour relevantly said in that case was "that the words 'is to be …. examined' in s 541(9) show that an order may be made prior to the examination

commencing". The context shows that his Honour was concerned only with the time at which an order might be made, not with the time at which production might be required pursuant to an order. Likewise, s 597(9) of the Corporations Law contemplates that a direction may be made under that subsection prior to the commencement of the relevant examination (as well as after the commencement of the examination). But it is clear that any direction under the subsection must require production at a time which satisfies the criterion of being 'at' the relevant examination, namely a time between its commencement and its conclusion. A similar position obtained under s 597(9) in the form it took before the 1992 amendments, as indicated in *Re BPTC Ltd (in liq)(No 2)* (1992) 29 NSWLR 713 at 718-19; 8 ACSR 533; 10 ACLC 1431 at 1434-5, where an alternative procedure under Pt 36 r12 of the Supreme Court Rules was sanctioned under which an order for production of documents in advance of an examination might be made.

Although the powers of the court under Pt 36 r12 do not arise in the present applications, any contemplated future use of that rule should take account of the remarks of Bryson J in *Re BPTC Ltd (in liq) (No 5)* (1993) 10 ACSR 756; 11 ACLC 734 at 736-7 and 740.

It needs to be borne in mind that the only legitimate function of an examination of a person under s 597 is to obtain information (and incidentally thereto, evidence) about the 'examinable affairs' of the relevant corporation , from the person being examined. The only legitimate function of a direction under s 597(9) to another person to produce documents at such an examination is to facilitate the obtaining of such information from the person being examined (see, in relation to the earlier form of s 597, *Re BPTC Ltd (in liq) (No 3)* (1993) 29 NSWLR 708 at 711-12; 11 ACLC 365 at 368, and *Re BPTC Ltd (in liq) (No 5)* (1993) 10 ACSR 756; 11 ACLC 734 at 740)."

Mr Hoffman further submits that the direction to Mr Islam under s 597(9) is not empowered either by the *Corporations Law* or the Rules under the Northern Territory *Supreme Court (Companies) Rules.*

[38] Rule 59 of the Northern Territory *Supreme Court (Companies) Rules* provides as follows:

> "The Order for an examination shall be in Form 13 and a sealed copy of the Order shall constitute the summons to the examinee for his attendance at the examination."

Form 13 provides inter alia at paragraph 3:

> "That at the time of the examination the said X.Y. bring with him and produce to the Court all of the documents mentioned in the Schedule hereto and all other books, papers, deeds, writings and other documents in his possession, custody or power in any way relating to the affairs of the abovenamed company."

[39] Mr de Zwart argues that there is nothing in the authorities referred to by Mr Hoffman which suggest that an order for production cannot occur prior to the examination.

[40] I agree with the submission made by Mr Hoffman that there is no power under s 597(9) of the *Corporations Law* or Rule 59 of the *Supreme Court (Companies) Rules* read with the provisions of Form 13 to order production of documents prior to the date of examination.

[41] I agree with Mr Hoffman's submission that it would appear that the rationale behind the legislation and the rules is to provide a safeguard for the person required to produce the documents. Section 596F of the *Corporations Law* empowers the Court to make directions as to the manner and the conduct of an examination including who may be present at an examination while it is held in private, access to records and other matters. I am in agreement that the order to produce the documents prior to the date for examination should be set aside. The order can only be that the documents be produced at the time of examination. Mr Hoffman also challenges the scope of the

production and that s 597(9) only empowers "production of documents in a person's possession that are relevant to the matters to which the examination relates or will relate". Mr Hoffman argues that the transcript of the application to the Court on 10 September 1999 shows the subject matter to be narrower than the order itself. Mr Hoffman asserts this is an inconsistency and the liquidator should be required to specify more clearly the documents which are to be produced relevant to the examination.

[42] I do not agree with this submission. I have already found that the scope of the application is not confined to the initial reasons put forward in the application for an ex parte order. The Gagudju Charitable Association Incorporated was formed in 1996. It was wound up on 28 April 1998. The time period is necessarily short and does not need to be more clearly stated in the schedule.

[43] I do not accept the argument that the scope of the documents to be produced is too broad.

[44] A further argument advanced by Mr Hoffman is that the document Mr Islam is required to produce are not in his possession, he being a partner of the firm Ernst and Young. Mr Hoffman submits that partnership records are not in the possession, custody or power of one partner nor are they his to give over (*Ex parte Merrett*; *Re ACN 072081111 Pty Ltd* (1997) 25 ACSR 146 at 151):

> "However, the essential issue is whether merely by showing that a person is a partner or a managing partner of a large firm of accountants and that that large firm of accountants has rendered a bill to a claimant against the company in respect of a large number of hours, provides evidence that the person can provide information. Is it more likely than not that that person, who is currently the managing partner, has information? The court must be satisfied on the balance of probabilities under s 140 of the Evidence Act 1995 (Cth), and the mere matter to which I have referred, is really, as far as the liquidator's case goes, insufficient.
>
> Second, the point that one partner has not the power to produce the partnership documents unless something more is established as to his or her authority, appears to be correct. It certainly was not answered in any way by Mr Ryan. The submission that it is a matter for the deputy registrar at the examination is not only unattractive as a complete waste of resources, but is also contrary to authority. For over a hundred years, it has clearly been the law that a person, who is given an examination of this nature, especially a professional person, who is ostensibly required to wait outside a courtroom for 12 days, is entitled to come to the court and say that the order is oppressive and it ought to be set aside: see, for instance, *Maville Hose Ltd* [1939] Ch 32. Section 121 of the Supreme Court Act 1970 (NSW) only makes clear the procedure for such a review."

It is Mr Hoffman's submission that if the liquidator wants production of the documents they need to obtain an order against Ernst & Young.

[45] I agree with the submission made by Mr de Zwart that this case is distinguishable from the decision in *Ex Parte Merrett*. In the matter before this Court, there has been extensive correspondence between the liquidator and Mr Islam. The summons in the matter of *Ex Parte Merrett* was directed toward a person who did not have personal information about the matter. Mr Merrett was the managing partner of Deloitte Touche Tohmatsu. The summons was directed to "The Managing Partner". The summons issued

without regard to who may have had information about the matter. In this matter it seems entirely appropriate to address the summons to Mr Islam.

[46] Finally, Mr Hoffman on behalf of his client seeks access to the affidavit of the liquidator filed under s 596C. The test for access to the affidavit, has been set down in *Re Excel Finance Corporation; Worthley v England* (1994) 52 FCR 69 at 93:

> "In our view the Court has a discretion to order the disclosure, to a prospective examinee, of material lodged in support of the application for an examination order and should do so where the justice of the case so requires: cf *Re British and Commonwealth Holdings Plc (Nos 1 and 2)* [1992] Ch 342 at 355 per Nourse LJ and at 367 per Ralph Gibson LJ.
>
> It does not follow that the Court would permit every examinee or potential examinee to have access to such material. There are sound reasons why inspection should not be freely granted for so to do could afford to an examinee information which could permit the examination process to be frustrated: cf per Sir George Jessel MR in *Re Gold Co* (supra). There could also be confidential information which should properly be withheld. However, we agree with Nourse LJ in *Re British and Commonwealth Holdings Plc* (at 355):
>
> > '… inspection of the statement should prima facie be allowed where the court is of the opinion that it will or may be unable fairly and properly to dispose of the application if part of the evidence is withheld from the person against whom the order is sought. It will then be for the officeholder to satisfy the court that confidentiality in whole or in part is nevertheless appropriate.'
>
> An applicant will not be permitted access to such material to enable him or her to 'fish' for a case. There must be material before the Court from which it appears that the applicant has an arguable case, to which the material is relevant, before the discretion should be exercised in favour of that applicant. But once that appears the discretion will normally be exercised in favour of the application. Nothing in O 71, r 81 of the *Federal Court Rules* 1979 (Cth) requires a different result."

This was followed in *Simionato v Macks* (1996) 19 ACSR 34.

[47] The applicant who wishes to examine the affidavit must have an arguable case to enable the Court to exercise its discretion in their favour.

[48] I am not satisfied that the applicant has established an arguable case or that the justice of the case requires that the applicant be granted an order for disclosure of the affidavit.

[49] Accordingly, the application to seek access to the affidavit is refused.

[50] Mr Hoffman submitted as an alternative that a list of topics to be addressed in the examination, should be provided to the applicant. I am not persuaded that this would be an appropriate order.

[51] I will deal with the issue of conduct money raised by Mr Hoffman who referred to Rule 62 of the *Supreme Court (Companies) Rules* which states:

> "The service of any Order upon an examinee and the tender of any conduct money may be proved by affidavit."

[52] It is Mr Hoffman's submission that this implies a requirement that conduct money be provided.

[53] I do not agree with this submission. I am informed Mr Islam resides and works in Darwin. There may be other considerations if Mr Islam had to travel a considerable distance and/or required overnight accommodation. However, that is not the position.

[54] Mr Hoffman also seeks an order that the liquidator pay Aminul Islam's costs and expenses associated with compliance with the summons. In the circumstances I consider it may be premature to deal with this application and rather than rule on it at this time I will allow the parties the right to address me further on the issue of costs and/or expenses associated with compliance with the summons when the examination has concluded.

[55] I have refused in principle the application to set aside the order for the examination of Mr Aminul Islam. I am prepared to hear a further submission from the parties as to the date of that examination.

[56] In summary, the orders of the Court on the interlocutory application are as follows:

1. The application to set aside the order made on 13 September 1999 for the examination of Mr Islam is refused. I am prepared to hear further submissions as to whether that date should still be 8 November 1999 or a later date.

2. The application that the order for production of documents by Aminul Islam be set aside is refused. The order that these documents be produced prior to the date of examination is set aside. The order for production of documents is that the documents be produced by Mr Islam at the examination.

3. The application to narrow the order for production of documents is refused.

4. The application that the examinee be entitled to inspect the affidavit of the liquidator sworn 2 September 1999 and sealed pursuant to s 596C of the *Corporations Law* is refused.

5. The application that the liquidator provide a list of topics the subject of the examination is refused.

6. The parties have leave to apply in respect of the application that the liquidator pay Aminul Islam's costs and expenses associated with compliance with the summons and that the liquidator pay Mr Islam's costs of and incidental to this application.

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