IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-005724
[2012] NZHC 2145

	BETWEEN	THE OFFICIAL ASSIGNEE Applicant
	AND	GRANT THORNTON Respondent

Hearing: 16 February 2012

Appearances: G Caro for applicant
K J Scott for respondent

Judgment: 23 August 2012

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 23 August 2012 at 4pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
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K J Scott, Buddle Findlay, PO Box 1433, Auckland 1140

[1] The applicant, the Official Assignee (the Assignee), is the liquidator of a failed finance company, Rockforte Finance Limited (in receivership and in liquidation) (Rockforte). Rockforte issued debt securities to the public via a prospectus. It ceased taking public funds in 2009, was placed into receivership in May 2010, and into liquidation in February 2011.

[2] The respondent, Grant Thornton, audited Rockforte's accounts for a two and a half year period ending 30 September 2008.

[3] As part of his duties, the Assignee wishes to investigate issues concerning related party loans, poor security for loans, poor documentation of loans, the accuracy of a registered prospectus, and the accuracy of the books and records of Rockforte generally.

[4] In furtherance of that investigation, he requested information from Grant Thornton, pursuant to s 261(2) of the Companies Act 1993 (the Act). Grant Thornton resisted production of documents that were not Rockforte's property, contending that s 261 does not require it to produce documents generally.

[5] Although the Assignee does not accept Grant Thornton's interpretation of s 261, and contends that it is entitled to an order compelling production under that section, he has applied for an order for production under s 266(2)(b) of the Act.

[6] Grant Thornton does not dispute that it was the auditor of Rockforte in the two and a half year period already mentioned, and hence is an entity to which ss 261 and 266 of the Act apply. It says that it does not wish to be obstructive and will comply with obligations under the Act. However, it says that it did not provide documents following the s 261 request because, on the proper interpretation of that section, there was no obligation on it to do so. It opposes the application under s 266 on the grounds that it would be oppressive to require it to produce the documents being sought (having regard to the volume of documents and the cost of producing them), and because the Assignee has not provided an adequate explanation for requiring the documents.

The Court's power under s 266

[7] Expressed very broadly, a liquidator's task is to take possession of, and realise, all assets of the company, and to investigate all means of recovery with a view to maximising the return to the company's creditors and contributories. The liquidator is given two powerful tools to carry out this process. First, the powers under s 261 to obtain documents and information, which powers are exercised outside of the Court. Secondly, the right to come to the Court to seek an order for compliance with his or her requirements under s 261,[1] or to seek an order that persons attend before the Court for examination or produce documents in that person's possession or control.[2] The Court's power is discretionary.

[8] The application in the present case is brought under s 266(2)(b) which reads:

> 266 Powers of Court
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> ....
>
> (2) The Court may, on the application of the liquidator, order a person to whom section 261 of this Act applies to—
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> ...
>
> (b) Produce any books, records, or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.

[9] Whether the matter comes before the Court by way of an order for compliance with a requirement under s 261 or on a request for an order for examination or production of documents, the Court will balance the need to enable the liquidator to obtain information to investigate the affairs of the company with a need to maintain fairness in proceedings, by taking into account the effect of an order on the party being compelled.[3] It is for the liquidator seeking the order to satisfy the Court that there is a proper case, after balancing all relevant factors.[4]

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[1] Section 266(1).
[2] Section 266(2).
[3] See *Re Northrop Instruments & Systems Ltd* [1992] 2 NZLR 361 (HC) at 365 where McGechan J commented that while the Court will endeavour to assist a liquidator to perform public interest functions, there is a counter veiling concern to restrain liquidators from excess "however well-intentioned"; see also *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, (1992) 4 All ER 876 (HL); *Laing v KPMG Peat Marwick* (1989)

[10] The Courts have identified two approaches to the exercise of this discretion. The first, and traditional, approach is for the Court to assess whether the liquidator's request or application is a genuine investigative step taken bona fide with a view to reaching an informed decision. The second, called the "Cloverbay" approach,[5] is to consider what is required to put the liquidator in the same position as the directors so far as knowledge of the company's affairs was concerned (referred to as "reconstitution of the company's knowledge").

[11] In a recent case in this Court, *Carrow Holdings Ltd (in liq) v Sidiq*, Heath J commented that, in reality, both approaches work together:[6]

> In reality, both approaches work together. It is equally important for the liquidator to re-constitute knowledge of directors of the company as it is for him or her to make informed decisions about what steps to take for the benefit of creditors. In that context, it must be remembered that a liquidator usually has limited funds with which to work and it is in the public interest that he or she ascertains relevant information with as little expense as possible and in the most expeditious manner.

[12] In *British & Commonwealth Holdings Plc v Spicer and Oppenheim*, the House of Lords commented that the power under the English equivalent to s 266 was an extraordinary power to be exercised after careful balancing of the factors involved, noting that the Court should take into account on one hand the reasonable requirements of the liquidator to carry out his task, at the same time as the need to avoid making an order which was wholly unreasonable, unnecessary, or oppressive:[7]

> The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents ("reconstituting the company's state of knowledge") but in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer

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4 NZCLC 65,180 (HC).
[4] *British & Commonwealth Holdings Plc*, above n 3, at 439.
[5] Arising from the approach taken by the English Court of Appeal in *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90 (CA).
[6] *Carrow Holdings Ltd (in liq) v Sadiq* HC Wellington CIV-2007-404-2854, 5 June 2008 at [32].
[7] At 439.

> or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others.

The application

[13] The liquidator seeks production of the following:

(a) all correspondence sent to and received from Rockforte and its representatives or agents or third parties;

(b) all books, records, papers and other information relating to Rockforte;

(c) all audit work, paper files created, generated or collated as part of any evaluation, audit or assignment undertaken for or in respect of Rockforte; and

(d) if Grant Thornton employed a specific electronic audit programme:

(i) all reports that were or could be generated including audit planning, information gathering, risk plans, actual audit plans, control and assessment and other sections of audit evaluation and control; and

(ii) all reports generated as a result of performing the audit.

[14] Counsel for Grant Thornton summarised its position on each of these categories in the course of the hearing:

(a) Grant Thornton is willing to provide the correspondence (category (a));

(b) Grant Thornton objects to producing "all books, records, papers and other information" (category (b)) primarily on the ground of the volume of documents involved;

(c) Grant Thornton objects to producing "all audit work and paper files created" (category (c)) on the ground that it is an unnecessary intrusion on confidentiality and privacy to require these working papers in the absence of any more specific identification of the purpose for which the liquidator is seeking them;

(d) Grant Thornton objects to producing the reports from its electronic audit programme (category (d)) because of the work involved in verifying it, and also because the Assignee had not made out a sufficient case for overriding its confidentiality and privacy in those documents.

Discussion

[15] It is common ground that the documents the Assignee is seeking belong to Grant Thornton, and not to Rockforte. There has been an issue in correspondence between the parties as to whether Grant Thornton was obliged to produce these documents in response to a request made by the Assignee under ss 261(2)(e) and 261(3)(b):

> 261 Power to obtain documents and information
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> ...
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> (2) A liquidator may, from time to time, by notice in writing require—
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> ...
>
> (e) A receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or
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> ...
>
> (3) A person referred to in subsection (2) of this section may be required—
>
> ...
>
> (b) To provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests....

[16] The Assignee's notice sought the same documents as he is seeking in the present application. The Assignee contends that the Assignee's entitlement under s 261(3)(b) to require provision of information obliges Grant Thornton to provide the documents. Grant Thornton says that s 261(3)(b), when read in the context of the rest of the section, gives the Assignee the power to request information about Rockforte, but not to require production of its documents. It says that the information may be requested, and provided, orally or in writing, but the Assignee can only obtain production of its documents by application under s 266.

[17] As the Assignee's application is for an order under s 266(2)(b), as distinct from an order under s 266(1) for compliance with the Assignee's notice, I will address the point, but only briefly, as it may be relevant to costs.

[18] Section 261(1) gives the liquidator power to require any person to deliver up books, records and documents of the company held by that person. Section 261(2) identifies several categories of persons (including an auditor) who may have knowledge of the affairs of the company and from whom the liquidator can seek information. Section 261(3) sets out specific things that the liquidator may require a person within those categories to do. This includes meeting with the liquidator, providing the liquidator with information "about the business, accounts or affairs" of the company as the liquidator requests, and being examined by the liquidator on that person's knowledge of the company.

[19] I accept the submission of counsel for Grant Thornton that s 261(3)(b) gives the Assignee power to make enquiries of Grant Thornton, but it does not give him power to require production of documents that belong to Grant Thornton rather than the company. The power to require production of another person's documents, which has been described as an extraordinary power,[8] is a discretionary power reposed in the Court, to be exercised on application under s266(2). If Parliament had intended liquidators to be able to exercise the same power by notice under s 261(3)(b), the wording of that subsection could be expected to mirror that in s 266(2)(b). Further, s 266(2)(b) would then be unnecessary, as a liquidator could apply for compliance under s 266(1).

[8] *British & Commonwealth Holdings Plc*, above n 3 at 439.

[20] Turning then to the application, as Grant Thornton has agreed to provide correspondence (category (a) of the documents sought), the issue for the Court is whether to order production of the documents in the other three categories.

[21] Grant Thornton's opposition, in essence, is that the discretion is to be exercised cautiously to ensure that the very wide powers exercisable under the section "are not used oppressively, vexatiously or unfairly",[9] and that the Official Assignee has not discharged the onus of showing that the very broadly framed request (in effect, for all of Grant Thornton's audit files) is necessary to enable the Assignee to discharge his duties.

[22] Counsel for Grant Thornton submitted that the Assignee had not articulated a specific purpose (or specific purposes) for seeking the documents, and there was no obvious benefit to producing its working papers in particular. Counsel pointed to Grant Thornton's willingness to provide the Assignee with copies of correspondence between it and Rockforte (an offer that the Assignee had not taken up), and submitted that that should satisfy his need to establish the information and explanations given to Grant Thornton by the directors. She argued that until the Assignee stated his specific purpose for seeking the documents, the Court could not discern whether or not this was a well-intentioned but excessive investigation,[10] having regard both to Grant Thornton's rights to privacy and confidentiality in their own records and to the fact that the volume of documents involved would make it an arduous and disruptive exercise.

[23] It is true that the Assignee has not identified specific purposes for which the information is sought, but I do not accept that he needs to do so. This application must be considered in the context of the liquidation. At the time of liquidation some 77 investors had invested approximately $3.86 million on the basis of Rockforte's prospectus. Although the majority of these investors have been repaid under the Crown Retail Deposit Guarantee Scheme, the receivers are projecting that the return to Treasury (standing in the shoes of the repaid investors) is likely to be less than 5 cents in the dollar. In addition, at time of liquidation Rockforte owed unsecured

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[9] *Laing*, above n 3, at 65,182.
[10] *Re Northrop Instruments & Systems Limited*, above n 3, at 365.

creditors over $338,000 (including some preferential debt to the Commissioner of Inland Revenue).

[24] The Assignee is working closely with the receivers, and shares their view that there are issues to investigate concerning possible misappropriation of investor funds, accuracy of the registered prospectus, and the accuracy of the books and records of the company. Rockforte operated under a trust deed that prohibited it from using investor funds to make loans to related parties of more than 2% of its tangible assets. He considers that there are issues to investigate in this respect (the Serious Fraud Office has investigated and alleges that a substantial portion of the investors' money was used to fund personal business interests of the directors). He refers to the Serious Fraud Office having laid a total of 93 charges against the three directors of Rockforte, alleging offences including theft by a person in a special relationship, false accounting, obtaining by deception, and false statements by a director.

[25] Against that background the Assignee says that he is making his own inquiries to determine whether there are any available actions that he can pursue for the benefit of Rockforte's creditors. In relation to the present application, he says Rockforte's books and records are in a poor state, and the information and explanations that the directors provided to Grant Thornton may include information not available elsewhere. He says that the correspondence will not provide the complete picture, as it may not record all communications (particularly oral communications which may be recorded in the working papers). He refers to the fact that Grant Thornton issued unqualified audit reports, and says that this needs investigation in light of what the receivers have discovered (he has still to assess whether there is any basis for a claim against Grant Thornton, and needs to make that decision after considering all relevant information).

[26] The Assignee acknowledges that the orders sought will cause disruption to Grant Thornton, but contends that this can be managed (with cooperation) to lessen the effect on Grant Thornton. He refers to a similar exercise involving the auditors of failed finance company Capital + Merchant Finance Limited (in receivership and in liquidation) (a substantially larger company with far greater losses) where the

auditors provided the Assignee with access to their entire audit file following a s 261 notice, and cooperation between the parties meant there was minimal business disruption to the auditors.

[27] I accept that the Assignee is seeking the documents in good faith, as part of an investigation that he is bound to undertake to establish whether there is any action he can pursue for the benefit of Rockforte's creditors. I consider that the Assignee has put sufficient evidence before the Court to allow it to balance the competing interests: the Assignee's reasonable requirements to carry out his duties as against the burden placed on Grant Thornton. I take the view that the Assignee's investigation should not be limited to specific transactions or circumstances that he can identify in advance. This was not required in *British & Commonwealth Holdings Plc.* The breadth of the orders will cause Grant Thornton inconvenience but, as was pointed out in *British & Commonwealth Holdings Plc*, that, of itself, does not make the order unreasonable.[11] Mutual cooperation will make the task more manageable and less disruptive. The public interest in investigating the circumstances that lead to Rockforte's collapse on this occasion must trump Grant Thornton's interests to privacy and confidentiality.

[28] I accept that Grant Thornton's own actions will come in for scrutiny by reference to the information that they are being required to produce. However, that is not a reason to decline the order.[12] The Assignee has said that he has still to assess Grant Thornton's position, and I consider that it is better that he do so with the benefit of all available information.

Decision

[29] The Assignee's application is granted.

[30] Leave is reserved to seek further directions if any issues arise in relation to the implementation of the order.

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[11] *British & Commonwealth Holdings Plc*, above n 3, at 439, quoted at paragraph [12] above.
[12] In *Re Northrop* an order for examination of two former company officers was made, even though proceedings were "clearly in the wind": *Re Northrop*, above n 3, at 362.

[31] The application before the Court required exercise of the Court's discretion. It did not have an obvious outcome, given the breadth of the orders sought (and I have already found that Grant Thornton was entitled to decline to produce the documents in response to the Assignee's notice). Grant Thornton will be put to some cost in complying with the orders. In the circumstances I consider it unreasonable to require Grant Thornton to pay the costs of the application. There is no order as to costs.

Associate Judge Abbott