IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-000141
[2017] NZHC 1397

BETWEEN	PERI MICHAEL FINNIGAN First Applicant
AND	BORIS VAN DELDEN Second Applicant
AND	BRIAN ROBERT ELLIS Respondent

Hearing: 11 May 2017

Appearances: K J Crossland and W Buckham for First and Second Applicants
R B Hucker and D J D Van Haut for Respondent

Judgment: 23 June 2017

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 23 June 2017 at 10.30 a.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

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G Bogiatto, Auckland

Introduction

[1] Fishing expeditions are a popular pastime for many people. The fisher does not know, of course, what he or she might reel in – trout, salmon, or nothing at all. Nonetheless, the line is thrown out in the hope, and the expectation, that something will bite. And then there is the alluring possibility that today, or maybe tomorrow, the hook will find that 'perfect catch'.

[2] The liquidators in this case, Ms Finnigan and Mr Van Delden, are said to be 'going on a fishing expedition'. In this legal context, the idiom has rather less cheerful connotations. This is especially so in the context of functionaries exercising tightly-constrained and essentially inquisitorial statutory powers, as in the present case. In this case, the liquidators want to fish in the lake of Mr Ellis' personal accounts. The 'perfect catch' would be evidence that Mr Ellis has the assets to satisfy any judgment made against him.

[3] Mr Ellis is a former director of a now liquidated company, Wenztrou Cooperation Ltd, formerly called Trojan Foods (NZ) Ltd. The liquidators and a creditor of Wenztrou have issued substantive proceedings against Mr Ellis and two other former co-directors for various alleged breaches of their director duties. The liquidators seek an order under s 266 of the Companies Act 1933 that Mr Ellis provide them with personal financial documents.

[4] The liquidators' reasons for wanting these documents are essentially that they want to know whether Mr Ellis is 'judgment-worthy'. The trial promises to be lengthy and expensive. Quite understandably, therefore, the liquidators want some reassurance that the costs and risks associated with continuing proceedings are outweighed by the possible return to the creditors.

[5] But understandable or not, the application is novel and controversial. No New Zealand court has expressly addressed the issue of whether liquidators are statutorily empowered to enquire into the financial position of potential or actual defendants. The liquidators invite the court to do so now.

The statutory framework

[6] The starting point, as always, is the statutory framework. The liquidators rely on s 266(2)(b) of the Companies Act in this application. The provision is laid out in full, with the specific wording relied upon highlighted in bold print:

> **266 Powers of court**
>
> (1) The court may, on the application of the liquidator, order a person who has failed to comply with a requirement of the liquidator under section 261 to comply with that requirement.
>
> (2) **The court may, on the application of the liquidator, order a person to whom section 261 applies to—**
>
> (a) attend before the court and be examined on oath or affirmation by the court or the liquidator or a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:
>
> (b) **produce any books, records, or documents relating to the** business, accounts, or **affairs of the company** in that person's possession or under that person's control.
>
> [emphasis added]

[7] Section 266(2) refers back to s 261, which relevantly provides:

> **261 Power to obtain documents and information**
>
> (1) A liquidator may, from time to time, by notice in writing, require a director or shareholder of the company or any other person to deliver to the liquidator such books, records, or documents of the company in that person's possession or under that person's control as the liquidator requires.
>
> (2) A liquidator may, from time to time, by notice in writing require—
>
> (a) a director or former director of the company; or …
>
> …
>
> (e) a … person having knowledge of the affairs of the company
>
> to do any of the things specified in subsection (3).
>
> (3) A person referred to in subsection (2) may be required—
>
> (a) to attend on the liquidator at such reasonable time or times and at such place as may be specified in the notice:

(b) to provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests:

(c) to be examined on oath or affirmation by the liquidator or by a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:

(d) to assist in the liquidation to the best of the person's ability.

[8] There is no question that Mr Ellis fits the criteria of the persons listed in s 261(2): as a director and former director in subs (2)(a); and for a time when was not a director or former director, as a "person having knowledge of the affairs of the company" in subs (2)(e). This brings into play the provisions in ss 261(3) and ss 266(2).

[9] The liquidators have already taken steps under s 261(3). They required Mr Ellis and his two former co-directors to attend an examination and to produce "information" relating to the affairs of the company. In fact, it appears that the liquidators asked the former directors one simple question, essentially: Will you provide us with the personal financial documents we request? Two said yes; Mr Ellis refused.

[10] It is because of Mr Ellis' refusal that the liquidators turned to the powers under s 266.[1] On the face of this provision, the liquidators had two options. Pursuant to s 266(1), they could seek enforcement of their powers under s 261(3). Alternatively, they could apply for a court order under s 266(2)(b). Why the liquidators took the latter route is obvious from a closer reading of the statutory language.

[11] There is no issue that the documents sought fall outside the scope of s 261(3)(b), which refers only to "information about the … affairs of the company". Even assuming "information" is read to include documentation, a point I expressly do not decide, the liquidators acknowledge that Mr Ellis' personal financial documents are not documents "of the company".

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1 For clarity, I note that default is not strictly necessary before exercising powers under s 266: *ANZ Banking Group v Sheahan* [2013] 1 NZLR 674 per Justice Heath.

[12] But s 266(2)(b) provides a power that is wider rather than co-extensive with that in s 261(3)(b).[2] Importantly, it casts a wider net that captures third-party documentation as long as it is "relating to the … affairs of the company".

The two issues: jurisdiction and discretion

[13] A close reading of s 266 makes it clear that there are two separate questions at issue in this application, concerning jurisdiction and discretion respectively:

(a) First, does the court have the *jurisdiction* under s 266(2) to grant orders for disclosure of the documents sought by the liquidators?

(b) Second, if there is jurisdiction, should the court exercise its *discretion* to grant such orders?

[14] The liquidators say that there is jurisdiction, and that there are good reasons for the court to exercise its discretion in this case. Mr Ellis disagrees on both counts. For me to rule in the liquidators' favour, I will have to be satisfied that both questions should be answered in the affirmative.

Discretion

[15] I begin with the issue of discretion and the inappropriately broad nature of the application brought by the liquidators, assuming momentarily that jurisdiction exists.

A comprehensive and invasive application

[16] The liquidators seek orders for a comprehensive disclosure of Mr Ellis' financial documents, specifically:

(a) Personal tax returns from 2012 to 2016;

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2 *ANZ Banking Group v Sheahan*, above n 1, following Judge Abbott in *Official Assignee v Grant Thornton* [2012] NZHC 2145 at [19].

(b) Copies of personal bank statements for any bank account Mr Ellis holds worldwide in respect of the period from 1 January 2015 to 24 November 2016;

(c) Documents evidencing his assets (including but not limited to, real estate, investments and shareholding) owned over the value of $10,000, not taking into account monies owing in respect of the same, during the relevant period;

(d) Documents evidencing personal liabilities over the value of $10,000 and in particular, loan agreements, credit card statements and financial facility agreements;

(e) Names of any Trusts, of which he is a beneficiary, a Trustee, or holds the power to appoint Trustee/s or beneficiaries.

[17] In addition, the liquidators seek orders that Mr Ellis attend before the Court and be examined on oath or affirmation on any matter relating to his financial position "if following review of the above documents the applicants consider it necessary".

A degree of carelessness in the liquidators' case

[18] The second order sought by the liquidators is poorly expressed. It implies, problematically, that the court is to, in effect, to hand over the judicial supervisory role to the liquidators to decide whether further examination was necessary. But that will not do. It is the court's task under s 266(2) to determine whether further examination is appropriate.

[19] Counsel admitted as much at the hearing. The intent, counsel said, was the liquidators would be reserved leave to come back and persuade the court that orders for further examination were necessary. The concession on the part of the liquidators was fitting, but it does provide an indication to a degree of carelessness in crafting the application for so invasive an order.

[20] Further indication of the same is found in the inappropriate breadth of documentation sought. The wide-ranging and highly personal nature of this documentation makes any order for disclosure of the documentation appear, at least at first blush, rather draconian and invasive.

[21] The liquidators stress that, assuming jurisdiction, Mr Ellis' financial affairs are not necessarily inviolate from enquiry. It may well be that Mr Ellis' private interests should yield to the interest of creditors represented by the liquidators. A balancing exercise must therefore be undertaken between the reasonable requirements of the liquidators undertaking their statutory duties, and the need to avoid unnecessary or oppressive orders for the person concerned.[3] But the liquidators have given little to encourage confidence that the balance should be struck in their favour.

[22] It is not obvious, for instance, why four years of tax returns is necessary. It is not enough for Ms Finnigan to merely say that this is required to establish Mr Ellis' "current judgment worthiness, as a pointer to future judgment worthiness". There was no attempt to explain the time periods in light of the policy position in the statutory scheme. It is also hard to see why it is necessary or relevant to require Mr Ellis to disclose the names of virtually each and every trust which he may be associated with.

[23] To a significant degree, the liquidators justify the breadth of the documentation sought on the grounds that Mr Ellis might restructure his financial affairs to shield his assets pending the determination of the substantive proceedings. But the evidence in support of this claim is, on the whole, inadequate for the court to accept the justification at face value.

[24] At a more basic level, the expressed purpose of the liquidators' application is to assess whether Mr Ellis is worth powder and shot. It surely suffices, then, for Mr Ellis to establish that he has enough assets to meet the potential judgment liability. But as it is, Mr Ellis is asked to lay out details of what might conceivably

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3 *British and Commonwealth Holdings plc (Joint Administrators) v Spicer & Oppenheim (a firm)* [1993] AC 426; [1992] 4 All ER 876 at 439, 885.

be personal assets dramatically in excess of the amount that judgment is sought for (approximately $775,000, plus interest). To order such extensive disclosure might be to use a sledge hammer to crack a nut, and ride roughshod over reasonable expectations that personal financial affairs are private and should normally remain so.

[25] The element of carelessness is also evident at the earlier stage in the process, when the liquidators examined Mr Ellis under s 261. I find it hard to believe that the liquidators could not have asked more prudent and effective questions than, in essence, 'will you give us the documentation we want?'. There is no bar to liquidators bringing an application under s 266 without first engaging 261. That said, I am reluctant to grant such wide-ranging orders under s 266 when the liquidators have not crafted and justified their application (or used their powers under s 261) with any great care.

[26] For these reasons, I am satisfied that the liquidators have not discharged their onus of satisfying the court that there is a proper case, on the balance of all the relevant factors, to exercise the court's discretion.[4]

Improper purpose and collateral advantage

[27] Mr Ellis raises a couple of additional arguments for why the orders sought would be oppressive and an improper exercise of the court's discretion. He first impugns the motivations of the liquidators, and second suggests that the application would unfairly give the liquidators a collateral advantage in the substantive proceedings. I want to stress that I find both submissions unconvincing.

[28] I see no such advantage to the liquidators. The documents would not appear to assist, in any material way, the liquidators' case in the substantive proceedings. Indeed, it is fair to say that any relevant documents would have been disclosed already in the substantive proceeding by way of normal discovery.

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4 *Official Assignee v Grant Thornton* [2012] NZHC 2145 at [9].

[29] More importantly, there is nothing to suggest that the liquidators' purpose is not *bona fides*. There is certainly no evidence the liquidators ulterior motive is (as Mr Ellis insinuates) to pressure Mr Ellis into settling the proceedings.

[30] Mr Ellis' argument appears to confuse the issues of jurisdiction with legitimate purpose. New Zealand courts have thus far not found that they have jurisdiction to give effect to liquidators' enquiries for documentation for the purpose of determining a person's judgment-worthiness. But it does not follow that the purpose itself is illegitimate. Even in Hong Kong, where courts have found there is no such jurisdiction, it has been rightly observed that:

> Liquidators need to identify, at any early stage, what promising paths they can pursue and, let it never be forgotten, what blind alleys they had best avoid so as not to throw good money after bad.[5]

It is prudent for liquidators to want to undertake a cost-benefit analysis of potential proceedings taking into account the potential ultimate recovery from a defendant.

[31] But the jurisdictional issue is not whether the liquidators' purpose is legitimate, but whether Parliament, through enacting s 266(2), intended to empower courts with the discretion to give effect to that purpose. I turn to that issue now.

The jurisdiction issue

[32] Strictly speaking, my findings on discretion make it unnecessary to discuss the jurisdictional issue. Given the novelty and importance of the issue, however, a survey of the parties' arguments is in order. I leave open the merits of the proposed re-interpretation of s 266(2); for reasons I will come to, this is not the appropriate case for making a determination either way.

The proposed re-interpretation of s 266

[33] The liquidators ask the court to read the scope s 266 more broadly than any New Zealand court has ever interpreted it before.

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5 *Joint & Several Liquidators of Kong Wah Holdings Ltd v Grande Holdings Ltd* (2006) 9 HKCFAR 766.

[34] It is common ground that for the court to have jurisdiction the documents sought must fall within the scope of the statutory provisions. Both parties agree that the central jurisdiction question as it relates to s 266(2) is whether Mr Ellis' personal financial documents fall under the category of documents "relating to the … affairs of the company".

[35] This wording requires the court to rule on whether the nature of the connection between the documents sought and the liquidated company is sufficiently close that the documents are caught by s 266(2). At the core of this case is a disagreement over what Parliament intended the nature of this connection to be.

[36] The question at issue was well-framed over two decades ago by the Federal Court of Australia in *Grosvenor Hill (Queensland) Ltd v Barber*:[6]

> The question is whether the court is limited by the section to ordering an examination the purpose of which is to go no wider than to determine whether or not there are reasonable grounds, including evidence, to litigate a case to a successful judgment, or whether, the court has power to order an examination, the purpose of which is to ascertain the likelihood of any judgment being satisfied; that is, whether it is a permitted purpose to inquire as to the worth of a potential defendant so as to be able to make a practical assessment as to the likelihood of a return to the company of the fruits of any favourable judgment and the necessary legal costs expended in obtaining it.

[37] Quite simply, can the liquidators' expressed intention for requesting documents be whether the litigation is financially prudent? Or more precisely, is the court empowered under s 266 to order the production of documents "to test the likelihood of the creditors in the winding up receiving a tangible benefit from the satisfaction of any judgment obtained"?[7]

The parties' submissions

[38] The submissions from both parties narrowed in on the statutory language of ss 261 and 266. Considerable attention was given to reading these provisions in light of how courts have interpreted analogous provisions in other jurisdictions, most notably Australia and Hong Kong.

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6 *Grosvenor Hill (Queensland) Ltd v Barber and Kelly* (1994) 120 ALR 262 at 268.

7 At 268.

[39] The liquidators rely on a long line of Australian authorities which have answered the *Grosvenor Hill v Barber* question in the affirmative. For the liquidators, the Australian legislation is sufficiently analogous to ss 261 and 266 that it sheds light on the proper interpretation of these provisions.

[40] There is no doubt that, at least in this regard, Australian courts have taken the powers of liquidators beyond what New Zealand courts have so far allowed. I note, however, that the preponderance of cases referred to me concern orders requesting information about personal insurance cover. These cases include *Grosvenor Hill v Barber*,[8] *Gerah Imports v Duke Group*,[9] and *Re Interchase Corporation Ltd (in liq)*.[10] The disclosure of a personal insurance policy raises quite separate considerations, and Mr Ellis' counsel accepted that there are distinct reasons why such disclosure should be ordered. There are other cases that appear more analogous to the present one, notably *Re Bosun Pty Ltd (in liq)*,[11] but even this case does not appear to go as far as what the liquidators are seeking here.

[41] The liquidators also rely on *Re Bosun Pty Ltd (in liq)*,[12] an appeal from a Master's orders that Bosun's director, Mr Makis, be examined and that documents be produced by a number of companies associated with Mr Makis. The liquidators expressed purpose was to enquire as to the worth of a potential defendant so as to undertake a cost-benefit analysis of commencing proceedings. But there is also a significant lack of analogy with the New Zealand context, in that statutory provisions expressly allow for the disclosure of documents of associated companies.[13]

[42] Mr Ellis, for his part, questions the similarity of the Australian provisions to ss 261 and 266. He says a closer analogy is to be found in the Hong Kong legislation. Significantly for Mr Ellis' purposes, Hong Kong courts have held that liquidators' powers do not extend to enquiries as to whether a defendant or potential defendant is worth powder and shot. The cases Mr Ellis especially relied on are *Re Weihong Petroleum Co Ltd (No 2)* and *Re China Medical Technologies Inc (No*

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8 *Grosvenor Hill (Queensland) Ltd v Barber and Kelly* (1994) 120 ALR 262 at 268.
9 *Gerah Imports Pty Ltd v Duke Group (in liquidation)* 1993 12 ALR 262 at 520.
10 *Re Interchase Corp Corporation Ltd (in liq)* [1993] 12 ACSR 405.
11 *Re Bosun Pty Ltd (in liq)*; *Markis v Sheahan* [2000] SASC 180.
12 *Re Bosun Pty Ltd (in liq)*; *Markis v Sheahan* [2000] SASC 180.
13 *Corporations Law*, s 9(c).

2).[14] The liquidators, in reply, say these cases can be distinguished on the grounds that the legislation is different, and omits the key phrase "affairs of the company".

On fishing again

[43] I see no need to delve into these linguistic debates. Such comparisons with foreign legislation are of some help as tools of interpretation. I would suggest, however, that in getting bogged down with the semantics, counsel somewhat lost sight of the wood for the trees. I consider it unlikely, that is, that the jurisdiction issue can be resolved simply by splitting hairs over the statutory language.

[44] The language of ss 261 and 266 do not operate in a vacuum. What is more important, and what was substantially absent from the parties' submissions, is an understanding of those provisions in light of the wider statutory scheme covering the powers, functions, and purposes of liquidators in New Zealand's unique commercial context. Only then can a proper answer be confidently found to the question of what Parliament intended by the phrase "relating to the affairs of the company".

[45] Mr Ellis submits that the statute does not allow liquidators to obtain documentation merely to work out whether a potential defendant is judgment-worthy. Certainly there is a need for liquidators to justify seeking the Court's assistance to coerce disclosure of such documentation; that must be assumed by reason of the Court holding a discretion or supervisory role under s 266. Parliament must have seen good reason to confer such a role on the Court. Mr Ellis goes further. He submits that 'fishing expeditions' are simply not contemplated by Parliament. The liquidators disagree. They want to affirm the words of Nicholson J, writing in the United Kingdom, who stated that:[15]

> I would not wish to associate myself with the proposition that questions of a fishing nature are to be disallowed. Indeed it is questions of that very nature that appear to me to be legitimate under [the relevant provision], inasmuch as the liquidator is afforded this statutory aid to enable him to obtain information not otherwise available to him.

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14 *Re Weihong Petroleum Co Ltd (No 2)* [2003] 2 HKLRD 747 and *Re China Medical Technologies Inc (No 2)* [2015] 2 HKLRD 27.

15 *Re Rothwells Ltd* (No 2) (1987) 7 ACLC 576 at 586.

[46] But the question is more complicated than simply: are liquidators allowed at all to fish in the pool of a potential defendant's financial affairs? That question cannot be divorced from other more nuanced and controversial questions.

[47] One such question is this: Where are the boundary-lines separating where the liquidators can or cannot fish? I would have expected more discussion from the liquidators on the boundaries of any extension of the liquidators' powers, and even the principles to guide the courts discretionary exercise of its extended jurisdiction. The fear of opening the floodgates by rubberstamping the liquidators' application is not naive. In a different but related context, the Court of Appeal has given one possible counterfactual: the financial affairs of a potential defendant's rich uncle being investigated because the potential defendant had an expectation or hope of receiving a gift or bequest from him.[16]

[48] Another such question is what justification the liquidators are required to put forward before the court will allow them to 'throw out their line'. In this vein, it is important to stress that in exercising their powers under ss 261 or 266, liquidators are not like children playing 'go fish' picking up cards from the pool with having any clue what they might be. As Nicholson J suggested, it is in the nature of an essentially inquisitorial power like that provided for in s 266(2) that the 'inquisitor' is, in some sense, always fishing. The interesting question becomes at what point, or on what degree of justification, the liquidators may go beyond the limits of their powers in s 261, and to ask the Court's assistance to further intrude on the rights of a potential defendant. Must liquidators point to 'something fishy' about the way a person has structured their financial affairs that gives rise a suspicion they are attempting to shield their assets? How substantial is the basis for such suspicion required to be?

[49] If the court is to push out the limits of such a provision in a potentially controversial way, it is entitled to more discussion on these crucial questions. There is no doubting that the power of the liquidator (s 261) or the court (s 266) to request documentation from persons who are not party to the litigation is an extraordinary

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16 *Hunt v Muollo* [2003] 2 NZLR 322 deals with the ability of a creditor under HC rules to obtain information relating to debtor's financial affairs post-judgment in an execution process.

one. Any proposed interpretation of the statutory provisions that significantly extends the scope and potential application of these powers must therefore be treated with great caution. A court will only move on the basis of comprehensive discussion on the key issues. This is accordingly not the proper application for deciding this important jurisdictional issue.

Result

[50] The application is declined. My findings on jurisdiction effectively preserve the status quo. But even if jurisdiction was granted, I find that it would be inappropriate to exercise the court's discretion to grant the particular application that the liquidators have made in this case.

[51] On the matter of costs, my preliminary view is that as costs follow the event under the statutory costs regime, the liquidators should expect to pay scale costs to Mr Ellis; and that such costs should be on a 2B basis. If the liquidators disagree then they may file and serve a memorandum as to costs within 10 working days of the date of this judgment. Mr Ellis will then have a further 5 working days to respond via memorandum, should he wish to do so.

Associate Judge Sargisson