Harvest Finance Limited – costs of compliance with s 236 order

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Case: Jackson & Anr (liquidators of Harvest Finance Limited) v Cannons Law Practice LLP & ors [2014] EWHC 4237 (Ch), Mr Registrar Jones, 16 December 2014

Synopsis: The court has jurisdiction to award the costs of compliance with an order for the production of documents under sec 236(3). In the circumstances of the present case, however, the court declined to exercise its discretion to do so.

Topics covered: Investigation powers/examinations; costs of compliance with order for production of documents under s 236(3) IA 1986

The Facts

The liquidators of Harvest Finance Limited (HFL) suspected that a large number of conveyancing transactions had been fraudulent, and sought disclosure under s 236 IA1986 of files held by the respondent solicitors relating to the conveyancing transactions involving HFL and a number of SPVs. Following an initial hearing in May 2013, the Registrar ordered delivery up of a sample of ten transactions and set a procedure under which an independent party appointed by the court would examine the files to consider the issue of third party legal privilege. At a subsequent hearing, the Registrar decided that privilege should not prevent disclosure. The respondents then delivered up all the files. They then claimed their time costs of compliance with the order.

The Decision

The Registrar's decision concerned the respondents costs of compliance with the s.236 order, as well as the costs of both the liquidators and the respondents in relation to the s.236 application itself.

Costs of compliance with the order

The Registrar refused to award the respondents their time costs for complying with the order.

(a) Jurisdiction: conflicting authorities([13]-[18])

There were conflicting authorities on whether r 9.6(4) IR 1986, which provides for the payment of costs of a person summoned to attend for examination, is limited to costs resulting from the exercise of the power under s 236(2), or extends to costs resulting from compliance with an order for production of documents under 236(3).

In *Re Cloverbay Limited* [1989] BCLC 724, Vinelott J held that there was no jurisdiction to award costs for compliance with an order for disclosure of documents or other information, and these costs did not fall within r 9.6(4) IR 1986,. The jurisdiction of the court was limited to exercising its discretion to refuse to make an order under s 236 if it would be oppressive and unfair on the respondent to do so. He did, however, see the possibility, in

"exceptional circumstances", of making a conditional order requiring costs to be paid.

In contrast, in the earlier decision in *Re Aveling Barford Limited* [1988] 3 All ER 1019 (which was not referred to in *Cloverbay*), Hoffman J said that r 9.6(4) did extend to a person required to provide documents and information, but went on to say that an order under s 236 had stronger analogies with a *subpoena duces tecum* or *ad testificandum* than with a *Norwich Pharmacal order*. There was no reason why there should be a presumption under s 236 that a respondent should be indemnified against the costs of compliance with the order. Robert Walker J in *Re BCCI* [1997] BCC 561 had expressed a tentative view that the approach of Hoffman J to r 9.6(4) should be preferred, commenting that *"It would be surprising …if the court had jurisdiction to provide for expenses of a witness summoned for oral examination but not the expenses of a respondent required to produce documents"*.

(b) Decision on Jurisdiction ([19]-[36])

A purposive construction of the rule would be that the person "summoned" is the person to whom s.236 applies, to require him to supply information, whether by examination or the production of documents. There was no reason to create any distinction between them when construing r 9.6(4) . To that extent, the approach in *Aveling Barford* appeared preferable to that in *Cloverbay*.

However, the Registrar went on to state that he might not need to choose between the two authorities. Hoffmann J in *Aveling Barford* had adjourned the question of whether the costs of compliance should be paid. There was no presumption that costs would be awarded and the court needed to know the relevant facts in order to decide whether to exercise its discretionary jurisdiction in the circumstances. The practical result of the two decisions for the current application was therefore the same, if Vinelott J's "exceptional circumstances" test was not invoked. On either case, in exercising its discretion, the court does not presume that the costs of compliance will be paid, and will take account of the fact that compliance is in the nature of a public duty.

(c) Application to the present case ([37]-[48])

The Registrar concluded that he should not exercise his discretion to permit the respondents to charge for their time costs.

- The existence of the public duty was of particular importance in the context of a suspicion of fraud
- Payment of the respondents' costs would transform their public duty into a professional service
- The liquidation should not have to bear the financial burden resulting from the fact that the records had not been easy to access
- As a result of the earlier decision on privilege, the respondents no longer needed to identify what documents might have been privileged
- If the respondents had met with a particular difficulty with the identification or transfer of files, they should have raised that with the liquidators or the court before incurring costs.

Costs of the s.236 application ([49]-[61])

Whilst the overall outcome on the legal costs of the respondents in relation to the s 236 application itself had to await further submissions on the costs incurred at each stage of the litigation, the Registrar did say that, in principle, the legal costs reasonably incurred should be paid as an expense of the liquidation. Whilst the respondents' initial approach had been "unhelpful", it had in the event been necessary at the earlier hearings to resolve the terms of the order and the issue of privilege. In practice, at least for some of the hearings, it could not be said that the respondents' conduct had amounted to an unjustifiable refusal to provide information. However, the legal costs relating to earlier correspondence from the respondents, resisting disclosure, of which the Registrar was critical, needed to be distinguished, because of that criticism.

Comment

Although the decision of the Privy Council in *Singularis Holding Ltd v Pricewaterhouse Coopers* [2014] UKPC 36, was not referred to by the Registrar, Lord Sumption stated (at the end of [25]) that: *".. as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance".*

The Registrar's conclusion that there is a jurisdiction in the court to order payment of the costs of compliance seems an orthodox application of the jurisprudence concerning the examination and production of documents under ss. 236 and 366 (the latter relating to the bankruptcy of individuals). The prospective costs of compliance can go to the question of whether the order, if made, might be oppressive, but that forms part of the factual matrix in each case. That conclusion was tempered by the absence of any presumption that the costs of compliance would be awarded (which might be contrasted with Lord Sumption's statement in *Singularis*), and that compliance was in the nature of a witness performing a public duty to provide the information properly sought by a liquidator (or TiB).

In another very recent decision (*Re Corporate Jet Realisations Limited: Green v Chubb & Jervis* [2015] EWHC 221 (Ch); 12 February 2015), concerning a liquidator's attempt to compel former administrative receivers of the company to disclose information to him, Mr Registrar Briggs commented on the potential size of the task regarding the production of large numbers of e-mails, and said that he would hear submissions regarding the cost of undertaking the exercise. *"However, the fact that there were many e-mails stored on different computers or servers does not remove the obligation to serve the public interest by making disclosure when asked by another office-holder"*. That comment chimes with the *Harvest Finance* decision, in which part of the respondent's case had been the difficulty in retrieving the information sought from computers which were "antiquated or old" and which did not lend themselves to searching using key words ([10.5]).