

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-6951

UNDER Section 12 of the Receiverships Act 1993
IN THE MATTER OF Part 19 of the High Court Rules
BETWEEN STEPHEN JOHN TUBBS AND COLIN
ANTHONY GOWER
Appellants
AND CRAIG ALEXANDER URQUHART
Respondent

Hearing: 8 December 2009

Counsel: M D Arthur and J A McMillan for Applicants
R P Lewis for Respondent

Judgment: 9 December 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 9 December 2009 at 3.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Chapman Tripp, PO Box 2206, Auckland
Rodney Lewis Law, PO Box 591, Hamilton

The application

[1] Mr Tubbs and Mr Gower, as receivers of FINCO Holdings Ltd (in receivership) apply, under s 12(2) of the Receiverships Act 1993 (the Act), for an order requiring a director of that company, Mr Urquhart, to make available to them documents under his control, relating to the “property in receivership”. That phrase means property in respect of which a receiver is appointed: s 2(1) of the Act.

Background

[2] FINCO Holdings carried on business as a financier. In April 2006, Spanbild Holdings Ltd acquired a 50% stake in the company. Interests associated with Messrs Miller and Urquhart retained ownership of the balance of the shares. Spanbild’s objective was to acquire a significant interest in a finance company, so that it could make arrangements for customers to finance the purchase of modular buildings it manufactured.

[3] By October 2007, the relationship among the shareholders of FINCO Holdings had deteriorated. On 8 October 2007, a formal agreement was executed to record the manner in which FINCO Holdings’ business would be wound down, in an orderly manner. The agreement was executed by the shareholders (Spanbild, Mr Miller and Mr Urquhart) and FINCO Securities Ltd, an Urquhart company.

[4] The shareholders’ intention was for FINCO Securities to administer the loan book, on behalf of FINCO Holdings. To achieve that aim cls 7, 8 and 9 of the agreement provided:

7. FINCO [Holdings] will continue to manage the loan book utilising the policy and procedures it has utilised in respect of administering the loan book to date.
8. However, it will be [FINCO] Securities which will provide FINCO [Holdings] with the necessary management personnel and administrative resources to enable FINCO [Holdings] to administer the loan book. It will be the responsibility of [Mr Urquhart] to

ensure that [FINCO] Securities provides the best allocation of resources to each task associated with administering the loan book.

9. To enable the services outlined in the previous paragraph to be provided, FINCO [Holdings] agrees to enter into a management contract with either [Mr Urquhart] and/or [FINCO] Securities to manage the administration of the loan book commencing from 15th October 2007. The payment to be made to [FINCO] Securities for providing these management services is to be as follows:

(a) From 15th October 2007 to 14th October 2008 - \$15,000.00 plus GST per month.

(b) For each successive periods of 12 months, commencing on 15th October 2008, the management fee will be based on the amount of the loan book outstanding at the commencement of each period of 12 months as follows:

<u>Value of FINCO [Holdings]</u> <u>loan book</u>	<u>Management fee</u>
Over \$10,000,000	\$15,000 plus GST per month
From \$7,500,000 to \$10,000,000	\$13,000 plus GST per month
From \$5,000,000 to \$7,500,000	\$11,000 plus GST per month
Less than \$5,000,000	\$9,000 plus GST per month

This contract will expire immediately with no obligations on either shareholder should one of the existing shareholders cease to be a shareholder.

[5] As a result of that agreement, FINCO Holdings retained the responsibility for managing the loan book (cl 7) and FINCO Securities agreed to provide personnel to undertake the work (cl 8). FINCO Holdings agreed to enter into a management contract for either FINCO Securities or Mr Urquhart to manage the loan book but, it appears that, rather than entering into another agreement, the parties have assumed cl 9 to be sufficient to create that contractual relationship.

[6] The terms of cl 7, 8 and 9 make it clear that the receivables remained the property of FINCO Holdings. In contrast, other assets of FINCO Holdings were assigned to FINCO Securities. Clauses 22 and 23 of the agreement provided:

22. FINCO [Holdings] agrees to assign, and [FINCO] Securities agrees to take an assignment of all existing lease commitment for which FINCO [Holdings] is liable, in respect of the office premises, motor vehicles and equipment as from 15th October 2007.
23. FINCO [Holdings] assigns and transfers to [FINCO] Securities all its entitlement to the fixed assets it currently owns.

[7] ANZ National Bank Ltd had provided banking facilities to FINCO Holdings. Its advances were secured by a General Security Agreement over FINCO Holdings' undertaking. The debt was guaranteed by Spanbild, Mr Miller and Mr Urquhart. As at June 2009, the bank was owed \$3,553,264.67. ANZ issued demand to recover that sum.

[8] FINCO Holdings was unable to pay the debt. Negotiations followed, between ANZ and Spanbild. Spanbild agreed to pay the debt and to take over the Bank's Securities: generally, see s 84 of the Judicature Act 1908.

[9] On 18 August 2009, ANZ served a notice of demand on Spanbild. Spanbild paid the debt (then \$3,769,026.27) under its guarantee. ANZ assigned its General Security Agreement and the benefit of guarantees given by Messrs Miller and Urquhart, to Spanbild.

[10] On 19 August 2009, exercising powers under the General Security Agreement, Spanbild appointed Mr Tubbs and Mr Gower as receivers and managers of FINCO Holdings.

[11] On 15 September 2009, the receivers wrote to FINCO Securities, purporting to terminate the 8 October 2007 agreement, with effect from 23 September 2009. The letter stated:

We are writing to give you notice that on 19 August 2009 Spanbild Holdings Limited appointed Stephen John Tubbs and I (jointly or severally) to be receivers and managers of all the property of the Company.

We have been provided with a copy of the agreement regarding future dealings with the Company dated 8 October 2007 ("the Agreement"). The Agreement contains arrangements regarding the provision of management services to the Company by FINCO Securities Limited.

We hereby give you notice that the management arrangements in the Agreement are terminated effective 23 September 2009. The grounds for this termination include (without limitation) the following:

- (a) The management arrangements are terminable at will by either party.
- (b) The management arrangements are terminable by either party on the appointment of a receiver over the assets of either party.
- (c) Justifiable concerns regarding the protection of the assets and access to information, warranting immediate effective termination.

Should you have any queries please contact either myself or Stephen Tubbs at this office.

Mr Urquhart does not accept that the agreement has been validly terminated.

[12] On 23 September 2009, the receivers wrote to Mr Urquhart demanding that all of the accounting records and other documents held on behalf of FINCO Holdings be delivered to them. Mr Tubbs wrote:

You are already aware that I was appointed Joint Receiver and Manager of the above Company on 20 August 2009 under the terms of a debt securities trust deed giving the holder a secured charge over all of the assets of the Company.

The effect of my appointment is that I have custody and control of the Company's assets and the directors, while remaining in office as directors, cease to have powers of management. Their statutory obligations as directors of the Company continue.

The Company's assets are therefore under my control and, accordingly, you should act in this regard under my instructions only.

We acknowledge receipt of your offer to purchase the non performing portion of the Finco Holdings Limited (In Receivership) receivables ledger and also thank you for your continuing interest in managing the balance of that receivables ledger.

With regards to the non performing portion of the ledger we will respond once we have had an opportunity to discuss with our appointer.

With regards to the on going management of the Finco Holdings Limited (In Receivership) business, we confirm our earlier notice of the termination of the management contract.

We now require that all records and files (hard and soft copy) be handed over to us. This includes all loan files, correspondence files, legal files, creditor (trade or otherwise) files and the latest operating system backup.

The Argos operating system licence owned and is in the name of Finco Holdings Limited and is now an asset under the control of the receiver. We

will arrange for a copy of the system to be installed at the receivers office and loan the companies database to this system.

I understand that you have other company databases operating off this licence. You will need to discuss with the operating system provider how best to continue these databases in the absence of the Finco Holding Limited licence. I also understand that all PPSR registrations are in the name of Finco Holdings Limited and advise that the receiver will work with you and the operating system provider to ensure that the appropriate amendments are registered, which you in the first instance will need to initiate.

The effect of this request is immediate. The files and records as requested should be adequately packed and forwarded to the receivers offices in Christchurch.

Should you have any matters or practical issues that arise from the matters covered in this letter please phone Graeme Coutts of my office in the first instance.

[13] Mr Urquhart has declined to deliver up the records required. The records are stored, physically, in premises in Parnell that had been shared by FINCO Holdings and FINCO Securities. There is debate, in the affidavit evidence, about what happened when one of the receivers (Mr Gower) and an associate (Mr Coutts) travelled to Auckland from Christchurch, on 5 October 2009, to see Mr Urquhart and to uplift the records. I make no findings on those controversial facts. Among other things, because the originating application procedure has been used, Mr Urquhart has not had an opportunity to respond to reply evidence given by Mr Gower and Mr Coutts about those issues.

[14] On 22 October 2009, the present application was filed, to compel Mr Urquhart to produce the records demanded to the receivers.

The form of the proceeding

[15] Mr Lewis, on behalf of Mr Urquhart, submitted that the proceeding was not validly brought under the originating application provisions of Part 19 of the High Court Rules. For the receivers, reliance was placed on r 19.4 which allows an originating application to be made by named “office holders” who seek directions from the Court. A “receiver” is one of the office holders named. The common feature of the “office holders” listed in r 19.4 is that, almost inevitably, the entity over which he or she has been appointed will be insolvent. While a receiver is

entitled to seek directions from his Court under s 34(1) of the Act, the present application was not brought under that section.

[16] I do not need to determine whether r 19.4 applies because, in any event, I am satisfied that the “interests of justice” permit the present proceeding to be commenced by originating application: r 19.5(1). Mr Arthur, for the receivers, applied orally for such an order, if necessary.

[17] I am satisfied that this is a case in which the summary procedure created by Part 19 of the High Court Rules should be used. The core facts are undisputed. Prompt disposal of the application is desirable. Provided no findings are made on disputed facts, Mr Urquhart’s interests are protected. In those circumstances, the “interests of justice” require that leave be given to bring the application under Part 19. See, generally, *Commissioner of Inland Revenue v McIlraith* (High Court, Hamilton, M162/02, 19 February 2003, Randerson J), at paras [15] and [16].

[18] The oral application for leave to bring the proceeding by originating application is granted.

The substantive application

[19] Section 12 of the Act provides:

12 Obligations of grantor

(1) A grantor and, in the case of a grantor that is a body corporate, every director of the grantor, must—

(a) Make available to the receiver all books, documents, and information relating to the property in receivership in the grantor's possession or under the grantor's control:

(b) If required to do so by the receiver, verify, by statutory declaration, that the books, documents, and information are complete and correct:

(c) Give the receiver such assistance as he or she may reasonably require:

(d) If the grantor is a body corporate that has a common seal, make the common seal available for use by the receiver.

(2) On the application of the receiver, the Court may make an order requiring the grantor, or if the grantor is a body corporate, a director of the grantor to comply with subsection (1) of this section.

[20] Mr Urquhart accepts that FINCO Holdings is the “grantor”, for the purposes of s 12(1). He also accepts that he is a director of the grantor, for the purposes of that provision.

[21] The receivers seek an order under s 12(1)(a) requiring Mr Urquhart to “make available to [them] all books, documents and information relating to the property in receivership in [Mr Urquhart’s] possession or under [his] control”. The application also seeks a direction that Mr Urquhart otherwise comply with his s 12(1) obligations.

[22] The receivers’ position is that:

- a) The General Security Agreement was validly assigned to Spanbild and the receivers were properly appointed under the terms of that security interest.
- b) Notwithstanding the contractual arrangements set out in the agreement of 8 October 2007, FINCO Holdings retains ownership of the records demanded.
- c) In any event, the agreement of 8 October 2007 has been validly terminated or repudiated. Either the agreement has been terminated on reasonable notice or it has been repudiated in a manner which leaves FINCO Securities able to make a claim as an unsecured creditor of FINCO Holdings.
- d) The evidence indicates that Mr Urquhart has declined to make available documents in his possession or control. Thus, an order is required.

[23] Mr Lewis submitted, in opposition to the application:

- a) There was no evidence that the receivers were validly appointed.
- b) The purported termination of the October 2007 agreement is of no effect.
- c) The receivers, as agents of FINCO Holdings, are required to honour that company's contractual commitments.
- d) FINCO Securities has a prior right to the records, under the 8 October 2007 agreement.

[24] Mr Lewis did not pursue the argument based on the validity of the receivers appointment, once a copy of the Deed of Assignment was produced. In Mr Arthur's written submissions, that document had been subject to a claim of confidentiality.

[25] At the start of the hearing, I had indicated that, without the Deed of Assignment, I was unwilling to make orders on the application. Having regard to that intimation, any confidentiality was waived by the appointor. On considering the document, Mr Lewis elected to abandon the point.

[26] It is clear, from the terms of the October 2007 agreement (set out at paras [4] and [5] above) that FINCO Securities did not obtain any proprietary interest in the debtor's ledger. Rather, FINCO Securities' contract was as described in cl 7, 8 and 9. For all practical purposes, FINCO Securities, in consideration of the management fee, has acted as the agent of FINCO Holdings, to manage the debtors' ledger.

[27] Leaving to one side the question whether the receivers have validly terminated or repudiated the contract, no exclusive right to possession of the records was given to FINCO Securities by the October 2007 agreement. Consistently with the commercial imperatives of the agreement, FINCO Holdings owned the records and those who controlled that company were entitled to call for them, in order to ensure the loan book was being managed adequately.

[28] Receivers have reporting duties under the Act: see ss 23 and 24. Among other things, the reports must contain particulars of the assets of the company:

ss 23(1)(a) and 24(1). That includes the quantum of accounts receivable. Without access to the records currently held by FINCO Securities, the receivers could not prepare adequate reports about the realisation of assets.

[29] FINCO Holdings was always entitled to the documents in issue (as its property) to oversee administration of the loan book. In addition, the receivers need the documents to report, in accordance with their obligations under the Act.

[30] If the receivers (as is likely) were to decline to return the records to FINCO Securities (on the basis that the October 2007 agreement has been terminated), it would be open to FINCO Securities to seek interim relief to prevent the receivers acting on the purported termination or repudiation of the agreement. I express no view on whether such an action would be tenable: though the commentary in Blanchard and Gedye's, *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington 2008), at para 10.16, suggests not.

[31] On the facts, it is clear that the receivers have demanded relevant records from Mr Urquhart. The records are owned by FINCO Holdings. The records relate to property (accounts receivable) in respect of which receivers have been appointed. Mr Urquhart is the human being with control over the records presently held by FINCO Securities. He is a director of FINCO Holdings to whom s 12(1) of the Act applies. The receivers need the records to comply with their statutory duties. There is no reason why Mr Urquhart should not be compelled to comply with his obligation to make available relevant books, documents and information required by the receivers. In my view, those combined circumstances entitle the receivers to an order under s 12(2), to enforce the director's obligation to supply the relevant records to them.

Result

[32] The application is granted. I make the following orders:

- a) Craig Alexander Urquhart, as a director of FINCO Holdings, within three working days of service of this order upon him, shall deliver to

the receivers of FINCO Holdings (through their solicitors, Chapman Tripp, Auckland) all books, documents and information relating to the property in receivership that is under his control. Without limitation, that includes:

- i) All original hard copy loan files relating to loans entered into by FINCO Holdings and
 - ii) An electronic copy of all data relating to FINCO Holdings loans, in a searchable electronic format, including a copy of the electronic database operated by Argos.
- b) Leave to apply is reserved.

[33] I am not prepared to make an order requiring Mr Urquhart to comply with other obligations under s 12(1). Mr Urquhart is obliged, as a matter of law, to do so.

[34] Costs are awarded in favour of the receivers, on a 2B basis, together with reasonable disbursements. Both costs and disbursements are to be fixed by the Registrar. I do not certify for second counsel.

P R Heath J

Delivered at 3.00pm on 9 December 2009