SUPREME COURT OF QUEENSLAND

CITATION:	*Interchase Corp (In Liq), Re* [2002] QSC 260
PARTIES:	**INTERCHASE CORPORATION LIMITED (IN LIQUIDATION) ACN 010 663 993** **GREGORY WINFIELD HALL and IAN RICHARD HALL** **(applicants)** **v** **ANTHONY GREGORY McGRATH & ORS** **(respondents)**
FILE NO:	S9394 of 2001
DIVISION:	Supreme Court of Queensland
DELIVERED ON:	21 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	24/07/2002, 13/08/2002, 15/08/2002, 21/08/2002
JUDGE:	Douglas J
ORDER:	**See Attachment A**
CATCHWORDS:	CORPORATIONS LAW – Liquidation – Liquidators – Rights and Powers in Winding Up CORPORATIONS LAW – EXAMINATIONS – Private or Public – Scope – Who may be examined – Matters for inquiry – Claimed oppression or abuse of process – Access to documents - s 596B – issue of summonses to proposed examinees – letter of request to the Chancery Division of the English High Court in London for examinations – whether evidence sought from reinsurers relates to the existence of a policy of insurance which is an "examinable affair" – tension between function of liquidators in winding up and privacy. *Corporations Act* 2001 *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 120 ALR 262 *Hamilton v Oades* (1989) 166 CLR 486 *Re Spedley Securities Limited; Ex parte Potts & Anor* (1990) 8 ACLC 673 *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 61
COUNSEL:	Mr W. Sofronoff QC with Mr D. Pyle for the applicants Mr P. McMurdo QC with Mr G. Sheahan for the respondents
SOLICITORS:	Allens Aurthur Robinson for the applicants Blake Dawson Waldron for the respondents

[1] **DOUGLAS J:** The applicants, the liquidators of Interchase Corporation Limited (In Liquidation) ("Interchase") seek orders pursuant to s 596B of the *Corporations Act* 2001 (henceforth referred to as "The Act") for the issue of summonses to proposed Australian examinees and further for the issue of a letter of request to the Chancery Division of the English High Court in London for the examination of certain persons who reside in the United Kingdom.

[2] There is no doubt that a court may summon a person for examination about a corporation's examinable affairs (see s 9 of the Act) if amongst other things the court is satisfied that the person "may be able to give information about the examinable affairs of the corporation" (s 596B(1)(b)(ii)). It is submitted on the part of the respondents that the exercise of the power given to a liquidator by a s 596B involves a tension between two important interests: *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 120 ALR 262. It is clear from that case that the first tension is the public interest of a liquidator obtaining necessary information to properly discharge the function of a liquidator in the winding up of the company for the benefit of the creditors. The second is the right of the individual to privacy in regard to his or her affairs, documents and papers (see *Re Spedley Securities Limited; Ex parte Potts & Anor* (1990) 8 ACLC 673; *Hamilton v Oades* (1989) 166 CLR 486).

[3] The facts of this case are that Interchase holds a judgment against ACN 010 087 573 Pty Ltd (Licensed Real Estate Agents and Valuers) (henceforth referred to as "ACN") for a sum in excess of $20M. The lead insurer of ACN was FAI Limited. That company, as is well known, is in liquidation. It has failed to pay under the policy in respect of which it secured the first layer of insurance namely $2M.

[4] First layer, second layer and third layer contracts exist for the HIH Insurance Company which some years ago purchased FAI Limited. The circumstances giving rise to the liability of ACN arose in about 1993. HIH is also in liquidation.

[5] Substantial material has already been supplied by the respondent to the applicant with respect to the existence of and nature of the reinsurance. However, the applicant wishes to commence proceedings against FAI/HIH in respect to the liability which arises pursuant to the judgment obtained against ACN.

[6] In *Grosvenor Hill* (supra) the liquidators sought the production to the court under the provisions of the law to which I have referred, served in insurance policies held by *Grosvenor Hill* in respect of the valuations in that case. The court consisting of Beaumont, Spender and Cooper JJ said at 264:

> "The court may summon a person for examination about a corporation's 'examinable affairs' (as defined in s 9 of the Law) if, inter alia, the court is satisfied that the person 'may be able to give information about examinable affairs of the corporation: s 596B(1)(b)(ii)."

[7] They also referred to s 9 which permits an examination "for any other affairs of the corporation".

[8] In discussing the reasoning at first instance by Drummond J the court said at 265:

> "It is clearly established that it is legitimate for a liquidator to use an examination to enable him to decide whether proceedings already commenced should be continued: *Re Hugh J Roberts Pty Ltd*, . . . at 585.

> In this case . . . the liquidator needs information as to the availability and likelihood of being able to realise the assets transferred if these are recovered."

[9] Importantly, their Honours said at 266-267:

> "A liquidator, when engaged in litigation on behalf of a company which is being wound up, or when contemplating instituting such litigation, is not in the same position as an ordinary litigant. The liquidator comes to the company as an officer of the court under a duty and responsibility to get in and maximise the assets of the company for distribution for the benefit of creditors. In the discharge of his or her duty and function, the liquidator comes to the company with limited or no knowledge of the company's assets, business and affairs. The liquidator is therefore in a position of disadvantage to make informed decisions of both a legal and a commercial nature necessary to carry out the winding up.
>
> The legislature has recognised this position of disadvantage and addressed the problem by the enacting of s 596B of the Law and its predecessors."

[10] Referring to *Re Spedley Securities* (supra) at 270-271 their Honours said:

> "In *Re Spedley Securities Ltd; Ex parte Potts*, above, Young J recognised that the statutory power was not limited to ordering an examination to obtain evidence to prove a claim. His Honour (at 676) referred to two statements contained in *Palmers Company Precedents* (17th ed, 1960) Part 2, p 471 which are relevant to the present appeal. The first statement, dealing with one of the circumstances when the power under the English equivalent of the then s 541 of the Companies (NSW) Code should be exercised, was as follows: 'where the proceedings are pending against the company and he (the liquidator) desires to ascertain whether he can *prudently* proceed with or defend an action' (emphasis added). The second statement was this:
>
> > The object of the examination is to get information to enable the court to determine what course ought to be followed with reference to some matter or some claim in the winding up.
>
> In support of this statement the learned editors cited *Re Greys Brewery Co.* His Honour continued (at 676):
>
> > The language of this passage which was approved in an earlier form by Maughan AJ [Re *Auto Import Co* (*Australia*) *Ltd* (1924) 25 SR(NSW) 52 at 55] directs attention not to the liquidator merely getting information to prove a case, but to the wider matter as to what are the prospects of success. This has at least two aspects to it. First, whether the liquidator should invest the company's money in pursuing an action, either which he commences or is commenced against the company, and secondly, whether he should straight away pay out any demand that is made against the company."

[11] In argument the applicant's case is said by them to be simple. It says that no amount of documentation provided by the respondents and their sources of information would enable the applicants to understand the following matters:

- ("the critical matter") the attitude of each reinsurer as regards the disclosure made by FAI and HIH prior to the relevant contracts of the reinsurance being included;
- the attitude of each reinsurer as regards the disclosure made by FAI and HIH prior to the relevant contracts of reinsurance being concluded;
- whether each reinsurer accepts that adequate notification of ACN's claim was given to it;
- the attitude of each reinsurer as regards any representations made by FAI and HIH prior to the relevant contracts of reinsurance being concluded;
- whether each reinsurer would rely upon the operation of any exclusion to avoid its liabilities in respect of a successful claim by ACN against FAI or HIH. This is particularly so in respect of the valuer's exclusion applicable to the HIH policies; and
- whether or not the breach of any contractual condition would be relied upon by the reinsurers.

[12] It is submitted, correctly, in my opinion, that as there is no lead insurer clause authorising a lead insurer to dictate to the other reinsurers as regarded payments of the claim in any contract disclosed, only each reinsurer can speak for itself on the issues outlined above.

[13] The application is opposed on two general grounds. The first is the operation of s 562A of the *Corporations Act* 2001. No application has yet been made by the respondent under this section. I can see that in circumstances where a payment may be made or may be agreed to be made to the applicant that an order under that section may well be necessary. So far as I am aware, that section has not had judicial consideration.

[14] The second objection to the application is that the reinsurance must remain confidential "to maintain business efficacy" and that "some reinsurers might argue that cover is voided by breach of confidentiality".

[15] It is the fact that the existence of any obligation of confidence could furnish a ground to avoid a policy disclosed pursuant to an order of the court but that remains implausible: see eg *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 61.

[16] In any event as the applicant submits, any such ground is already in existence the policies having been disclosed and none of those policies contain any such confidentiality clause.

[17] I have reached the conclusion that the evidence reveals that the evidence sought from the reinsurers relates to the existence of a policy of insurance which is an "examinable affair" pursuant to s 9. I am also satisfied that the persons proposed to

be examined "may be able to give information about the examinable affairs of the Corporation" (s 596B(1)(b)(ii). Accordingly, I am prepared to make the orders sought. It is important that the applicant must, by 4 October 2002 make a decision whether or not to sue FAI/HIH for recovery under the policy bearing in mind the cost of such an action. The proposal action is likely to be expensive and complicated. The applicant is entitled to examine the proposed examinees in order to determine the strength or otherwise of the proposed action and whether he should commit creditor's funds to the action.

[18] I pronounced judgment in this matter on 21 August last and indicated that my reasons would follow. The above are my reasons. Since 21 August last I have signed a draft order which has been agreed upon between the parties a copy of which is annexed hereto and marked with the letter A.

"Attachment A"

Form 59 **Order** **Rule 661**

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: S9394 of 2001

IN THE MATTER OF INTERCHASE CORPORATION LIMITED (In Liquidation) ACN 010 663 993

Applicants: **Gregory Winfield Hall and Ian Richard Hall**

Respondents: **Anthony Gregory McGrath & Ors**

ORDER

Before: Douglas J

Date: 21 August 2002

Document initiating proceedings: Application filed by leave 24 July 2002 ("*the Application*").

Upon the Applicants' undertaking by their Counsel that they will not by themselves, or by their servants or agents enter into any agreement between any of the applicants, Interchase Corporation Limited (In Liquidation) ACN 010 663 993 ("*Interchase*"), ACN 010 087 573 Pty Ltd ("*ACN*") and/or Michael Tidbold on the one hand and any reinsurer in respect of any claim by Interchase and/or ACN and/or Michael Tidbold or any assignee of any of them for indemnity without first providing two months' written notice to the liquidators of HIH Casualty and General Insurance Limited (In Liquidation) and FAI General Insurance Company Limited (In Liquidation) or their solicitors.

THE ORDER OF THE COURT IS THAT:

1. The persons whose names and addresses are set forth in Schedule A to the Application as exhibited and marked "*Exhibit A*" to the Affidavit of John Joseph Baartz sworn 3 July 2002, (except Lindsay Self), ("*the Australian examinees"*) be summoned before the Magistrates Court at Brisbane ("*the Court*") for examination about the examinable affairs of Interchase at a time fixed by the Clerk of the Court and from day to day thereafter until the conclusion of the examination.

2. That summonses, (except the summons addressed to Lindsay Self), substantially in the form disclosed to the court on the hearing of the Application be issued.

3. That the Australian examinees produce the books and records relating to the affairs of Interchase more particularly specified in the summonses referred to in paragraph 2 hereof.

4. That the persons whose names and addresses are set forth in Schedule B to the Application as exhibited and marked "*Exhibit "B"*" to the Affidavit of John Joseph Baartz sworn 3 July 2002 be summoned for examination about the examinable affairs of Interchase.

5. That the Registrar of this Honourable Court issue a Letter of Request in the form annexed hereto and marked "B" to the Chancery Division of the English High Court in London.

6. Pursuant to ss.596F and 597 of the *Corporations Act* 2001:

   (a) the questions put to the examinee and the answers given by the examinee from any such examination shall be recorded in writing and a copy of the same shall be furnished to the applicant by the Clerk of the Court;

   (b) if the applicants require the examinee to authenticate the transcript of his examination in accordance with the provisions of the *Corporations Act* 2001, the examinee shall attend and authenticate the transcript, and alternatively, the liquidator may authenticate the transcript of examination of the examinee by any other means provided for in the provisions of the *Corporations Act* 2001;

   (c) the examinations be held in private;

(d) any documents produced by an examinee in accordance with a summons:

(i) be produced in sealed boxes;

(ii) not be available for inspection by any person other than the authorised persons as defined in paragraph 1(b)(ii) of the orders of Justice Douglas of 11 December 2001 and 6(b)(ii) of the orders of Justice Douglas of 24 July 2002 and/or any of the persons referred to in paragraph 7 herein;

(e) the authorised persons not disclose, publish or communicate to or discuss with any person other than each other any information obtained through the examination of any person pursuant to this order without Anthony Gregory McGrath's written consent or leave of this Honourable Court;

(f) the information referred to in paragraph 6(e) above, which the authorised persons are not to disclose, publish or communicate to or discuss with any person other than each other and/or any of the persons referred to in paragraph 7 herein includes, but is not limited to:

(i) the name or names of any reinsurer with a contract of reinsurance with either FAI General Insurance Company Limited (In Liquidation) ("*FAI*") or HIH Casualty and General Insurance Limited (In Liquidation) ("*HIH*"); and

(ii) the details or terms of any reinsurance treaties, contracts or arrangements that either FAI or HIH has with any other person (including any reinsurers);

(g) the persons who may be present at any examination subject to this order shall be restricted to the following:

(i) legal representatives acting for, and employees of, Mr McGrath;

(ii) any of the persons referred to in paragraph 7 herein;

(iii) authorised persons;

(iv) the presiding judicial officer and court staff;

(h) access to the records of any examination the subject of this order be restricted to those who were allowed to be present at the time of the private examination in accordance with 6(g) above.

7. Paragraphs 1(c), 1(d), 1(e) and 1(f) of the Order of Justice Douglas of 11 December 2001 and paragraphs 6(c), 6(d), 6(e) and 6(f) of the Order of Justice Douglas of 24 July 2002 shall not apply to any examinee or their legal representatives, any reinsurer or its legal representatives, or the Australian Securities and Investments Commission or its legal representatives.

8. The affidavits read on 24 July, 13 August and 15 August 2002 and the exhibits thereto be sealed up and not opened or inspected other than by the applicants, the respondents or their legal representatives except by order of the Court.

9. The applicants be permitted to include within the class of authorised persons as defined in paragraph 1(b)(ii) of the orders of the Justice Douglas of 11 December 2001 and 6(b)(ii) of the orders of Justice Douglas of 24 July 2002, such person or persons from the Trustee for the noteholders whose name(s) are provided to the respondents' solicitors at least 10 days prior to such inclusion subject to any further order.

10. Such summons referred to in paragraph 2 hereof requiring the attendance of examinees at the Magistrates' Court in Brisbane on 6 September 2002 may be served less than fourteen (14) days before 6 September 2002 but must not be served later than 4.00pm on 26 August 2002.

11. The time for appeal of this order be abridged to seven days from 21 August 2002.

12. That the costs of and incidental to this application and the applications of 24 July 2002, 13 August 2002 and 15 August 2002 be paid by the liquidators of HIH and FAI on the standard basis.

13. The costs of the application of 11 December 2001 be reserved.

14. There be liberty to apply.