Neutral Citation Number: [2025] EWHC 446 (Ch)

Case No: CR-2021-001825 AND 001826

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT

IN THE MATTER OF NMCN PLC (IN LIQUIDATION)
AND IN THE MATTER OF NMCN SUSTAINABLE SOLUTIONS LIMITED (IN LIQUIDATION)

Royal Courts of Justice
Rolls Building,
London EC4A 1NL

Date: 27/02/2025

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

HELEN DALE, JONATHAN RODEN AND AMANDA WADE (AS JOINT LIQUIDATORS OF NMCN PLC AND NMCN SUSTAINABLE SOLUTIONS LIMITED)	**Applicants**
- and -	
BDO LLP	**Respondent**

- -

Clara Johnson (instructed by **Gateley Plc**) for the **Applicants**
Rebecca Sabben-Clare K.C. and Edward Harrison
(instructed by **Clyde & Co**) for the **Respondent**

Hearing date: 8 November 2024

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Approved Judgment

This judgment was handed down remotely at 11.45am on 27 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

ICC Judge Burton :

1. The joint liquidators of NMCN Plc (the "Company") and its subsidiary NMCN Sustainable Solutions Limited ("SS", together, the "Companies") seek an order pursuant to sections 235 and 236 of the Insolvency Act 1986 (the "Act") requiring the Companies' former auditor, BDO LLP ("BDO") to deliver up its files, prepared in respect of its audit of the Companies' 2018 and 2019 accounts (the "Audit Files").

Background

2. The business of the Company and its subsidiaries (the "Group") included the provision of infrastructure projects in two key sectors, water and built environment. SS formed part of the Company's water division. The Companies were the two principal businesses within the Group and accounted for 100% of its revenue. It was a substantial enterprise, engaged in long-term contracts for which, according to its 2019 accounts, the Group's turnover exceeded £400 million.

3. BDO conducted audits of the Group's financial statements for ten years until July 2020. On 27 March 2019, BDO signed an unqualified independent auditor's report in respect of the Company's financial statements to 31 December 2018 which stated that the Group had total equity of approximately £18.2 million.

4. In 2018, the Group implemented, for the first time, a significant new accounting standard, International Financial Reporting Standard - Revenue from Contracts with Customers ("IFRS 15"). The new standard required that revenue for long-term contracts only be recognised when it was "highly probable" that a significant reversal would not occur.

5. The Group's accounts for the year ending 31 December 2019 reported profit before tax of £7.441 million. Its balance sheet showed retained earnings of £18.013 million and total equity of £20.946 million. The accounts reported that the Company and the Group were financially strong and healthy. On 22 April 2020, BDO signed its independent auditor's report in respect of the 2019 accounts. The opinion was unqualified.

6. In his witness statement in support of the application, one of the Companies' liquidators, Mr Roden, highlights that all of the matters identified in the report as "Key Audit Matters" related to the Group's contracts and that in the section described as "An overview of the scope of our audit" BDO states that it:

> "assessed the Group's control environment and internal systems used to generate the key accounting entries for revenue, direct material costs, subcontractor costs, payroll, stock and contract assets".

7. On 24 July 2020, the Company announced that its chief finance officer had declared his intention to stand down to "pursue alternative opportunities".

8. Having retained the same auditors for ten years, the Company was obliged to offer the appointment for competitive tender. BDO resigned with effect from 30 July 2020.

9. Before its CFO formally resigned, on 6 August 2020, the Company published its unaudited interim results for the first six months of 2020, reporting a profit before tax of £809,000 and that it had declared an interim dividend of 10 pence per share that would be paid on 11 September 2020. His resignation was announced on 28 August 2020 and that of the Company's CEO, with immediate effect, a month later.

10. On 29 September 2020, Ernst & Young LLP ("EY") was appointed as the Company's external auditor. Just under a month later, the Company announced that following an extensive review of all of its major contracts, it now expected to make a loss before tax of between £13.5 million and £15 million for the year 2020 and that an external investigation had commenced "to verify the extent of prior year adjustments included within the loss". On 28 October 2020, BDO was engaged to assist the Company in that exercise. The Company prepared its own internal report identifying that profits before tax had been overstated in the 2019 accounts and that its 2020 half-year results had been overstated by £5.3 million and £14.8 million respectively, resulting in overall losses and insufficient reserves to have declared the earlier dividend.

11. On 23 December 2020, the Company issued a regulatory news announcement to the stock exchange that it expected losses before tax of approximately £16.5 million including £5.3 million of prior year contract adjustments in relation to five contracts within its water division "relating to errors which should have been identified and corrected at the reporting date and information affecting estimates which should have been available".

12. On 22 January 2021, BDO reported on the allocation of contract losses. It did not disagree with the manner in which they had been allocated in the Company's own internal report.

13. Ultimately, EY reported that it was unable to conclude an audit of the 2020 accounts and a restatement of the 2019 accounts. By emails sent in September 2021, EY reported to the Company the various reasons it was unable to do so, principally the significant amount of audit information that had been requested but not provided and the number of contracts not yet reviewed, but which EY considered needed to be reviewed as a result of the adjustments that had been made following an initial, extended number sampled. EY commented on factors that influenced their conclusion that further contract testing was necessary including by reference to: "the lack of consistent application of IFRS 15 over revenue recognition and documentation related to judgments" and "the historic culture of over-optimism and diminished transparency of reporting risks and opportunities in respect of contracts".

14. The latest draft of the 2021 accounts sent by EY to the Company in September 2021 provided a figure for losses before tax of £39.54 million. In the same month, the Financial Reporting Council ("FRC") announced that it had commenced an investigation into BDO's audit of the 2019 accounts. By letter dated 9 September 2024 to the Applicants' solicitors, the FRC stated that it had exercised its regulatory powers and obtained from BDO a list of documents concerning the 2019 audit, including the 2019 Audit File and additional documents including time and billing records in relation to the audit, handwritten notes made by the audit team members who undertook more than 20 hours of work on the audit, emails relating to the audit and copies of queries raised by the audit team in relation to the audit with BDO's in-house technical department.

15. The Companies entered administration on 6 October 2021 and compulsory liquidation on 16 September 2024. In the absence of further recoveries, there will be no return to unsecured creditors.

The Joint Liquidators' application

16. Following voluntary disclosure by BDO, the only element of the Joint Liquidators' application that remains, is for BDO to disclose the Audit Files. Mr Roden's witness statement explains at paragraph 29 that they are required:

> "so that we can examine the audit work carried out by BDO, in circumstances set out below. The Administrators wish to investigate whether BDO breached the duties BDO owed to the companies. The Administrators also wish to investigate the information relevant to the audits which was provided to BDO by management and employees."

17. After providing a chronological background to the Companies' accounts and audits, he continues from paragraph 60:

> "The Administrators require production of the files identified above so that the Administrators can establish the reasons behind the Company's spectacular collapse into insolvency, and examine the work carried out by BDO in respect of the relevant audits, including its audit testing, to ascertain whether BDO has discharged the duties it owed to the Company. This will enable the Administrators to properly consider (inter alia) the accounting treatment of the long-term contracts that the Group entered into (including the changes associated with the adoption of IFRS 15 for the 2018 audit: see below).
>
> 61. The Administrators also require production of the files so that the Administrators can examine all information provided by the Company's management and employees to BDO and how this affected the audits and reporting of the Company's and Group's financial results. If properly prepared and maintained, the audit files should record dialogue with management in the course of the audit. The Administrators are investigating the conduct of former officers and management of the Company and there is the possibility that information may have been withheld from or misrepresented by management.
>
> 62. The Administrators do not yet know whether there are claims to be pursued against BDO (or other parties) relating to the matters raised in this statement. The matters to which I have referred above suggest that there was a material misstatement of the Group's financial position for the 2019 year end (and possibly prior years) and that the 2020 unaudited half year results were also misstated. The Administrators do not know whether (or the extent to which) the explanation of any misstatements is that BDO were in breach of their duties to the Company: or

> whether any misstatements may have resulted from the deliberate or other conduct of the Company's management or employees.
>
> 63. The request for the audit files is, the Administrators consider, reasonably required by the Administrators to establish whether such claims exist, whether there are any defences and their prospects of success. Production of the audit files should enable the Administrators to establish these matters, as effectively and as inexpensively as possible. If claims against BDO and/or other parties exist, it appears that such claims may have value (and thus, if pursued successfully, result in recoveries for the benefit of creditors): I have referred above to the distribution paid in September 2020. The remuneration of the Company's directors was also, in part, based on the Company's financial performance.
>
> 64. Should there be any claims identified which the Administrators decide to pursue, litigation funding will be sought and, if appropriate, After The Event (ATE) insurance. By obtaining litigation funding and ATE insurance, the Administrators will protect the estates from any potential adverse costs risk whilst also pursuing what may be valuable assets. The Administrators' assessment of whether any claims exist (against BDO or other parties), and the merits of any claim which may exist, is likely to be significantly assisted by sight of the relevant audit files, and the availability and terms of litigation funding and ATE insurance are likely to improved."

18. Mr Roden continues by explaining that as IFRS 15 was first applied to the Companies' accounts from 2018, the Applicants anticipate that the errors which resulted in the misstatements in the 2019 accounts, may well also have affected the 2018 accounts.

19. BDO opposes the application on the basis that the Applicants have not demonstrated a reasonable requirement for the Audit Files. It asserts that the Applicants' request to see all of BDO's audit files lacks sufficient specificity: the audit files are not limited to the work undertaken in respect of the long-term contracts but cover all aspects of BDO's work on the Group's overall financial statements, such as the likely effect of a new IFRS 16 on leases and accounting for the acquisition of a new subsidiary. They submit that the evidence in support of the application provides absolutely no reason to justify the disclosure of such documents.

20. BDO further claims that as a matter of discretion, when the factors involved are weighed against each other, the balance should incline the court not to order production. It contends, in particular, that:

    i) the documents sought belong to BDO and were not within the Companies' control prior to their administration. BDO has already provided the Applicants with all documents shared between BDO and the Companies on a shared portal;

    ii) the Applicants have failed to advance adequate grounds for the application: BDO's own papers will not assist the Applicants in understanding the reasons

behind the Companies' collapse into insolvency, nor will they assist them in considering the information provided by the Companies' management and employees to BDO beyond that which has already been provided by BDO;

iii) insofar as the Applicants wish to obtain the Audit Files in order to consider whether to bring proceedings against BDO:

a) they should determine such matters by reference to the Companies' own records, and consequently have no reasonable requirement to obtain BDO's working papers; and

b) they are seeking an unfair and unwarranted advantage which would not be available to other litigants by circumventing the Professional Negligence Pre-Action Protocol (the "Protocol") which Ms Sabben-Clare K.C. describes as "carefully calibrated by the Courts to protect potential defendants whilst providing potential claimants with such information as they truly need". BDO highlights that most of the relevant authorities in relation to disclosure of documents pursuant to section 235 and 236 of the Act pre-date the Protocol that was introduced in July 2001.

21. BDO has set out details of the cooperation that it has already constructively provided, despite what it describes as the Applicants' initial broad and unfocussed requests for documentation. It has extracted some 2,262 documents from the Portal to assist the Applicants, together with accompanying explanations and indices. In BDO's evidence in opposition, its solicitor, Mr Roberts highlights that between July 2020 and October 2021, the Applicants' own firm, Grant Thornton, was retained to examine the Companies' cash and financial position. A large amount of information should consequently already be available to the Applicants.

22. Bearing in mind the urgency with which the Applicants now seek an order of the court, BDO has also highlighted that it heard nothing from the Applicants in relation to their request for the Audit Files until a year after their appointment and then nothing between September 2023 and service of the application notice on 13 June 2024.

Relevant legal principles

23. The legal principles regarding the exercise of the court's powers under sections 235 and 236 of the Act are well-established and, in this case, broadly agreed. However, the parties disagree:

i) whether, as the Companies' auditor, BDO should be considered to be an "officer" of the Companies for the purposes of section 235;

ii) whether the test set out in *British and Commonwealth Holdings plc v Spicer & Oppenheim* [1993] AC 426 should be approached in one or two stages, the latter requiring the office-holder first to establish that they reasonably require the information or documents sought and then, once established, for the court to balance that reasonable requirement against any potential oppression that may be caused to the respondent in providing it; and

iii) the extent to which those principles should apply following the introduction of the Protocol;

24. Sections 235 and 236 of the Act provide:

> "*235 Duty to co-operate with office-holder*
>
> (1) This section applies as does section 234; and it also applies, in the case of a company in respect of which a winding-up order has been made by the court in England and Wales, as if references to the office-holder included the official receiver, whether or not he is the liquidator.
>
> (2) Each of the persons mentioned in the next subsection shall-
>
> (a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and
>
> (b) attend on the office-holder at such times as the latter may reasonably require.
>
> (3) The persons referred to above are-
>
> (a) those who are or have been at any time officers of the company,
>
> (b) those who have taken part in the formation of the company at any time within one year before the effective date,
>
> (c) those who are in the employment of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,
>
> (d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question, and
>
> (e) in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company.
>
> …
>
> *236 Inquiry into company's dealings, etc*

> (1) This section applies as does section 234; and it also applies in the case of a company in respect of which a winding-up order has been made by the court in England and Wales as if references to the office-holder included the official receiver, whether or not he is the liquidator.
>
> (2) The court may, on the application of the office-holder, summon to appear before it-
>
> (a) any officer of the company,
>
> (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or
>
> (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.
>
> (3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.
>
> … "

25. The powers under sections 235 and 236 are conferred to enable an insolvency office-holder to discover the true facts concerning the affairs of the insolvent estate so that they may be able as quickly, effectively and with as little expense as possible, to complete their duties: *Pickard v Fim Advisers LLP* [2010] EWHC 1299 (Ch) per Kitchin J at [28].

26. In *Re Rolls Razor Ltd* [1968] 3 All ER 698 Buckley J noted (at 700) that section 236 is intended to enable the court to help an insolvency office-holder discover the truth of the circumstances in connection with the affairs of the company:

> "…as effectively as possible and…with as little expense as possible…It is…appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surround any such possible claim".

27. In *British and Commonwealth Holdings plc* [1993] AC 426 Lord Slynn rejected the notion that section 236 should be limited to an order, the purpose of which is to reconstitute the company's knowledge. He stated at page 426:

> "Nor do I see any support in earlier judgments which have been cited to us relating to the predecessors of section 236 or to comparable sections for such a limitation to "reconstituting the company's knowledge." On the contrary, for example, in *In re Gold Co*. (1879) 12 Ch.D. 77) in a case under section 115 of the Companies Act 1862 (25 & 26 Vict. c. 89) (which enabled the court to summon any officer or any persons supposed to be capable of giving information concerning the transaction and trade dealings of the company), Sir George Jessel M.R. said, at p. 85:
>
> > 'the whole object of the section is to assimilate the practice in winding up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees, in bankruptcy to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed'".

28. Lord Slynn continued at 429:

> "I am therefore of the opinion that the power of the court to make an order under section 236 is not limited to documents which can be said to be needed "to reconstitute the state of the company's knowledge" even if that may be one of the purposes most clearly justifying the making of an order.
>
> At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved - on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned.
>
> …
>
> 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 or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others."

29. In *Sasea Finance Limited v KPMG* [1998] BCC 216, Robert Walker J summarised his understanding of the relevant test. His deployment of the word "then" which I have highlighted in the passage that follows, suggests a two-stage test along the lines contended for by Ms Sabben-Clare:

> "The essential conditions for office-holders applying for relief under s.236 are to establish a reasonable requirement for information (a matter on which the onus is on the office holders, but on which the views of the office holders themselves are normally entitled to a good deal of weight) and ***then*** for the court to carry out a balancing exercise, weighing the potential importance of the information to the office holders against the potential oppressiveness to the respondents of being required to provide it.

30. The paragraphs from Lord Slynn's judgment set out at paragraph 28 above, also refer:

    i) separately to balancing the reasonable requirements of the office-holder against avoiding making an order that is oppressive to the respondent;

    ii) to a proper case being one where the administrator reasonably requires to see the documents to carry out his functions (again suggesting the need for the court separately to identify a reasonable requirement) *and* where 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; and

    iii) to the *application* not being unreasonable because of its potential oppression on the respondent, rather than the administrators' *requirement* to see the documents being unreasonable because of any such potential oppression.

31. However I was not referred to any authority where the court has more clearly identified a two-stage test. In *Cloverbay Ltd v BCCI SA* [1991] Ch 90 the court emphasised that the circumstances surrounding any application under section 236 may vary infinitely and that the statute does not seek, in any way, to fetter the court's discretion. There, the court referred to balancing on the one hand, the importance to the office-holder of obtaining the information against, on the other hand, the degree of oppression to the respondent. This appears to suggest that the degree of oppression might influence the court's determination of the extent to which the office-holder's asserted requirement is reasonable.

32. I accept therefore, that when considering whether to make an order under section 235 (which expressly refers to the office-holder's reasonable requirement) and section 236 (where the common law similarly imposes a "reasonable requirement" test), the court's discretion is at large and it remains open to me to consider the burden and any potential oppression that may fall upon BDO when determining the reasonableness of the Applicants' asserted requirement.

33. It was also in *Sasea Finance* that Robert Walker J noted at paragraph 4 of his judgment that:

> "KPMG, as the company's auditors, are most probably officers of the company within the meaning of s.236(2)(a) …"

and that whilst such an interpretation might not give rise to claims against them as fiduciaries:

> "that cannot to my mind diminish the duty of an auditor under s.235 of the Insolvency Act 1986 to cooperate with office holders, a power to which Ralph Gibson LJ in *Re British and Commonwealth Holding* at page 372 attached importance, in addition to and separately from any subsisting fiduciary duty. "

34. The case for making an order against those who have a statutory duty to cooperate with office-holders under section 235 was regarded in *Re Cloverbay* as being usually stronger than when considering an application against a third party.

35. It is not unusual for an insolvency office-holder to seek an order under section 236 against a prospective defendant to litigation which they may decide to commence or which they may already have commenced. Ms Johnson referred me to the quotation from *Re Gold Co,* cited with approval by Lord Slynn in *British and Commonwealth* (set out at paragraph 27 above) and by Robert Walker J in *Sasea Finance,* when taking me through a practice that emerged, briefly, following the court's decision in *Re Castle New Homes Limited* [1979] 1 WLR 1075. Insolvency office-holders started pointedly to make it clear in their evidence in support of an application under section 236 (or its predecessors) that they had not yet conclusively formed a view as to whether to commence litigation. This arose from a concern that pursuing such an application after reaching such a conclusion would give the office-holder an advantage not available to ordinary litigants. In *Re Cloverbay* the Court of Appeal rejected the imposition of a test based on the readiness or otherwise of the office-holder to commence litigation. The court's discretion is at large and as seen in *Sasea Finance,* it may be exercised in favour of making an order, even after proceedings have been commenced against the respondent.

36. In *Re XL Communications Group Plc* [2005] EWHC 2413 (Ch) a district judge's decision to refuse to make an order against BDO pursuant to section 236 was upheld. More than six years had passed since the company entered liquidation. A newly-appointed, replacement liquidator sought a long list of documents from BDO stating that they were required in order to carry out his investigative duties as liquidator and because he was trying to establish the company's true financial position both before and after it was floated on the Alternative Investment Market.

37. Having reviewed the authorities cited to him, the district judge noted that when applying for an order under section 236 of the Act, the relevant office-holder would usually be expected to provide at least a general indication of the nature of the investigation(s) for which the information was required. He concluded that the liquidator had not made out a reasonable requirement for the information and documents sought. In doing so, he had noted that as a considerable period of time had elapsed following the commencement of the liquidation:

> "it falls upon the liquidator to set out what enquiries/investigations have been made and the result of those

> which has therefore resulted in the application in order for him to complete the enquiries and fill in the gaps in the information about the company's affairs, dealings and property."

38. On appeal, these were, according to Kitchin J, all matters that the district judge was entitled to consider when exercising his discretion in refusing to make the order.

Do the Applicants reasonably require production of the Audit Files?

39. Whilst the evidence in support of the application sets out various reasons why an order is sought in respect of the Audit Files, it and Ms Johnson's submissions focus primarily on the Applicants' contention that they are reasonably required in order to determine the merits of any potential claim against:

    i) BDO; and/or

    ii) the Companies' management.

40. In support of her contention that the Applicants have failed to make out a reasonable requirement to see the Audit Files, Ms Sabben-Clare drew together from BDO's evidence that since first being appointed as administrators of the Companies in 2021, the Applicants have gained access to:

    i) all of the Companies' records;

    ii) all of the materials put together by the Companies' to prepare their accounts;

    iii) via the shared portals, all of the correspondence and documentation passing between the Companies and BDO;

    iv) all of the information provided for the purposes of the Applicants' own firm's instruction, at the behest of the Companies' bank, to conduct a series of financial reviews and an independent business review prior to the Applicants' appointment as administrators;

    v) all of the documents created and considered as part of an extensive exercise to review all of the Company's major contracts, leading to an announcement on 13 October 2020 expecting the Group to report a loss of between £13.5 million and £15 million; and

    vi) all of the documents created and considered as part of an external review, conducted by Grant Thornton, referred to in a letter from the Company to the FRC dated 17 June 2021. The letter described the targeted line of investigation adopted in the review in relation to the sixteen contracts perceived to pose the most risk and uncertainty to the Company's financial performance, and stated:

> "The review also focused on those factors that could or should have been known at the relevant reporting dates, by considering both the supporting documentation available at that time, as well as any evidence that has subsequently come to light which would conflict with

> or cast doubt upon the judgements made at the reporting date.
>
> …
>
> This review highlighted a number of contracts that had been misreported as at 31 December 2019 and a number of contracts that had commercial issues that would affect the half year position for 2020 and consequently the full year."; and

vii) according to a detailed report prepared by the NMCN Commercial teams for the Company's board of directors, a further, "full review of all water contracts undertaken within the business" by the newly appointed Water Commercial Director and the relevant commercial and operational teams. The reviewers were said to have applied the "highly probable" criterion under IFRS 15 to assess whether it was appropriate to have included these sums within the final outturn revenue positions reported at the relevant date".

41. BDO's case is that despite having access to all of this information, showing what was available to BDO when it conducted the 2018 and 2019 audits and the reasons why significant loss adjustments were subsequently considered necessary, the Applicants have not identified any specific gaps in the information which they seek to fill by their application. The information was, Ms Sabben-Clare says, "parcelled up and handed to them on a plate" and yet their evidence does not reveal any detailed consideration of those documents before making a blanket request for all of the documents comprising the Audit Files: not just those relating to the water contracts where the misstatements were identified, but everything.

42. She submits further, by reference to Mr Roberts' witness statement, that the Applicants' approach is misguided: in order to determine whether a claim might lie against BDO, the Applicants should first be determining whether the Companies' accounts were misstated. BDO's Audit Files will not answer that question. Secondly, they should determine whether a reasonably competent auditor would have detected the misstatement. This, she submits is a matter for an expert. If such an expert wishes to see how BDO approached the audit, they only have to look to the methodology set out in the audit completion reports that were sent to the Company. Finally, to pursue such a claim, they would need to be able to show that but for the alleged negligent audit, some loss would have been avoided: how would the Company have acted differently? It is BDO's case that none of these issues give rise to a reasonable requirement for the Applicants to see the Audit Files.

43. The third element of Ms Sabben-Clare's submissions concerns the potential oppression to BDO if it were to be ordered to produce the Audit Files against their potential usefulness to the Applicants. This, she says, should incline the court to decline to make the order sought.

44. In terms of administrative burden, Mr Roberts' evidence refers to the need to conduct a review of the material to exclude privileged documents. Ms Sabben-Clare informed the court that if it were to decide to make an order against BDO, she would wish, at a

consequentials hearing to address the court regarding the costs of complying with such an order.

45. However, the asserted oppression principally lies not in the time or cost of compiling and delivering the documents comprising the Audit Files, but in the advantage that such disclosure would give to the office-holders over and above that available to any other proposed litigant who would need to comply with the Protocol.

46. Despite being in office for more than three years, having all of the information noted above and the limitation period for a claim in respect of the 2018 audit imminently expiring on 26 March 2025, the Applicants have given neither a Preliminary Notice (under paragraph 5 of the Protocol) nor a detailed Letter of Claim, to which the intended defendant should normally be given 3 months to reply. The court's discretion to order pre-action disclosure is generally not exercised where the claimant already has sufficient material to decide whether or not to commence proceedings, even if their case cannot be perfectly pleaded at that stage. Ms Sabben-Clare referred the court to *Carillion Plc (in liquidation) v KPMG* [2020] EWHC 1416 (Comm) where the court declined to order pre-action disclosure and *AssetcCo Plc v Grant Thornton UK LLP* [2013] EWHC 1215 (Com) where an order was similarly refused, as neither a letter of claim nor particulars of claim had been prepared identifying the issues between the parties.

Decision

47. In my judgment, the Applicants have made out a reasonable requirement for the Audit Files to be made available to them. I have reached this conclusion for the following reasons:

i) Mr Roberts' evidence confirms that BDO maintained self-contained audit files for each year. Mr Roberts also confirms that BDO's 2018 and 2019 audits were undertaken in accordance with International Standards on Auditing (UK) regulatory requirements. ISA 230 sets out the audit documentation that should be maintained for prescribed purposes. We spent some time during the hearing considering the requirements of ISA 230. Those which appear to me to be particularly pertinent were highlighted in Ms Johnson's skeleton argument:

> "Audit documentation that meets ISA 230 provides:
>
> '(a) Evidence of the auditor's basis for a conclusion about the achievement of the overall objectives of the auditor; and
>
> (b) Evidence that the audit was planned and performed in accordance with ISAs (UK) and applicable legal and regulatory requirements'.
>
> For the purposes of ISA 230 "audit documentation" is:
>
> 'The record of audit procedures performed, relevant audit evidence obtained, and conclusions the auditor reached (terms such as "working papers" or "workpapers" are also sometimes used).

> In the UK, audit documentation shall include all documents, information, records and other data required by ISQC (UK) 1 (Revised June 2016), ISAs (UK) and applicable legal and regulatory requirements'.
>
> An auditor is required to prepare audit documentation that is:
>
> '…sufficient to enable an experienced auditor, having no previous connection with the audit, to understand:
>
> (a) The nature, timing and extent of the audit procedures performed to comply with the ISAs (UK) and applicable legal and regulatory requirements;
>
> (b) The results of the audit procedures performed, and the audit evidence obtained; and
>
> (c) Significant matters arising during the audit, the conclusions reached thereon, and significant professional judgments made in reaching those conclusions.'
>
> Further, ISA 230 requires the auditor to retain any other data and documents 'that are important in supporting the auditor's report as part of the audit documentation'.
>
> The audit files must also document:
>
> (a) '…discussions of significant matters with management, those charged with governance, and others, including the nature of the significant matters discussed and when and with whom the discussions took place'.
>
> (b) 'If the auditor identified information that is inconsistent with the auditor's final conclusion regarding a significant matter, the auditor shall document how the auditor addressed the inconsistency'."

ii) IFRS 15 required an assessment of the likelihood of a significant reversal of revenue from long-term contracts. An auditor is required to deploy professional scepticism and to maintain appropriate documentation to demonstrate that he has done so. ISA 230 states at paragraphs A9 and A10:

> "An important factor in determining the form, content and extent of audit documentation of significant matters is the extent of professional judgment exercised in performing the work and evaluating the results. Documentation of the professional judgments made, where significant, serves to explain the auditor's conclusions and to reinforce the quality of the judgment. Such matters are of particular interest to those responsible for reviewing audit documentation, including those carrying out subsequent audits when

> reviewing matters of continuing significance (for example, when performing a retrospective review of accounting estimates).
>
> A10. Some examples of circumstances in which, in accordance with paragraph 8, it is appropriate to prepare audit documentation relating to the use of professional judgment include, where the matters and judgments are significant:
>
> > • The rationale for the auditor's conclusion when a requirement provides that the auditor "shall consider" certain information or factors, and that consideration is significant in the context of the particular engagement.
> >
> > • The basis for the auditor's conclusion on the reasonableness of areas of subjective judgments (for example, the reasonableness of significant accounting estimates).
> >
> > • The basis for the auditor's conclusions about the authenticity of a document when further investigation (such as making appropriate use of an expert or of confirmation procedures) is undertaken in response to conditions identified during the audit that caused the auditor to believe that the document may not be authentic."

iii) It is clear to me, therefore, that having complied with their obligations under ISA 230, the Audit Files should provide a record of how BDO carried out its function as auditor, how it exercised professional scepticism and how it interrogated the evidence provided to it by the Companies. That record appears to be unique: there is no suggestion in BDO's evidence that all issues its auditors considered and all of its reasoning for the conclusions reached were shared with the Companies. The importance of considering this record, when assessing whether BDO met its duties as auditor, can be seen from BDO's completion report. For 2018 it states:

> "For a risk based selection of contracts from each operating segment, supported by a further sample of other contacts, we obtained a copy of the contract documentation and critically assessed and challenged the recognition of revenue from a review of the performance of the contract. In particular, we have:
>
> > • assessed the accuracy of the adoption of IFRS 15, focussing particularly on the timing of and amounts recognised in respect of variable income (as highlighted by the detailed assessment carried out by management on the adoption of IFRS 15 as being the most significant area of change). We also assessed the contracts tested for any other indicators that may be affected by IFRS 15

> such as the restriction of revenue recognition where the ultimate collectability may be in doubt.
>
> • we have substantively tested the revenue figures as applied to the contracts throughout the year."

iv) Having seen the significant adjustments that were subsequently made to the contract revenue figures, in my judgment it is entirely reasonable for the Applicants, in order to meet their duty to the Companies' creditors, to seek to see *how* the revenue figures were "substantively tested" by BDO, which contracts were selected for testing and how they critically assessed the Companies' revenue recognition.

v) In my judgment, it is only by seeing the Audit Files, that the Applicants can reach a reasonably informed, preliminary view as to whether BDO met its duties as auditor to the Companies. I reject the suggestion that because the identified misstatements and adjustments primarily related to water contracts, their request is too wide. Errors in one part of the audit may be replicated in others. Responsibility for such errors, may lie entirely with the Companies' management and/or not give rise to any actionable claim against BDO. But the Applicants will not know that until they see the Audit Files. I see no reason to restrict disclosure of the Audit Files to those elements that concern the water contracts.

vi) It follows that I consider that the Audit Files are more likely than not to comprise an important record of the information provided to BDO by the Companies' management team and employees. Whilst BDO has correctly stated that such information should already be at the Applicants' disposal, Ms Wade's evidence explains that the Applicants recovered electronic data totalling approximately 80 terabytes. The Company had over 500 email accounts and multiple stores of files. Ms Wade provides an indication of the enormous costs that would be involved in seeking to host all of the information. I accept from her uncontested evidence that the Applicants do not have sufficient knowledge of the manner in which the Company's management engaged with the audit process to enable them reliably to target a search of the email accounts to establish all the information that was being given to BDO for the purposes of the audit. I am also satisfied that it is more likely than not that the Companies may not have any record of some or perhaps all of the information that was provided orally to BDO.

vii) By contrast, BDO's Audit Files were prepared specifically to keep all of the documents that were pertinent to each audit, in one place. It is more likely than not (and again I note that BDO has provided no evidence to the contrary) that the bulk of the Companies' emails regarding each audit, and (to the extent that any existed) BDO's attendance notes of information provided orally, will have been kept on the relevant Audit File. The Audit Files should thus together provide among them, a full record of all information requested from and provided by the Companies.

viii) The documents comprising the 2019 Audit File were checked for the purposes of protecting BDO's privileged information before being delivered to the FRC.

Whilst Mr Roberts states that a similar exercise would need to be undertaken in respect of the 2018 Audit File, the evidence suggests that the extent of such an exercise pales in comparison with the potential cost of seeking to identify every employee at the Company involved in the provision of information to BDO for the purposes of the 2018 Audit and then, taking into account the additional IT difficulties set out in Ms Wade's evidence, searching their email addresses. The authorities clearly establish that one of the purposes of section 236 is to enable an insolvency office-holder who comes to a company as a stranger, as cost effectively as possible, to gain an understanding of its assets and liabilities. The assets in this case are potential claims against BDO and members of the Companies' management teams and the evidence shows that it would be more cost-effective to obtain the relevant information to enable an assessment of the merits of any litigation, from the Audit Files than by trying to reconstitute all of the Companies' records in a searchable format.

ix) When considering the potential prejudice or oppression to BDO in having to comply with such an order, I am not aware of any authority, I was taken to none, nor can I see any good reason why one would exist that provides that notwithstanding the court's wide discretion when considering whether to make an order under sections 235 and 236 of the Act, that discretion should now be restricted or limited in some way, as a result of the introduction of the Protocol. The Applicants were appointed long after the audits in question and after the departure of key members of the Companies' management team engaged in those audits. This, in part, is the reason why, according to the Applicants' evidence, they have not yet been able to determine whether a claim may even lie against BDO.

x) I do not consider the Applicants' request to be too wide or general. It is not asking for every document that ever passed between the Companies and BDO. It seeks a targeted order to see files which BDO's evidence describes as "self-contained".

Conclusion

48. Taking into account the unique nature of the information that should be held on the Audit Files, as well as the likelihood of the Audit Files capturing, in a self-contained arena all of the information provided by the Company to enable the audits to be performed, this is, in my judgment, an appropriate case to exercise my discretion in favour of making an order that BDO deliver up the Audit Files. I am satisfied that the Applicants reasonably require the Audit Files. The potential oppression caused to BDO in providing them, knowing that their disclosure may lead to litigation being commenced against them and that a privilege review must first be conducted in respect of the 2018 Audit File, does not dissuade me from concluding that the Applicants' requirement to see the files is reasonable, nor, when weighed in the balance, to decline to make an order in the terms sought.