Neutral Citation Number: [2024] EWHC 2792 (Comm)

Claim No: CL-2022-000218

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Friday, 1st November 2024

Before:

MR. JUSTICE PICKEN

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Between:

NMC HEALTH PLC (IN ADMINISTRATION)	**Claimant**
- and -	
ERNST & YOUNG LLP	**Defendant**

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MR. TOM PASCOE, MR. CHINTAN CHANDRACHUD and **MR. JAMES SHAERF** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) appeared on behalf of the **Claimant.**

MR. THOMAS PLEWMAN KC, MR. EDWARD HARRISON and **MS. KATHERINE RATCLIFFE** (instructed by **RPC LLP**) appeared on behalf of the **Defendant.**

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JUDGMENT 1

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MR. JUSTICE PICKEN :

1. This is a further hearing in this matter following a hearing before me which took place at the start of October. There are four items that have been raised and which therefore the court has to consider.

2. The first is one that I have already dealt with concerning disclosure of something called the Bin Butti Settlement Agreement. I have decided in relation to that, whilst noting a number of markers which Mr. Plewman KC on behalf of the Defendant has laid down, that the right course is for there to be a joint approach to the UAE Bankruptcy Court, in the hope that certain confidentiality restrictions can be overcome so enabling that settlement agreement to be disclosed.

3. I need not get into the detail of what I have directed in that respect, save to point out that, in the event that the disclosure is not forthcoming from that court, then this is an issue which will have to come back before this court and, if at all possible, given my pre-reading and familiarity with the case, before me.

4. I should just say in passing, as the transcript itself will record, that there is no issue between the parties as to the relevance and therefore disclosability of the settlement agreement. The only issue concerns confidentiality, as Mr. Pascoe on behalf of the Claimant has confirmed.

5. The second issue is the issue now that I am addressing in this ruling, which concerns certain LCIA documents, namely arbitration proceedings between the company described as 'Limited', which is a separate entity to the Defendant ('NMC'), and certain LCIA respondents. Those LCIA respondents

are represented by Eversheds, who have confirmed that they have no objection to the disclosure of the relevant documentation. However, not unreasonably, they require that the costs of the relevant review referable to that disclosure process should be met not by their clients but by at least one of the parties to these proceedings. Those costs are thought to amount to something in the region of $70,000, although it may be that the costs turn out to be slightly more, but that is the broad territory.

6. This is a matter that was the subject of some debate at the CMC that took place before Bright J in April this year. I have been reminded by Mr. Harrison on behalf of the Defendant of certain exchanges which took place at that hearing, and in particular between Mr. Pascoe and the judge. Those exchanges are very helpfully summarised in the second witness statement of Charlotte Henschen dated 13th September 2024 at paragraphs 50 to 54. I do not need to repeat what is there stated.

7. Suffice to say that what was contemplated as a result of those discussions, namely that the Claimant would take the matter of the disclosure of the LCIA documents forward with the LCIA respondents and indeed Limited, Mr. Harrison complains, was not done with any great efficiency. In those circumstances, Mr. Harrison submits that it would be appropriate that the Claimant meets the costs that Eversheds contemplate will be incurred. He further submits that, had a third party disclosure application been made by the Claimant, then in the ordinary way the Claimant could (and would and should) have expected to have to bear the costs concerned.

8. Dealing with the first of those matters, I prefer not to arrive at any particular conclusion as to whether there was delay or fault since the hearing before Bright J, because it seems to me, ultimately, that, even if there were, and I note everything that is said by Mr. Harrison in that respect, the fundamental issue really turns on the second point raised, namely whether it was the Claimant that would have been expected to have made the putative third-party disclosure application, in which case the Claimant might be expected to be meeting the costs of the third party as regards the disclosure sought, or whether, as Mr. Shaerf on behalf of the Claimant points out, it was as open to the Defendant to make the putative third-party disclosure application (and so incur the relevant costs of the third party) as it was for the Claimant to do so.

9. In my view, the fact that both Mr. Harrison and Mr. Shaerf are able to make that mirror-image submission demonstrates that I should not proceed on the basis that one or the other, that is the Claimant or the Defendant, would or should have been expected to make the third-party disclosure application. I bear in mind in particular that Mr. Shaerf is able to (and does) say that it is, of course, the Defendant that seeks these documents from the Claimant and therefore it would have been open to the Defendant just as much as the Claimant to have made the putative third-party disclosure application.

10. In this respect, Mr. Harrison highlights how the issue concerning the relative status of Limited and NMC (the 'Holdings' company), the Claimant in other words, is of relevance. I see that, but I am in no particular position to make a determination in that respect on what is a narrow issue concerning who should bear the costs of the third parties, namely those parties represented by

Eversheds. It seems to me that, standing back, the fair approach is to require that those costs are split between the Claimant and the Defendant on the basis that either of them could have made the putative third-party disclosure application. That is, therefore, the order I make.

11. I should say, in passing, that whilst Mr. Shaerf took what might be described as a jurisdictional objection to the making of an order in these terms, on the basis that the relevant Practice Direction at paragraphs 18 and 17, which are the ones here invoked by the Defendant in relation to this disclosure aspect, do not apply. I am less than persuaded that I should feel myself so inhibited. On the contrary, it seems to me that what might in previous times have been described as the Court's inherent jurisdiction and now is to be found in CPR 3.1(m) more than justifies me in arriving at the determination that I have.

12. The costs of this aspect of the application ought to be costs in case.

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