

Neutral Citation Number: [2024] EWHC 2793 (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

Between:

NMC HEALTH PLC
(IN ADMINISTRATION)
- and -

Claimant

ERNST & YOUNG LLP

Defendant

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.**

JUDGMENT 2

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MR. JUSTICE PICKEN :

1. The next item concerns certain documentation which has been described by the parties as the ‘Regulator Documents’.
2. There are two aspects in relation to which I have so far heard submissions. I am going to focus on the first before coming on separately to deal with the second, having first heard from Mr. Pascoe in relation to that second.
3. This first category concerns documents comprising communications to and from various regulators in the UK and the USA and, most helpfully, it has been agreed between the parties that what is concerned with here are 18 such documents, namely: four PowerPoint presentations provided to variously the FSA, the SFO, the Department of Justice and the Securities and Exchange Commission by Quinn Emanuel and the joint administrators, dated 3rd June 2020, 23rd December 2020, 12th January 2021 and 1st December, 2021; and secondly, 14 communications comprising two letters, six emails and six attachments made with the FSA responding to detailed questions asked by the FSA about the joint administrators' discoveries from their investigation.
4. The submissions today have clarified that the issue is really a rather narrow one. Mr. O'Rourke in his seventh witness statement dated 27th September 2024, when dealing with the UK and US Regulator Documents, says this concerning what he describes as the four PowerPoint presentations, as I understand it - at paragraph 85.1:

"As I have explained, four presentations were created for the dominant purpose of the regulatory investigations (not litigation). However, the entirety of their content reflected the administrators' ongoing work and preparation for litigation

against EY and others, i.e. they reflected the contents of (some of) the Investigation Documents. That in turn reflects the fact that the regulators had requested an update on the administrators' investigations which, as I have explained above, were already underway by the time that the presentations were made and were being carried out for the dominant purpose of litigation. That is why the presentations were prepared with significant input from Quinn Emanuel which, as explained, was appointed to advise on claims to be brought by NMC. The presentations provided a (then current) snapshot of the Joint Administrators' investigations into the fraud. Without any waiver of privilege, the presentations were given with Quinn Emanuel in attendance and Quinn Emanuel provided the copies of the presentations to the regulators. The presentations also have Quinn Emanuel's name on the front page of them. The documents are privileged on the basis that they reflect the contents of other documents which are, themselves, privileged. I should also mention that the presentations reflect legal advice provided by this firm in relation to claims against EY and other third parties. This material would in any event be privileged on the grounds of legal advice privilege, but this does not (unlike NMC's claim to litigation privilege) cover the entirety of the presentations."

5. Then, turning to deal with the 14 other communications, Mr. O'Rourke explains as follows:

"These documents constitute communications that were created for the dominant purpose of the FCA's regulatory investigation (not litigation) but which contained material drawn from a snapshot of the Joint Administrators' ongoing investigation, which was being carried out for the dominant purpose of litigation. These communications consisted of detailed questions relating to the Joint Administrators' investigation into NMC and their resulting knowledge of its affairs and NMC's responses to those questions. As above, Quinn Emanuel sent or is copied to all of this correspondence which reflects the fact that NMC's responses were being drawn from material prepared for the purpose of litigation. The answers to the FCA's questions required NMC to disclose further information from its ongoing investigation which, as explained, was being conducted for the dominant purpose of litigation."

6. Mr. Pascoe has explained, together with Mr. Shaerf, in their skeleton argument, and confirmed orally today, that what Mr. O'Rourke was there intending to do was to reflect the approach described in *WH Holding Limited*

v E20 Stadium LLP [2018] EWCA Civ 2652 by the Court of Appeal (the then Master of the Rolls, Sir Terence Etherton MR, Lord Justice Lewison and Lady Justice Asplin) at paragraph 27(iv), as follows:

"Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege."

This, Mr. Pascoe submits, is the consideration that Mr. O'Rourke should be taken as having had in mind when saying what he did in the passages from which I have quoted.

7. Mr. Plewman submits, however, that that is not the effect of those passages. Nowhere, Mr. Plewman observes, does Mr. O'Rourke say in terms that it is not possible to disentangle the privileged -- that is litigation privileged in this case -- information or advice from the unprivileged. In this respect, Mr. Plewman takes me to the decision of Beatson J (as he then was) in *West London Pipeline and Storage Limited and Others v Total UK Limited and Others* at paragraph 53 where this is stated:

"Thus, affidavits claiming privilege whether sworn by the legal advisers to the party claiming privilege as is often the case, or, as in this case, by a Director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created..."

It is Mr. Plewman's submission that, in the circumstances, that requirement has not been met.

8. I should observe that it does not seem to me that it matters whether the precise language used by the Court of Appeal in *WH Holding Limited* at paragraph 27(iv) is used or not. What does matter, however, is that that approach is the

approach that Mr. O'Rourke had in mind, whatever the language he sought to use when explaining the approach that he was adopting.

9. In those circumstances, I consider it sensible for Mr. O'Rourke to serve a further witness statement essentially confirming that that is indeed the approach that he was seeking to follow. That would confirm what Mr. Pascoe has confirmed to me today.
10. It seems to me appropriate, in the circumstances, the point having been raised by Mr. Plewman, that that confirmation and clarification are forthcoming, assuming -- and I do not doubt it at all -- that what Mr. Pascoe says on instructions is the case.
11. I should say for the present that I have a strong sense that Mr. O'Rourke did indeed have the correct approach in mind in circumstances where, whilst he uses the language in more than one place of "reflecting" rather than anything more specific, he nonetheless has gone to some lengths to describe what it is that the documents involve in the case of the Regulator presentations, for example, describing them as providing a then current "snapshot" of the joint administrators' investigations.
12. I am also conscious, as I pointed out during the course of submissions, that at the end of paragraph 85.1 in the last two sentences, which I have quoted, Mr. O'Rourke draws a distinction between the legal advice privilege which, in his assessment, could apply to some of those presentations but not the entirety, on the one hand, and the litigation privilege, which is claimed and is the subject of this ruling, on the other, in the latter case the implication at least being that

there is an inability to disentangle. However, as I say, it will be a matter for Mr. O'Rourke to address specifically.
