Case No: HT-2022-000463 / HT-2021-000148

[2024] EWHC 1122 (TCC)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: Thursday, 18 April 2024

Before:

MRS JUSTICE JEFFORD

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Between:

(1) LONDON & QUADRANT HOUSING TRUST
(2) QUADRANT CONSTRUCTION SERVICES LTD **Claimants**

- and -

(1) WPHV LTD (In Administration)
(2) WILLMOTT DIXON HOLDINGS LTD
(3) BE LIVING GROUP LTD
(4) WALSWORTH LTD
(5) HARDWICKE INVESTMENTS LTD
(6) WILLMOTT DIXON LTD
(7) BE LIVING HOLDINGS LTD
(8) CHUBB EUROPEAN GROUP LTD
(9) CHUBB EUROPEAN GROUP SE
(10) CNA INSURANCE COMPANY LTD
(11) AXIS SPECIALTY EUROPE SE
(12) ALLIED WORLD ASSURANCE COMPANY (EUROPE) DAC
(13) MS AMLIN CORPORATE MEMBER LTD
(14) AMERICAN INTERNATIONAL GROUP UK LTD
(15) ENDURANCE WORLDWIDE INSURANCE LTD
(16) LLOYD'S UNDERWRITER SYNDICATE NO. 2786 EVE
(17) THE UNDERWRITING MEMBERS OF LLOYD'S SYNDICATE NO. 1861 ATL FOR THE 2019 YEAR OF ACCOUNT
(18) FLECTAT 2 LTD (FORMERLY AMTRUST CORPORATE MEMBER LTD) FOR AND ON BEHALF OF SYNDICATE 1206
(19) THE UNDERWRITING MEMBERS OF LLOYDS SYNDICATE 4711 SUBSCRIBING TO X0A1FCE17A0S
(20) LLOYD'S UNDERWRITER SYNDICATE NO. 2003 XLC
(21) LIBERTY CORPORATE CAPITAL LTD
(22) MARKEL INTERNATIONAL INSURANCE COMPANY LTD
(23) AMTRUST EUROPE LTD **Defendants**

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APPEARANCES

MR M THORNE and MR C EWING (instructed by Devonshires Solicitors)
for the **Claimants**

MR D KHOO (instructed by Simmons & Simmons LLP) for the **2nd to 7th Defendants**

MR L WYGAS (instructed by CMS Cameron McKenna Nabarro Olswang)
for the **8th and 9th Defendants**

MR T WEITZMAN KC (instructed by Reynolds Porter Chamberlain LLP)
for the **10th to 14th, 16th, and 18th to 22nd Defendants**

MR N HEXT KC (instructed by Weightmans Solicitors LLP)
for the **11th and 12th, 14th to 17th and 20th Defendants**

MR G HILTON (instructed by Shoosmiths LLP) for the **23rd Defendant**

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Approved Judgment

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MRS JUSTICE JEFFORD:

1. There is before the court an application made by the claimants on 4 April for disclosure guidance pursuant to Practice Direction 57AD paragraph 11. The application, as framed, was for guidance and/or an order that "when providing disclosure in these proceedings, the Defendants should not redact or withhold documents pertaining to claims, circumstances or notification of issues relevant to these proceedings (as determined by reference to the Claimants' theory of the case) on the basis of "confidentiality" or "privilege"" and an order that documents supplied by brokers to the defendants should be disclosed within three days of receipt. The application was supported by a statement of Mr Netherway and elaborated upon in Mr Thorne's skeleton argument for the case management conference and this application.

2. In that skeleton argument he formulated the guidance that was sought as follows, that:

> "The Defendants should not withhold or redact any document or part of a document insofar as that document, or part of a document:
>
> a) communicates to brokers and/or insurers and/or
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> b) evidences the communication to brokers and/or insurers of and/or
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> c) evidences brokers' and/or insurers' knowledge of
>
> a claim or circumstance in respect of the Defects, the projects or the materials at the Development and/or in respect of WPHV's potential liability in relation thereto."

3. The arguments advanced in support of the application can be summarised briefly as being, firstly, that the defendants had failed to provide any explanation as to why they should withhold or redact any documents concerned with notification on the grounds of privilege; secondly, that since the claimants were advancing a claim against the PI Insurers under the Third Parties (Rights against Insurers) Act 2010 no privilege could be asserted by the defendants against WPHV in respect of such rights and, accordingly, no privilege could be asserted by the defendants against the claimants, who stood in the shoes of WPHV for the purposes of its claims; and, thirdly, that the PI Insurers had waived the right to rely on any privilege essentially by putting in issue whether notifications within policy periods had been given.

4. I expressed the preliminary view (which I still hold) that an application for disclosure guidance under paragraph 11 of the Practice Direction was not appropriate at the stage of the proceedings. The nature of an application for disclosure guidance is one which should be made, and indeed one which may only be made, where there is a significant difference of approach between the parties and the parties require guidance from the court in order to address the point of difference between them without formal determination, and the point is suitable for guidance to be provided either on the papers or, other than in substantial claims, within the maximum hearing length and maximum time for pre-reading provided in paragraph 11.2, which are one hour and 30 minutes respectively.

5. As to the first point - the significant difference of approach between the parties - the history of correspondence set out in Mr Netherway's statement and responded to in the later statement of Ms Sanderson, demonstrates that an issue has been back and forth amongst the parties in relation to the disclosure of documents which evidence notification to the insurance defendants of claims or circumstances giving rise to claims within particular policy periods.

6. In that correspondence, the insurance defendants repeatedly said that they intended to withhold or redact documents that were privileged. It did not, it seems to me, follow from that that the defendants were making general assertions that they could withhold any document, even if relevant to the question of notification, but rather that they were seeking to indicate that they would examine relevant documents and, if necessary, redact them in order to maintain privilege.

7. As will be apparent from what I have said already, the scope of the guidance from the court that was sought went far beyond simply seeking clarification as to what the defendants might have meant by that and into the realms of seeking determinations of principle by the court on matters of privilege including the right to assert privilege.

8. Returning for a moment to paragraph 11.1, there appeared, until the end of March, to be a large measure of agreement that the defendants should examine documents and redact them and provide them accordingly and there was no apparent significant difference of approach between the parties. Rather, what Mr Thorne says is that the parameters of any intended redaction were not clarified and that the guidance that was being sought was being sought in order to determine those parameters without a formal determination, albeit it is open to the court on a disclosure guidance hearing to make an order. But at the point when this application was made, that significant difference of approach had not yet materialised because the redactions had not been made, the documents had not been provided in redacted form and no-one, least of all the court, could know what the significant difference of approach between the parties was. Accordingly, on that basis alone, it seems to me that an application for disclosure guidance was inappropriate and premature.

9. Further, as I have said, although it is contemplated that the court may make an order, the nature of disclosure guidance and the time periods given for maximum hearing length and maximum pre-reading, other than in substantial claims, indicates that what is contemplated is not what I might characterise as a "full blown application" for determination of questions of privilege. Even though, as Mr Thorne rightly submits, the court may direct a longer hearing in a substantial case, and this undoubtedly is a substantial case, that provision reflects the fact that in a substantial case there may be a multiplicity of disclosure issues on which guidance can sensibly be sought. But, even in a substantial case, the provisions of paragraph 11 indicate the sort of hearing and the sort of matter that the court would be expected to deal with by way of disclosure guidance without formal determination.

10. In my view, if a point of principle is sought to be determined on privilege then that should be the subject matter of an appropriate application after a claim to privilege has been asserted and most likely within the parameters of paragraph14 of the Practice Direction. I simply do not see, as I indicated in my preliminary views yesterday, how the court could give useful guidance, in any event, as to the approach that the defendants ought to take when the application being made or the guidance

sought goes significantly beyond guidance simply on the parameters of redactions and into the realms of determination of issues of principle arising under the Third Parties (Rights against Insurers) Act 2010 and as a result of an alleged waiver of privilege.

11. Having said all of that, it is, of course, the case, and there is merit in Mr Thorne's submissions to this effect, that the upshot of the issuing of this application has been further correspondence between the parties in which the defendants have sought to clarify their position and there has been ventilation at this case management conference of the issues that might arise in relation to redaction of documents in order to maintain privilege. That does not, in itself, in my judgment, justify either the issue of the application for disclosure guidance or, which is what Mr Thorne urges me to do, simply "parking" or adjourning that application to be dealt with at a future date if issues arise in relation to the redaction. I say that not least because there would be a practical difficulty in bringing that application as currently framed back before the court to be dealt with on another occasion but in a completely different context, namely, addressing individual documents in respect of which privilege may have been asserted and it may then be argued that privilege has been wrongly asserted. Merely formulating the issue that way seems to me, again, to reinforce what I have said in relation to subparagraph 1 of paragraph 1 of the Practice Direction to the effect that there is, as yet, no significant difference in approach, or at least none that can be articulated, between the parties on which my guidance could or should be given.

12. Insofar as I can dismiss an application for disclosure guidance, which seems a rather strange concept, I dismiss the application. If any issues arise in the future once redacted documents have been provided then those issues should be the subject matter of a further application to the court.

13. For the avoidance of doubt, Mr Thorne has not abandoned the arguments which he raised in relation to the effect of the Third Parties (Rights against Insurers) Act 2010 on privilege or waiver of privilege; I have not determined those arguments; and they may be raised and ventilated at a future hearing if that becomes necessary.

LATER

14. So far as costs are concerned, Mr Thorne submits that, although his application has been dismissed, he should not have to bear the costs, or the whole of the costs, of the application, relying on the first instance on paragraph 11.5 of the Practice Direction, which provides that, unless otherwise ordered, the costs of an application for disclosure guidance are costs in the case and no order from the court to that effect is required.

15. The provision that the costs of an application for disclosure guidance are costs in the case reflects the nature of the disclosure guidance provisions in which the court has given informal guidance to the parties as to the manner in which they ought to carry out a particular aspect of disclosure. Having found that this application was not properly brought within paragraph 11 and certainly does not have the characteristics of an application for informal guidance, it seems to me that it is a case in which it is appropriate for me to make a different order, namely that the costs should be borne by the losing party, that is the claimants.

16. Having said that, I indicated when giving judgment in relation to the application that one of the outcomes of the making of the application was further correspondence between the parties as to, as it has been put, the parameters of any redaction. That has also been usefully ventilated in court on this case management conference, bringing some degree of commonality to the parties. The difficulty with the application, however, as I said in giving judgment on the principal application, was in part that it went well beyond the scope of informal guidance and sought significant and wide orders as to assertion of privilege, or determination of issues as to assertion of privilege, on the basis that no privilege could be asserted by the insurance defendants and/or that they had waived any such privilege.

17. The first of those points, the parameters of any redactions, is a matter, as I have said, that has been raised and could usefully have been raised on a case management conference if not already satisfactorily aired between the parties. There does seem to me to have been some case management utility in that having taken place on this case management conference and that should be reflected in the order as to costs. Accordingly, what I propose to do is this. I will summarily assess the defendants' costs in the normal way and I will order the claimants to pay 75 per cent of the sum which I have then summarily assessed, rather than 100 per cent, to reflect the utility of the discussion on this case management conference of issues relating to privilege.

18. Mr Thorne has submitted that I should go further than that in that the costs that have been incurred in dealing with the legal issues as to the scope of privilege should be reserved to any subsequent hearing. That does not seem to me to be an appropriate course to adopt. Although I have not determined those issues, they were, in my judgment, not issues that were appropriately raised on this application. They have undoubtedly involved the parties incurring significant costs and even if those issues need to be revisited at a later date, those costs will be incurred again. It may be that the fact that those issues have already been considered by solicitors and counsel at this stage would affect any costs order at a subsequent hearing and be taken account of on that occasion. No doubt the claimants will bear that in mind if that happens and draw it to the attention of the judge dealing with the matter. But, so far as the costs of this application are concerned, I do not consider it appropriate to make any discount, if I can put it that way, beyond what I have already indicated, that is 75 per cent of the amount that I summarily assess on the basis of the costs schedules.

LATER

19. So, as far as defendants 2 to 7 are concerned, it is recognised that their position on this application is somewhat different from the insurance defendants. They are, as they put it in Mr Khoo's skeleton, "caught in the middle", and have not had to address the legal issues in relation to privilege which were raised and dealt with at considerable length by the other parties, but they have necessarily been involved in the application and expended costs on it.

20. I note the submission made by Mr Thorne to the effect that no costs schedule was provided in accordance with the relevant practice direction. I do not intend to make any discount to the costs claimed in respect of that failure. It might be appropriate to mark that in a case where the costs incurred were unexpectedly drawn to the court's attention, for example, at the last minute, but this is a relatively straightforward matter in which the nature of costs likely to be incurred and the extent of the costs likely to

be incurred has been in play with other parties in time and there can be no difficulty with the claimants, and indeed the court, dealing with a summary assessment.

21. The total sum expended is £8,364.90 before the addition of VAT. It does seem to me, having regard to the scope of the submissions made, that that may be properly regarded as a somewhat high figure and, doing the best I can, taking account of the extent to which the second to seventh defendants have participated in this application, I am going to summarily assess the costs at £6,000, to which the 75 per cent should then be applied, and the costs are therefore summarily assessed in whatever that amount transpires to be.

LATER

22. On the Chubb (defendants 8 and 9) schedule of costs, I agree with Mr Thorne that the thirty hours of work done on documents is excessive. I am not going to set a figure for what would have been reasonable, but I do regard that as excessive. Counsel's brief fee, I recognise, includes all preparation, including on the complex legal issues, but, nonetheless, £12,500 on this application does seem to me to be on the high side.

23. Doing the best I can and taking a broad-brush approach, I summarily assess the costs at £16,000, which will then be subject to the 75 per cent calculation that I have indicated already.

LATER

24. There does seem to me to be a difficulty, I am afraid, Mr Weitzman, with your position. You very fairly indicated the two refresher fees, slightly oddly it says, "for the summary judgment hearing", but we will skip over that particular error on the face of the document. As it happens, the optimism that this could all be dealt with in one day was, I think, misconceived, not least because of the scope of the issues that arose on the DRD, and even if those have now been narrowed, they have only been narrowed because of further time that was allowed within the CMC estimate in the first instance.

25. I do not think it would, therefore, be right to make a summary assessment that included the whole of those refreshers, but clearly something needs to be allowed because there is preparatory work that has been done by the 2017 excess defendants in relation to this matter. With a division by two and a bit of rounding up, I will summarily assess the costs at £6,000. Obviously then 75 per cent of that figure, just for the avoidance of doubt.

LATER

26. In light of those submissions, I am going to address, first, the matter of Ms Sanderson's statement. It was served on 15 April and therefore undoubtedly late and, as Mr Thorne has said, after skeleton arguments had certainly been prepared if not already provided to the court.

27. To a large extent, therefore, I am afraid that I do agree with Mr Thorne that it was an unnecessary recitation of correspondence which was already before the court and/or had already been addressed in counsel's skeleton. But, at the same time, I do not

regard it as having been a pointless exercise. As I just indicated to Mr Hext, I have read it and I am aware of the issues that it raises in trying, as he put it, to correct an impression as to the parties' and the solicitors' conduct in relation to the obtaining of brokers' documents and considering them. But, even on that basis, I do take the view that the time spent in preparing that statement and the hours spent in collating documents are excessive and I intend to make a significant reduction in the costs bill in order to reflect that.

28. Again, taking a broad-brush approach, I summarily assess the 2019 excess defendants' costs at £17,000, with that amount then to be subject to the 75 per cent calculation as with all the other defendants.

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