Lexis®Nexis Case Summaries

Henderson & Jones Ltd v Ross and others

[2022] EWHC 2560 (Ch), [2022] All ER (D) 50 (Oct)

The Chancery Division dismissed the claimant's claim against the defendants. The claimant sought an order that the fifth defendant bank produce all documents and answer the claimant's request for further information (RFI). The claim concerned a restructure of the Hospital Medical Group Limited. The company was placed into creditors' voluntary liquidation and the fifth defendant was the company's bank and held security over its assets, including a legal charge over property affected by the restructure. The claimant (as assignee of the company's relevant claims) alleged that: (i) the transactions executed as part of the restructure were unlawful distributions and transactions at an undervalue intended to defraud creditors; (ii) the first to third defendants had acted in breach of fiduciary and other duties; and (iii) the fifth defendant had assisted in the breach of those duties. The fifth defendant denied the allegations of dishonest assistance. The court held, among other things, that to disclose privileged information concerning the contents of the fifth defendant's advice from Eversheds was privileged. Having found that such privilege had not been waived, it was not open for the court to use CPR Part 18 to circumvent it. Hence, the claimant's RFI application was rejected.

Catchwords

PRIVILEGE – WAIVER OF PRIVILEGE – LEGAL ADVICE

Background

The proceedings concerned a restructure of the Hospital Medical Group Limited (the company), which took place from 30 November 2012. On 9 February 2016, the company was placed into creditors' voluntary liquidation. The fifth defendant (Barclays) was the company's bank and held security over its assets, including a legal charge over property affected by the restructure. The claimant (as assignee of the company's relevant claims) alleged that: (i) the transactions executed as part of the restructure were unlawful distributions and transactions at an undervalue intended to defraud creditors; (ii) the first to third defendants had acted in breach of fiduciary and other duties, including by causing the company to enter into the restructure transactions and causing the company's assets to be transferred to other group companies for insufficient consideration; and (iii) Barclays had assisted in the breach of those duties, including by agreeing the restructure, permitting the transactions to proceed and by lending to a new trading company.

The claimant also alleged that Barclays' assistance had been dishonest in that S, a director of Barclays' business support unit, had acted dishonestly. In particular, it alleged that, because S had been directed to consideration of the balance sheets showing how the proposed restructure would work, he had been aware that its intended effect had been to: (i) significantly decrease the net assets of the company; (ii) waive significant intercompany balances; and (iii) declare a dividend of £6m, at the same time leaving the company with liabilities to creditors.

The claimant made an application, by which it sought orders that: (i) having waived privilege therein, Barclays was to produce all documents involving Barclays' legal advisor (Eversheds) that had been previously withheld on privilege grounds; and (ii) Barclays was to answer Request 7 of the Claimant's Request for Further Information dated 28 February 2022 (the RFI), on the basis that the allegations relating to Barclays' knowledge of the restructure arose in part from an e-mail from Eversheds to S, attaching balance sheets.

Issues and decisions

(1) Whether the disclosure application succeeded.

Considered fairly, objectively and in proper context, the evidence did not bear the meaning or effect that the claimant had ascribed to it. Although S's witness statement referred, albeit in negative terms, to the content of legal advice, the claimant's submissions did not sufficiently engage with the reason why that evidence had been put forward by Barclays (see [33] of the judgment).

The claimant had accepted in oral submission that the relevant e-mail had been privileged when disclosed. Accordingly, consistent with the case law, when the claimant had made assertions in its amended pleading as to the contents of that privileged document, including its suggested reference to the balance sheets, Barclays had been entitled to respond thereto. Barclays had done so in minimal terms, replying only to the specific averments positively advanced by the claimant. It could not therefore be said that privilege in the contents of that document had thereby been waived (see [35] of the judgment).

First, there had been no, or no sufficient, reference to legal advice in the relevant part of S's evidence. Second, there had been, in any event, no reliance by Barclays. S had been saying no more than, with the panoply of executives and professionals (including Eversheds) involved, things had appeared to be 'above board'. Even if that could be said to represent inferential reliance, the authorities were clear that that was insufficient (see [40] of the judgment).

PJSC Tatneft v Bogolyubov and others [2020] EWHC 3225 (Comm) considered.

(2) Whether the request for further information succeeded. The claimant contended that it was seeking clarification of Barclays' denial in the defence.

First, the order would require Barclays to disclose privileged information concerning the contents of its advice from Eversheds. Having found that such privilege had not been waived, it was not open to the court to use CPR Pt 18 to circumvent. Second, the information sought was neither necessary nor proportionate. Third, had it been necessary for the court to consider the exercise of its case management powers, it would have refused the order: first, the origin of the request was the claimant's own language from its own pleading. The linguistic issue since identified by the claimant could have been anticipated at the outset and the RFI avoided; and, second, the request was not formulated in sufficiently concise or precise terms (see [46] of the judgment).

Judgment date
12 October 2022

Judge
Mr Recorder Richard Smith (Chancery Division Court)

Representation
Jeffery Onions KC, Hugh Sims KC, Stefan Ramel and Dan Butler (instructed by Harrison Clark Rickersbys, Inc. Spreicher Grier) for the claimant.
Adam Kramer KC and Hannah Glover (instructed by Addleshaw Goddard LLP) for Barclays.