Neutral Citation Number: [2021] EWHC 2786 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF RHINO ENTERPRISES PROPERTIES LIMITED
AND IN THE MATTER OF ASKWITH INVESTMENTS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Thursday, 25th February 2021

Before:

MR. JUSTICE ADAM JOHNSON

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Between:

Claim No: CR-2019-004456

(1) ROBERT NICHOLAS JASON SCHOFIELD
(2) RHINO ENTERPRISES HOLDINGS LIMITED — **Applicants**

- and -

(1) MATTHEW DAVID SMITH
(2) CLARE BOARDMAN — **Respondents**

And Between:

Claim No. CR-2020-003993

(1) RHINO ENTERPRISES PROPERTIES LIMITED
(2) ASKWITH INVESTMENTS LIMITED — **Claimants**

- and -

CLYDE & CO — **Defendant**

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Approved Judgment

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MR. STEPHEN DAVIES QC and MR. NEIL LEVY (instructed by Horwich Farrelly and formerly by Knights Plc) appeared on behalf of the Applicants/Claimants.

MR. TOM SMITH QC and MS. HANNAH THORNLEY (instructed by Stephenson Harwood LLP) appeared on behalf of the Former Administrators/Respondents.

MS. FAITH JULIAN (instructed by DAC Beachcroft LLP) appeared on behalf of the Defendant.

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Transcript of the Stenograph Notes by Marten Walsh Cherer Ltd.,
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MR. JUSTICE ADAM JOHNSON :

1. Claims are brought against the former joint administrators of two companies by contributories of those companies. The companies also bring claims against Clyde & Co who provided advice to the joint administrators.

2. Clyde & Co in their defence have denied owing a duty of care to anyone other than the joint administrators. In saying that, they point to the terms of the engagement letter entered into in August 2013. Thus, in the Clyde & Co action, a question arises as to who Clyde & Co's clients were.

3. The companies seek a direction before me that they should be entitled to disclosure of Clyde & Co's advice held by the joint administrators.

4. The companies, in broad summary, say as follows: (1) the joint administrators contracted effectively as agents for the companies by means of the engagement letter for all purposes and so there was only ever one client or one set of clients of Clyde & Co, i.e. the companies; alternatively (2) if the joint administrators took their own advice, it was joint advice and therefore falls to be disclosed, because none of the exceptions which would otherwise entitle the joint administrators to limit the disclosure of the joint advice applies.

5. The joint administrators say as follows: (1) the engagement letter was an engagement letter with them only, i.e. only the joint administrators in their personal capacities were parties to it as a matter of contract; (2) it is true that some advice was taken by the joint administrators acting as agent for the companies – that is referred to as "*the company advice*"; but (3) other advice was taken from Clyde & Co by the joint administrators for their personal benefit - referred to as "*the personal advice*".

6. To summarise, and as discussed this morning with counsel during our debate on these issues, I am thus presented with three different interpretations of the same set of facts.

    i) The companies say effectively there was only ever one set of clients i.e. the companies themselves, and the legal professional privilege issue needs to be determined on that basis.

    ii) The joint administrators say that the position is more nuanced and that in effect there were two sets of clients, i.e. the companies for whom the joint administrators procured advice acting as agents, but also the joint administrators personally, in the sense that they took advice in relation to their own personal obligations as administrators and in relation to possible claims against them arising from their conduct of the administration.

    iii) Clyde & Co, the third affected constituency, say in fact there was only ever one set of clients, i.e. the joint administrators personally, and that defines the scope of any duty of care owed by them.

7. This presents, as will be readily apparent, a series of interconnected questions concerning who Clyde & Co's clients were and the ability of the joint administrators to assert privilege against the companies.

8. Before me today Ms. Julian, representing Clyde & Co and acknowledging that overlap between the Clyde & Co issue, if I can describe it in those terms, and the question affecting the joint administrators, has offered a compromise position. She says as follows on behalf of Clyde & Co, namely that: "*Even if our position is that there was only ever one set of clients i.e. the joint administrators, we are content for the court to proceed on the basis of the present application by adopting the joint administrators' formulation i.e. that there were two clients, namely the companies and the joint administrators from time to time*".

9. The companies, however, are not content to proceed on the basis of that assumption, which obviously cuts directly across their primary position, which is that there was only ever one set of clients, namely the companies themselves, on whose behalf of the joint administrators contracted as agents. Mr. Davies QC, acting for the companies, has said that it would be artificial to proceed on the basis of an assumption, and I agree. It also seems to me however, that determining or adopting his primary formulation, which is what he invites me to do, would obviously have an impact on the position of Clyde & Co and the question of the scope of the duty of care that Clyde & Co are said to owe.

10. Taking all of those factors into account, it seems to me the proper position is as follows. There is a factual question to be addressed as to who Clyde & Co's clients actually were. That question has a bearing on the outcome of the legal professional privilege application and has an obvious overlap with the question of the scope of the duty of care owed by Clyde & Co, as I have already mentioned.

11. This central question can only fairly be addressed, as it seems to me, on an application in which all three affected constituencies are represented and have a proper opportunity of putting their cases. That, I regret to say, is not this application, which has a time estimate of only one day. There has been some debate between the parties in any event as to whether that is an adequate estimate, with Clyde & Co and the joint administrators maintaining the position, as I understand it consistently, that it is not.

12. It seems to me that given the issues I am presented with today, the time estimate is not an adequate one. There are some important questions of principle which will be of interest generally to company administrators. I am not confident that such questions can be addressed satisfactorily in the time available and in a manner which is fair to all the parties. Ms. Julian has confirmed to me this morning that she does not have instructions to present the substance of Clyde & Co's position. In any event, as I have already said, it seems to me there is inadequate time available for her to do so, notwithstanding the fact that Mr. Davies QC is confident that he can set out his clients' position in short order.

13. In summary, the court should resist the temptation to try to squeeze a quart into a pint pot. It will never fit, and it is likely in the long run to lead to an unsatisfactory outcome for everyone. Additionally, there is no urgency as such in relation to this application. Understandably there is some anxiety, given the long history, to resolve these issues in a sensible and efficient way, but as Mr. Davies QC himself put it in his skeleton argument, the application is brought in order to provide the clarity that may be needed in due course during disclosure.

14. In fact, the parties are some way from disclosure. Apart from other matters, I understand there are outstanding applications by both the joint administrators and by Clyde & Co to strike out the claims or enter summary judgment against the claimants relying on the terms of a settlement agreement entered into with Barclays.

15. It is not suggested that the documents sought by means of the present application have any bearing on the outcome of that hearing, which presently is scheduled to take place in May of this year, 2021. It is possible that, as Mr. Davies QC explained it, the documents sought will have some bearing on a potential later application by Clyde & Co for its own strike out relying on the scope of its duty of care, in the event that its position in relation to the settlement agreement point is unsuccessful. But we are some way away from that application having to be disposed of.

16. Bearing in mind (1) the issues which arise for determination and their significance, (2) the practical difficulties of accommodating the hearing within the one day estimate allowed, and (3) the fact that there is no pressing urgency for the matters to be resolved today, it seems to me that the fair and best thing to do overall, as a matter of case management apart from anything else, is to adjourn this application, and I will so order.

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This judgment has been approved by Johnson J.