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Case 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

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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 LLP**) for the **Claimant**
MR. THOMAS PLEWMAN KC, MR. EDWARD HARRISON and MS. KATHERINE RATCLIFFE (instructed by **RPC LLP**) for the **Defendant**

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JUDGMENT
ON DISCLOSURE

Transcript of the Stenograph Notes
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MR. JUSTICE PICKEN:

1. This is a resumed hearing relating to a hearing that took place on 1st November. At that hearing, I dealt with a number of matters, but there turned out to be insufficient time to deal with the further matter that I am addressing today. I say that, however, acknowledging that the issue was the subject of submissions lasting just under an hour and so when I say this is a resumption, it is indeed that. The submissions I have heard today have recapped, to a limited degree, the submissions that were put forward to me by Mr. Plewman KC on behalf of the Defendant and, to a lesser extent, by Mr. Pascoe on behalf of the Claimant on that occasion, but have today been developed more fully.

2. The category of documentation that I am now concerned with has been variously described in the past as "administration documents", but for today's purposes, has been described as "investigative documents". The documents are, in short, documents that concern the administrators of NMC, specifically documents that have been generated by those administrators.

3. There are three issues that arise or potentially arise. The first is whether the issue before me is one that it is open to the Defendant now to revisit, as Mr. Pascoe would put it, in the light of the fact there was a previous hearing before Bright J that took place on 15th April this year where there was discussion and there were submissions similar to those advanced before me today and on the last occasion.

4. In short, Mr. Pascoe submits that the Defendant is now precluded from raising the points that it does in relation to these investigative documents in the light of a ruling that Bright J gave on the previous occasion. That has been described by Mr. Plewman, in particular, by way of shorthand, as the *Henderson v Henderson* point; *Henderson v Henderson* being the well-known authority which prevents parties from essentially re-litigating issues that have already been raised and determined by the Court.

5. The second issue concerns the relevance of the documents with which I am concerned.

6. The third issue concerns privilege and whether those documents are ones that the Claimant is entitled to assert privilege over. I have not heard submissions in relation to that third issue and, in the light of this ruling, in relation to the particular documents that I am now concerned with (and I will come on to define those shortly), I need not hear submissions on the privilege issue, because, as will become apparent, I have reached the very clear conclusion, as it happens, echoing the conclusion of Bright J, that the documents are not relevant and, therefore, do not fall to be disclosed and so privilege does not arise.

7. I will, however, have to hear submissions on privilege shortly because the documents that I am concerned with more generally on this application include two categories, namely 140 or so interviews which were conducted by the administrators and five witness statements which were obtained by the administrators, in relation to which the relevance objection (or irrelevance objection) is not taken.

8. The matter I am therefore ruling on at the moment concerns other documentation which are not those interviews or those witness statements and which, in summary, fall into the category identified by Mr. Plewman in his skeleton argument, at paragraph 59, namely: supporting evidence for the size and scale of the fraud, how the fraud has been perpetrated, who perpetrated the fraud and potential claims and recoveries; secondly, reports of evidence regarding the involvement of related parties in the fraud; and thirdly, work summarising and reporting of evidence reviewed.

9. Those three categories are the ones I am now concerned with and described by Mr. Pascoe, at least, as the morass of other documentation in addition to the interviews and witness statements to which I have referred.

10. I deal briefly, but only briefly in the circumstances, with the first of the issues which I have identified, namely whether the *Henderson v Henderson*-type principle applies here at all. I was addressed on that issue by Mr. Plewman, on the last occasion, and briefly today, and Mr. Pascoe, very briefly, on the last occasion, but not at all today, because I indicated to him that I did not need to hear from him on the issue. Suffice to say that, were I to have founded my current decision on the *Henderson v Henderson* point, I would have to have gone into rather more detail than I propose to do. I do not, in the circumstances, base my decision on that principle.

11. I see some force, I say merely in passing and at a very high level, in the submission which Mr. Plewman makes, namely that in circumstances where Bright J was dealing with a limited and narrower category of documentation, namely documentation of an "administration type", as he described it, or as I, for present purposes describe it, of an "investigative type", in relation to the so-called Virtual Cabinet of Limited, that is the NMC Limited company, it is not a terribly useful starting point for Mr. Pascoe to have to submit, as he does, that, as he puts it, the logic of Bright J's ruling in relation to that narrower category should be taken as carrying forward into this wider category. Either Bright J determined the issue in relation to the wider category or he did not. It seems to me that there is some force in the submission, albeit I did not hear from Mr. Pascoe on this in any detail, that having to resort to the logic of a ruling, a previous ruling, is problematic when it is said that that previous ruling actually binds the parties so as to preclude the application of the sort now made.

12. Instead, I found my decision on the question of relevance. I am very clear, in this case, as indeed Bright J appears to have been, but I make it plain that I have reached this decision independently and not because I regard myself as even remotely bound by anything Bright J had to say, that there is a clear distinction between what might be described as contemporaneous documentation which should be disclosed and has, as I understand it, been disclosed and documentation which has come about after the event through the investigation carried out by the administrators.

13. I acknowledge that there is an acceptance of the relevance of the various interviews and witness statements, but it does not follow, despite Mr. Plewman's exhortation to the contrary, that all documentation generated by the administrators, therefore, falls into the relevance bracket in the same way as the interviews and the witness statements. It does not follow at all.

14. On the contrary, I have been referred to a Hong Kong decision, namely that of Chan J in *China Forestry Holdings Co Limited (In Official Liquidation) and Others v KPMG* [2020] HKCFI 2614. In that case, which was not dissimilar to the present, in the sense that it involved a negligence claim against an auditor, in the same way as the current claim does, the complaint was that the auditor, KPMG in that case, negligently failed to detect certain alleged irregularities in respect of an audit in 2009: see [5]. Those irregularities arose out of an alleged fraud, in the same way as in the present case, the negligence being said to consist of failing to detect appropriately that alleged fraud. It was an application, as Mr. Plewman points out, for disclosure that was made somewhat late in the day, which had a potential effect on trial preparation: see [15].

15. The judge went on, under the heading ”Fraud”, starting at [33], to say this, at [40]:

> "... There is no issue that there was a wide ranging fraud involving people in the top management. By its very nature, it is quite unlikely for the parties to be able to get to the bottom of a sophisticated and wide ranging fraud."

He continued at [41]:

> "Importantly, the trial of this action were not to be about the fraud, although it is an important backdrop against which the Court will have to inquire into the adequacy or otherwise of the 2009 Audit."

He then continued, at [43], to say this:

> "This brings me to the probative value of the materials sought. It must be borne in mind, first and foremost, that the Liquidators had shared with KPMG the documents available to them. There is equality in analysing and making use of those documents."

Pausing there, the position in the present case is that, likewise, the administrators have shared, in the language of Chan J, the relevant contemporaneous documentation and so there is likewise an equality in terms of being able to analyse and make use of the documents.

16. The judge continued at [44]:

"Amongst the discovery sought, the materials which are most relevant to the issue of fraud must be the interview records of the Key Individuals. These interviews could only have taken place no less than 4 or 5 years after the event ... It would be wishful thinking to believe that any of the interviewees had confessed to taking part upon the fraud upon interview 4 or 5 years later."

In the present case, as I have indicated, there is an acceptance of the relevance of the interviews and signed witness statements, and so there is here in that respect a point of distinction.

17. Importantly, the judge then went on, at [47], to say this:

> "It will not be right for any part of the trial to be turned into an inquiry of the fraud based on a collection of hearsay evidence of questionable probative value."

He continued at [48]:

> "It is incumbent for the Court, having in mind the Underlying Objectives, to take a balanced view of the value of the materials sought to KPMG and to the Court, and how discovery of such material at this stage may impact on the trial."

Then at [49] he explained:

> "For these reasons, I am unable to agree with KPMG that in fraud materials are relevant or necessity [sic]".

He then at [52], dealing with another category, namely so-called liquidators' reports, said this:

> "As regards the Liquidators' Reports ... apart from the lack of relevance or necessity of 'business and affairs' discussed above, I am unable to see why it is relevant or necessary to know, as Mr. Yu (who appeared for KPMG) submitted, the view of the Liquidators on those matters. The Court will be required to examine the facts of this case and to adjudicate on the allegations made against KPMG."

18. Mr. Plewman suggests that this case is of limited assistance, given that, as the judge indicated at [41], at least as Mr. Plewman characterised it, the trial was not about the fraud, there being, as stated at [40], "no issue there was a wide ranging fraud." In that case, therefore, Mr. Plewman suggests, the Court at trial was not going to be concerned with the underlying fraud, whereas in contrast, as the section 1 of the DRD at issue 13, under the heading, "The Nature and Operation of the Fraud", indicates, there is an acceptance that there should be disclosure given in relation to, amongst other things:

(i) what the fraud comprised; "(ii) how it was perpetrated, recorded, hidden and/or resolved; (iii) by whom it was perpetrated, recorded, hidden and/or resolved; (iv) for whose benefit; (v) with the assistance of [which parties]; (vi) how it was uncovered; (vii) what concerns were expressed to the NMC Group by third parties ... and (viii) how did this lead to NMC being placed in administration and various of its subsidiaries being re- domiciled [elsewhere]."

Indeed, I go on to note as well that issue 15 is concerned with:

> "... the true financial position of NMC and the members of the NMC Group from time to time during the [so-called] Relevant

> Period and how was both the true and purported financial position of those companies recorded and documented?"

In relation, therefore, to those matters, Mr. Plewman observes there is a distinction between the present case and the case in *China Forestry*.

19. I consider that Mr. Plewman possibly reads too much into the passages which I have cited. Specifically, at [47], I do not read Chan J as saying that the underlying fraud was irrelevant. On the contrary, what I read Chan J as saying is that the Court at trial was not going to be concerned with an inquiry of the fraud, as he put it, "based on a collection of hearsay evidence of questionable probative value". I do not focus on his reference to "hearsay evidence" since as, Mr. Plewman points out, hearsay evidence is admissible in this Court. Rather, I read what Chan J was saying as being that the documentation concerned with the liquidators in that case, investigations and their views as to what may or may not have constituted the fraud, are irrelevant. That seems to me to be confirmed by what Chan J went on to say at [52].

20. The same principle applies here and I say that without regarding myself as bound by anything that the Hong Kong Court said, but simply recognising and agreeing with the principle as there stated.

21. I note also, in passing, that Schedule 1 of the DRD, under the heading "Quantum", at issues 17 and 18, contains issues concerned with quantum and mitigation at issue 18 and that disclosure has been agreed to be given in relation to those issues. That disclosure, including investigative documents to the extent that they fall into those categories, here again entails a distinction between documents in those categories and what might be described as non-contemporaneous documents concerned with issues 13 and indeed 15.

22. I should mention also what Section 2 has to say, at internal page 12, item 14. Under the heading, "Administrators' Investigations", this is stated:

> "C had previously confirmed to D that it would seek to take account of potentially relevant existing categorisations and tagging of contemporaneous documents used for the purpose of the Administrators' investigations or potentially evidencing the alleged fraud or relevant to C's alleged losses, irrespective of whether those documents are responsive to the search parameters proposed. Without any waiver of privilege C confirms that it has done so. In particular, where a potentially relevant contemporaneous document has been specifically recorded or collated by the Joint Administrators' team in the course of the Administrators' investigations of potential claims, those documents have been included as part of C's disclosure exercise. For completeness, those documents were stored either on Relativity or on a secure file transfer platform."

I read that out as express confirmation of the point I made in passing when quoting from Chan J's judgment at [43]. There is, in this case, equality as to analysis and making use of the relevant underlying documents. What there is not, and nor should there be, because I am wholly unpersuaded that the relevance hurdle has been overcome, is a need, whether for Model D purposes or at all, for documents of an investigative nature to be provided.

23. I should mention in this further respect that Mr. O'Rourke, in his seventh witness statement, at paragraph 82, states that, according to the Defendant's definition of investigation documents as given in the witness statement in support of the application, his instructions are that:

> "... it will likely encompass millions of documents produced by the Joint Administrators and Alvarez & Marsal in the course of their investigations ...".

Mr. Plewman queried whether, in reality, what was there being referred to was the whole entirety of documentation generated by the joint administrators over the course of the last several years, so including documentation of no relevance at all involving, for instance, the filing of statutory reports, the establishment of the creditors' committee, dealing with former employees and filing of tax returns.

24. Ultimately, on this issue, it is difficult for me to form any real firm view, but what I am clear about is that the exercise that would be required, were the relevance hurdle to be overcome, would be very substantial indeed. In those circumstances, this is not a case where one can, as it were, give the applicant the benefit of the doubt in relevance terms, subject to privilege obviously, and require the responding party to carry out the exercise contemplated. Nor does it make sense to require the parties to endeavour to agree search terms unless the relevance hurdle is overcome and, as I say, I am clear that it is not.

25. I should mention, lastly in this context, that Mr. Plewman gave various examples during the course of his submissions today (and on the last occasion) as to the nature of documentation that might exist. His particular example which is worth highlighting, but there were others, is a case where one of the people working for the administrators e-mails a colleague referring to an interview note or transcript and observing that what the relevant interviewee said in that transcript on that occasion differed from what had previously been said. In those circumstances, Mr. Plewman suggests that it would be appropriate for the relevance hurdle to be regarded as overcome.

26. The difficulty with this is that it is pure speculation and it is, as Mr. Pascoe put it rather well, "needle in the haystack territory". That is the sort of territory that Chan J decried and, whilst recognising that in that case there were particular timing issues with the proximity of the trial, nonetheless it is a feature that seems to me to be applicable here also.

27. In those circumstances, my conclusion is that the relevance hurdle is not overcome and therefore I need not, on these categories, resolve once and for all the *Henderson v*

Henderson abuse of process point and nor need I address the privilege issue, which I will now hear submissions on concerning the interviews and the witness statements.

(For continuation of proceedings: please see separate transcript)

28. The final aspect that I now need to address concerns privilege in relation to the two items to which I have previously referred and as identified in paragraph 59 of Mr. Plewman's skeleton argument for this hearing, namely records of some 140 interviews or so and five witness statements. As previously noted, it is accepted by Mr. Pascoe on behalf of the Claimant that those are documents that are relevant, hence the importance now of determining the privilege issue that divides the parties.

29. It is common ground as to what is the applicable legal approach to litigation privilege, for that is the privilege that is here relevant. A description of litigation privilege was provided in the very well-known case of *Waugh v British Railways Board* [1980] AC 521, at pages 543-544, in these terms:

> "... a document which was produced or brought into existence either with the *dominant* purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

30. Later authority, and there have been many cases citing that proposition from *Waugh*, include *Starbev v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm), where at [11(4)] it was explained that, for litigation privilege to apply, the document must have been produced:

> "... for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings."

That, therefore, there is a requirement not only that proceedings be in reasonable contemplation, but also that the relevant documentation be produced with the dominant purpose of such litigation is clear.

31. It is, in the present case, the second aspect on which Mr. Plewman takes issue in respect of the claim for privilege that has been made by the Claimant in respect of the two categories of document that I have identified. As to this, it is worth immediately referring to the evidence of Mr. O'Rourke, in his seventh witness statement, where the privilege has been asserted.

32. The first place to look is paragraphs 70-72 of that witness statement, where Mr. O'Rourke says as follows:

> "70. NMC was put into administration in this jurisdiction on 9 April 2020. The UAE Subsidiaries were put into administration in the ADG Mon 27 September 2020. The statutory purpose of both administrations was to *'achieve a better result for the company's creditors as a whole than would be likely if the company were wound up'.*"

In paragraph 71 he goes on to say as follows:

> "Quinn Emanuel was instructed by the Joint Administrators the day after the administration of NMC, on 10 April 2020. That was because litigation was reasonably contemplated by the Joint Administrators at that date (Quinn Emanuel being a litigation only law firm). Indeed, litigation was already on foot as explained below. Without waiving privilege, the purpose of Quinn Emanuel's instruction was (and remains) to advise in relation to actual and potential claims by and against NMC, including against EY, NMC's auditor throughout the entire period that NMC was the parent company of the NMC Group, and the perpetrators of the fraud against NMC."

Mr. Pascoe highlights Mr. O'Rourke's reference to "the" purpose of Quinn Emanuel's instruction being as described, submitting that the use of that word demonstrates that it was "<u>the</u>" purpose, and so it follows it must be the dominant purpose for the purpose of the litigation privilege test.

33. In paragraph 72 Mr. O'Rourke continues as follows:

> "The reason why the Joint Administrators sought immediate legal advice in relation to bringing claims was that it was obvious from the announcements made even before the administration that litigation was in prospect. Specifically, that NMC and the NMC Group had been the victim of a massive fraud, that its (newly uncovered) debts were far greater than its assets, and that the administrators' main role in fulfilling its statutory purpose was therefore going to be, as it often is in administrations of this type, to investigate, defend and bring claims in order to maximise recoveries for the companies' creditors."

34. I will return to the announcements to which Mr. O'Rourke there refers in a short while, but moving forward in his witness statement, the other relevant paragraphs are contained in paragraph 83.1 and 83.2 as follows:

> "83.1 140 interview transcripts. I can confirm that all of these interviews were conducted with the dominant purpose of evidence-gathering for litigation (indeed for this litigation against EY) and were conducted with the oversight of QE,

> whose remit was (and is) to advise on litigation. I can also confirm that each of the 140 interview transcripts has been re-reviewed by a senior member of Quinn Emanuel's team, who has confirmed that the dominant purpose of the interviews was as described above."

Then at paragraph 83.2 and lastly Mr. O'Rourke says this as to the "Five signed witness statement":

> "I can confirm, as should be self-evident from their very nature, that these were created for the dominant purpose of litigation."

35. As I say, it is in these passages that Mr. O'Rourke asserts the privilege that is now at issue before me. In addition, however, Mr. Pascoe has taken me to two other witness statements which are witness statements prepared for the purposes of the litigation, rather than dealing with the specific application before me. The first is a witness statement dated 24th May 2024 from a Mr. Julian Edward Jones, who is a Managing Director at Alvarez & Marsal, who explains what it is that he and his team did once appointed in the context of the administration. Specifically he explains at paragraph 2, as follows:

> "In this witness statement I explain the work my team and I undertook to revise the consolidated NMC financial statements by: (i) removing the effect of journal entries processed by NMC that have been identified as potentially false or wrongly recorded; and (ii) by making additional journal entries for omitted transactions, assets or liabilities using the information available to NMC (the '**Revision Exercise**'). This exercise was undertaken for the purpose of assisting the joint administrators of the different NMC entities in administration in the pursuit of various claims. It involved considering over 35,000 individual journal voucher entries that had been processed in NMC's accounting ledgers, which equated to approximately 110,000 individual journal postings to different general ledger account lines across 18 entities."

36. He then goes on, in paragraphs 9 and following, to explain how various accounting manipulations as he describes them were discovered. Specifically, at paragraph 11, he says this:

> "Following NMC's entry into administration in April 2020 (the '**Administration**'), the investigation team was very busy dealing with many pressing issues for the Joint Administrators, given Limited and the subsidiary operating companies were on the front line of the UAE's response to the Covid-19 pandemic. Most relevantly for me and my team, Limited and its subsidiaries were facing a number of claims in the UAE on-shore Courts, primarily from their banking creditors, which

> included attempts to obtain and enforce local attachment orders. NMC also had its own potential claims that it needed to understand and preserve."

37. The other witness statement to which Mr. Pascoe took me is a witness statement, again prepared for trial purposes and again dated 24th May 2024, from another Managing Director at Alvarez & Marsal, namely Mr. Richard Fleming, who explains, in paragraphs 30-33, the nature of the various claims involving NMC that have been brought. It is fair to observe, however, as Mr. Plewman did in his reply submissions, that those are all claims that post-date what is likely to be the key period here, namely from April 2020, when the administration was entered into and Quinn Emanuel were appointed and when, at a later stage, on any view, although at what point is unclear, if Mr. Plewman, at least, is right, litigation privilege was properly entitled to be asserted.

38. I indicated that I would return to certain of the notices that were provided, as described by Mr. O'Rourke in his witness statement and I do so, albeit briefly, now.

39. The first of these is dated 26th February 2020 and is described as an announcement to the market, in effect. Under a heading "Update regarding independent review, CEO removal and other matters", the following is stated:

> "NMC announced on 17 January 2020 that the Independent Review Committee of the Board of NMC (the 'Committee') had retained the law firm Glaser Weil LLP and engaged Mr Louis Freeh, former Federal Judge and FBI Director, and his firm Freeh Group International Solutions, LLC (together the 'Review Advisers'), in each case to advise and assist the Committee in relation to its review into allegations raised in recent reports by short seller Muddy Waters and certain other third parties ...".

40. This was followed in March 2020, so again before the administrations, with a further announcement headed "Update on financial position" where the following was stated:

> "NMC announced on 2 March 2020 the appointment of Moelis and PwC to support the Company in its discussions with lenders and to assist in providing transparency with respect to its financial position ...
>
> In addition to $2.1 billion Group debt reported at 30 June 2019, the Company has identified over $2.7 billion in facilities that had previously not been disclosed to or approved by the Board.
>
> NMC is continuing to work with its advisers to understand the exact nature and quantum of the undisclosed facilities. The Board believes that some proceeds may have been utilised for non-Group purposes."

41. Then, later that month, on 24th March 2020, another announcement, again headed "Update on financial position", contained the following, amongst other things:

> "NMC announced on 10 March 2020 that the Group's debt position was materially above the last reported number as of 30 June 2019 and was estimated at that date to be around $5 billion. The Board of NMC has received another update on 23 March 2020 advising that the Group's debt position is currently estimated to be around $6.6 billion, including the $360m convertible bond and $400m sukuk. The Group's bilateral and syndicated debt obligations are comprised of over 75 debt facilities from over 80 financial institutions. Work on verifying the outstanding debt obligations is continuing.
>
> ...
>
> Furthermore, the Board has been informed of the presence of cheques (written by Group companies), which may have been used as security for financing arrangements for the benefit of third parties. A preliminary view is that the amount of these cheques totals approximately $50 million. The existence of these cheques has only recently been brought to the attention of the Board and urgent investigations are ongoing."

42. Mr. Pascoe highlights these announcements as amplification of what Mr. O'Rourke refers to and, materially, as demonstrating that by the time that the administrations were entered into and Quinn Emanuel were appointed, the investigations were already on foot. Those investigations, Mr. Pascoe would suggest, as demonstrated by those announcements were indeed into financial irregularities, were with a view to potential pursuit of claims arising out of those irregularities, whether against particular entities or more generally but in either case so attracting, potentially at least, litigation privilege.

43. Furthermore, Mr. Pascoe took me to certain other progress reports which came to be issued in respect of the administration. The first of these dated 28th May 2020, headed "Joint Administrators' Proposals" and postdating the administrations quite obviously, described at paragraph 3.2.1, under the heading "Investigations", the following:

> "As noted above, on 17 December 2019, Muddy Waters issued a report raising serious concerns about the Company's accounts. It made reference to the inclusion of fraudulent asset values and theft of the Company's assets.
>
> Reviewing the debt position of the Group and the allegations of fraud and various transactions entered into by the Company/Group are the key areas of focus of our investigation.

> We are reviewing the affairs of the Company to assess whether actions can be taken against individuals and/or third parties to increase recoveries for creditors."

44. I was also taken to further such reports dating from November 2020 and May 2021, but I am not going to set out the details of those. Suffice to say that they do indicate that the investigations, in broad terms, were contemplating the bringing of claims against various entities, but, as Mr. Plewman observes, post-dating as they do the commencement of the administrations, it is perhaps less than clear that they greatly assist me in my current task. What they do, however, Mr. Pascoe suggests, is demonstrate that, unsurprisingly, as he would put it, the administrators, having been appointed, were doing what might be expected, which was finding out what happened and taking steps to recover monies for the benefit of the creditors.

45. As to this, Mr. Pascoe placed considerable reliance on a decision of the Court of Final Appeal of the Hong Kong Special Administrative Region, namely *Akai Holdings Limited In Compulsory Liquidation v Ernst & Young* dating from 2008. In that case, at [81(xi)] Bokhary J described the submissions which were put forward by Akai as entailing the following:

> "The Akai liquidators' purpose in creating those transcripts and notes was to provide a basis for legal advice in connection with the existence of rights of recovery for the benefit of creditors, and the existence of causes of action (whether or not they constituted claims in reasonable prospect at the time when the documents were created). The Akai liquidation, coupled with the very nature of seeking and obtaining orders for private examinations, comprised the relevant legal context."

46. He then went on, at [88], to refer to the evidence that was before the Court in respect of the asserted litigation privilege. That included the following, contained in a witness statement, at [20]:

> "A necessary aspect of the Liquidators' investigations, undertaken for the purpose of identifying and recovering the assets of Akai, has been the interview and examination of persons who were involved in the affairs of Akai."

Then at [21], this was stated:

> "The interview and/or examination of these persons has been undertaken to enable the Liquidators to discover information and documents which may be relevant to the identification and recovery of the assets of Akai through potential claims against third parties."

I note that Mr. Pascoe draws an analogy between the position in relation to the witness statements and interviews in that case and those that are relevant in the present case.

47. Later, at [95], Bokhary J made reference to *Highgrade Traders Limited* [1984] BCLC 151 and the case of *Waugh*, before saying this at [100]:

> "That turns on the issue of dominant purpose. On this issue, I am persuaded that the Courts below ignored crucial evidence in the form of (i) the circumstances of this liquidation and (ii) the evidence filed by these liquidators ...".

He continued at [101]:

> "I need not repeat what I have already noted as to the content of the crucial evidence on the dominant purpose issue when summarising Mr Kosmin's submissions thereon. Upon considering that evidence, I find that it points strongly to this conclusion. In resorting to private examinations and interviews pursuant to or under threat of s.221, the liquidators did so for the dominant purpose of bringing the transcripts and notes of those examinations and interviews into existence for them to be placed before the legal advisers of the company in liquidation in order to obtain legal advice in connection with litigation that was in active contemplation and therefore in real prospect at the time. Indeed, there was, in my view, no evidence that any other purpose could have been the dominant one."

48. He then explained why, in those circumstances, his conclusion was that the decision at first instance needed to be reversed, stating at [102] that he concluded that:

> "... litigation was in real prospect and that the dominant purpose test is satisfied so as to bring the transcripts and notes concerned under the protection of litigation privilege and shield them from disclosure."

49. One of Bokhary J's fellow judges was Lord Hoffmann, who explained at [112] as follows:

> "When Akai Holdings Ltd ('the company) was compulsorily wound up in 2000, the liquidators found little left to satisfy claims by creditors in excess of US$1 billion. The only significant source of assets appeared likely to be claims against the former management, who had made away with the company's money, and the former auditors, who had not prevented them from doing so. But in practical terms such claims were not likely to be enforceable except through litigation. That required the liquidators to investigate what had happened and consider (with legal advice) whether the company had causes of action."

50. Lord Hoffmann then went on, at [117], to say this as regards the litigation privilege issue:

> "The case in my opinion depends upon the answers to two simple questions. First, did the liquidators conduct the examinations for the sole or dominant purpose of obtaining advice from their solicitors as to bringing or conducting legal proceedings? Secondly, were such proceedings reasonably anticipated at the time?"

He continued at [118]:

> "A good deal of effort has been devoted to make this case seem more complicated." Before then explaining, later in the same paragraph that: "But for present purposes the relevant question is *why* the liquidators wanted to reconstitute the state of knowledge of the company. If it was for the dominant purpose of obtaining legal advice in connection with anticipated litigation, then privilege attaches."

51. It was Mr. Pascoe's submission, in the circumstances, that, as he put it, getting real and adopting the approach described by Lord Hoffmann and Bokhary J, the question in the present case as to dominant purpose becomes very clear, namely that the taking of the interviews and the obtaining of the witness statements must have been with the dominant purpose of litigation, whether that is litigation against Ernst & Young or others. Mr. Pascoe asked, rhetorically, what other purpose might those activities have been undertaken for.

52. Against this position, Mr. Plewman's position was straightforward. He referred the Court to certain correspondence, which he suggested makes it clear that, in the initial stages after the administrators were appointed, they did not have as their dominant purpose in creating the transcripts and the witness statements the bringing of claims, whether against Ernst & Young or anybody else.

53. In this respect, Mr. Plewman took me to correspondence as follows. First, a letter from Quinn Emanuel dated 19th June 2020 and so some six weeks or so after the administrators were appointed - and, as Mr. O'Rourke explains, it is known that Quinn Emanuel were appointed just a day after that. In that letter, addressed to RPC, solicitors for the Defendant, it was stated as follows:

> "1. As you know, we act for the Administrators of the Company, who were appointed under the terms of an Administration Order dated 9 April 2020.
>
> 2. The application for an Administration Order was triggered by concerns that NMC, and its group companies, had been the victim of a large-scale fraud ...

> 3. Part of the function of the Administrators has, therefore, been to conduct an urgent investigation into the facts and circumstances leading to the Company's insolvency whilst, at the same time, taking steps to preserve the value of NMC and its group companies by continuing to trade the business as a going concern ...
>
> 4. Given these priorities, the Administrators have not, as yet, given detailed consideration as to whether NMC may have claims against third parties but are conscious of (i) the objectives of an administration under paragraph 3 of Schedule B1 of the Insolvency Act 1986 and (ii) the essential duty of administrators to collect and protect the assets of the company.
>
> 5. The Administrators are mindful of the fact that the Company may have a claim or claims relation to EY's provision of audit services to the Company from 2012 to date. Having regard to the Administrators' objectives and duties, but without having reached any view on whether the Company has a claim or claims against EY, the Administrators are concerned that certain of the Company's engagement letters with EY contain a contractual time-bar, which purports to require the Company to 'bring any claim ... no later than 3 years after the act or omission alleged to have given rise to the claim' (the 'Contractual Time-Bar'). For the avoidance of doubt, the Administrators' position on the validity, effectiveness or scope of the Contractual Time-Bar is reserved."

The letter then went on to request the agreement to a standstill agreement.

54. This was followed, on 30th June 2020, by a further letter from Quinn Emanuel to RPC, which explained various things, including by reference, under the heading: "Interview requests" at paragraph 8, to the administrators' request to speak to certain individuals and to RPC's request for an agenda of the topics that the administrators wished to discuss that an agenda was attached to the letter. As Mr. Plewman highlighted, no reference was made in that agenda to a claim being brought against the Defendant.

55. Then, on 8th July 2020, there obviously having been other correspondence in the meantime, Quinn Emanuel wrote again to RPC, specifically referring to a letter apparently from RPC dated 29th June 2020. In paragraph 2 this was stated:

> "2. You state that 'in the light of your confirmation that the Administrators are actively considering potential claims against EY ... [EY] will now take steps to terminate all audit engagements.'
>
> 3. Our letter did not confirm that the Administrators are actively considering potential claims against EY. We said that 'the

> Administrators have not, as yet, given detailed consideration as to whether NMC may have claims against third parties' given their 'priorities' of 'conduct[ing] an urgent investigation into the facts and circumstances leading to the Company's insolvency' and 'taking steps to preserve the value of NMC and its group companies by continuing to trade the business as a going concern', which includes '[o]perating the NMC group hospitals and healthcare clinics'. The statement that '[t]he Administrators are mindful of the fact that the Company may have a claim or claims against Ernst & Young LLP' is not a 'confirmation that the Administrators are actively considering potential claims against EY'."

56. Mr. Plewman's submission, based on this correspondence, was straightforward. There, he submitted, the Claimant, through Quinn Emanuel, their solicitors, were saying in terms that they were not, at that stage, bringing a claim or even, in effect, contemplating a claim, let alone having a dominant purpose in bringing such a claim against Ernst & Young.

57. In those circumstances, Mr. Plewman submitted, the litigation privilege assertion by Mr. O'Rourke on behalf of the Claimant should be rejected, at least as at that point in time. At a minimum, Mr. Plewman suggested, the Court should now order the Claimant (presumably through Mr. O'Rourke, their solicitor) to clarify the position and identify with more specificity the claim to litigation privilege.

58. I see some force in Mr. Plewman's observations in respect of this correspondence. However, on balance, and adopting the approach favoured by Bokhary J and Lord Hoffmann in the *Akai* case, and so standing back and asking myself what it is that the purpose must have been, once they were appointed, of the administrators conducting the interviews and obtaining the witness statements that they did, it seems to me that it is unreal to take it that there was not the dominant purpose that Mr. O'Rourke has described in his witness statement. Mr. O'Rourke has been explicit in the passages to which I have referred, specifically in relation to the witness statements and the interviews, at paragraph 83.1 and 83.2, in stating what the dominant purpose was. I ask myself what other purpose there could have been, as I say, in doing what was done, and I conclude that there can have been no other purpose. This is not activity which falls into the category of administrators' work that would not entail the bringing of claims, at least potentially.

59. I then ask myself, having been reminded by Mr. Plewman of what Beatson J (as he then was) had to say in *West London Pipeline and Storage Limited v Total UK Ltd.* [2008] EWHC 1729 (Comm) at [53] whether the material, in the form of Mr. O'Rourke's seventh witness statement, is sufficient. Beatson J said this:

> "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 ...".

60. It seems to me that what has been done here is sufficient, and I am in no doubt that litigation privilege has been properly asserted - indeed, that focusing on the aspect of the test which requires an examination of the dominant purpose, the dominant purpose must have been the litigation or litigation of some sort. Whether that is litigation against Ernst & Young or others is an irrelevance.

61. That explains why, in my view, Mr. Plewman's understandable reference to the correspondence involving Quinn Emanuel, nonetheless, does not disturb my conclusion. The fact that at that point Quinn Emanuel were not saying that there was an intention on the part of the administrators to sue the Defendant is neither here nor there. It is sufficient for litigation privilege purposes that there is a dominant purpose in doing what was done as regards other third parties.

(For continuation of proceedings: please see separate transcript)