IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY
COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

No. CL-2023-000677

[2024] EWHC 1255 (Comm)

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

Friday, 26 April 2024

Before:

MR JUSTICE FOXTON

B E T W E E N :

(1) ROYAL & SUN ALLIANCE INSURANCE
(2) AXA INSURANCE LTD — Claimants

- and -

KROLL ADVISORY LTD — Defendant

MR N DAMNJANOVIC (instructed by Clyde & Co LLP) appeared on behalf of the Claimants.

MISS J HIGGS KC (instructed by Reed Smith LLP) appeared on behalf of the Defendant.

MISS C VAUGHAN-NEIL (instructed by Wedlake Bell LLP) for the First Respondent.

THE SECOND RESPONDENT appeared In Person.

J U D G M E N T

MR JUSTICE FOXTON:

1 This is an application made today by the claimants, who are two insurance companies, for non-party disclosure orders under CPR 31.17 against two respondents, Mr Paul Clark, and Mr David Whitehouse. Mr Clark and Mr Whitehouse were and are officers of the defendant, Kroll Advisory Ltd, ("Kroll") and they are administrators who act pursuant to appointment in complex insolvencies. Kroll have professional indemnity insurance with the claimants and, as those policies frequently do, the cover provided extended in certain circumstances to cover costs or liabilities incurred by the officers of the company.

2 Mr Clark and Mr Whitehouse were appointed as administrators of Glasgow Rangers Football Club. Very regrettably and, as it has since been confirmed, entirely inappropriately, criminal proceedings were brought against them in relation to their conduct in their role as administrators. Those proceedings led Kroll to approach the claimants seeking an indemnity against the significant defence costs being incurred under the professional indemnity policy.

3 As I understand the position (although this is simply my understanding of the effect of the evidence before me and not a finding), there was agreement in principle between the Claimant and Kroll that the policy would provide cover but disagreement as to the precise amount of the indemnity which could be claimed. In the event, the criminal proceedings commenced in Scotland were discontinued, and Mr Clark Mr Whitehouse themselves brought proceedings against the Scottish prosecuting authorities, seeking damages for malicious prosecution and under Art.5 of the Human Rights Act 1998.

4 In the event, the dispute between the claimants and Kroll as to the amount of the indemnity was settled by a settlement agreement pursuant to which the claimants paid £4.7 million to Kroll on account of what had been referred to as criminal defence costs ("CDCs"), and there was an agreement by Kroll to account for any sum awarded by way of damages, compensation or costs in the proceedings which had been commenced by Mr Clark and Mr Whitehouse against the Scottish prosecution authorities, to the extent that Mr Clark and Mr Whitehouse received any sum that is so awarded. In particular, clause 6.2 of the settlement agreement provided:

> "Insofar as
>
> 6.2.1 In the Crown Proceedings David Whitehouse and/or Paul Clark (and David Grier, should he be joined to the Crown Proceedings or commence similar proceedings) is awarded any sum by way of damages, compensation or costs in respect of the Losses which are subject of payment under the terms of the Agreement (or any part thereof), and
>
> 6.2.2 D&P, David Whitehouse and/or Paul Clark (and/or David Grier) receive any such sum that is so awarded
>
> D&P will account to Underwriters in respect of such amount(s)."

5 In the event, the Scottish authorities admitted liability in open court for the torts of malicious prosecution and liability under the Human Rights Act, and there was a

confidential mediation between the authorities and Mr Clark. That confidential mediation resulted in a settlement. A separated confidential mediation involving Mr Whitehouse also resulted in settlement. The claimants contend that those settlements have triggered Kroll's obligation under cl.6.2 of the settlement agreement with insurers to pay a sum on account of that part of any settlement referrable to CDCs. I should explain that it is common ground that at least at some stage in the proceedings between Mr Clark and Mr Whitehouse and the Scottish authorities, claims were advanced for CDCs for the sum of just over £2.25 million in relation to Mr Clark and the sum of just over £3,072,000 in relation to Mr Whitehouse.

6 The matter having been explored over lengthy correspondence, it is Kroll's position, based on the information they say is available to them, that the amounts paid to Mr Clark and Mr Whitehouse pursuant to those settlements did not include any amounts on accounts of CDCs. The extensive correspondence failed to resolve the matter and the claimants therefore issues proceedings against Kroll, in effect arguing that amounts were payable under cl.6.2 of the settlement agreement under one of a number of legal theories, or alternatively that if (as it were) any entitlement to those amounts had otherwise been defeated by the structure of the settlement, that in itself gave the claimants' rights.

7 Very sensibly, in my view, the claimants and Kroll agreed that the proceedings would be put on hold pending an application that the claimants had indicated they were minded to bring against Mr Clark and Mr Whitehouse for non-party disclosure, and that remains the position as at today's date.

8 The principles governing applications under CPR 31.17 are well known. They are summarised in Mr Hollander KC's *Documentary Evidence* (14th) at [3.04] and following and by Henshaw J: *Re: Bugsby Properties LLC v LGIM Commercial Lending Ltd* [2021] 1054 (Comm), [15]-[23]. First, the documents sought must be likely to support the applicant's case or to adversely affect the case of another party. This has been held to require that the documents "may well" support the applicant's case or "may well" adversely affect case of another party. It is also clear that, although that test must apply to every document within a class when a class of documents is sought, the "may well" test can be satisfied because some documents in the class may provide important context to other documents and thereby, in combination with those documents, satisfy the test even if, as freestanding CPR 31.17 requests, they would not have done so.

9 Secondly, and I accept the submission made on behalf of Mr Clark by Miss Vaughan-Neil that this is also a threshold requirement, it must be shown that production of those documents is necessary fairly to dispose of the claim or to save costs. One reason why that requirement is frequently not satisfied is that it is possible to obtain either the documents themselves or the information they will contain from some other source. It is also clear, whether this is approached by reference to the necessity requirement or by reference to the court's general discretion, that any order must be clear as to what it is that the non-party is being required to produced rather than, as in the case of disclosure between parties in litigation, requiring the non-parties to search for documents that are relevant to the pleaded issues, see *Twin Benefits v Barker* [2017] EWHC 177 (Ch) at 33. I accept that that is not the only factor that goes to the court's general discretion,

and as always under the CPR, one needs to consider the overriding objective and the overall justice of the case.

10 The first point taken by Miss Vaughan-Neil is that the application is premature because Kroll have yet to serve their defence. I accept that there will be cases in which the applicant should wait for the service of the opposing party's statement of case before making an application. There was an example of that in *Abbas v Yousef* [2014] EWHC 662 (QB). However, that will not always be the case. Where a key difference between the parties to the proceedings has already emerged, and is not going to go away, I am persuaded that the court can make a CPR 31.17 order even before the other party's statement of case has been served.

11 As I have mentioned, there has been very extensive pre-action correspondence in this case in which Kroll takes front and centre as their principal response (but I accept not their only response) that no amounts were paid under the two settlements on account of CDCs. Indeed, so well developed have the arguments been in correspondence that when draft particulars of claim were sent to Kroll as part of the pre-action protocol process, the response of Kroll's solicitors was to say those documents did not raise any issue not previously raised in correspondence and that the claimants were "well aware of Kroll's position." The letter, however, went on to address Kroll's answer to the particulars of claim in some detail.

12 It is also the case that, although Miss Vaughan-Neil has floated a potential construction argument as an answer to this case whatever the documents might show, Kroll did not take the point that that issue of construction should be heard and resolved before this application was heard. On the contrary, fully alive to that potential argument, they took the view, as I have said sensibly, that this application should be heard first. I think it was not without significance that when describing me Kroll's options just now, Miss Higgs KC referred to the suggestion that no settlement payment had been made on account of CDCs as Kroll's "primary case".

13 Second, as I intimated a moment ago, Miss Vaughan-Neil takes the point that, on the proper construction of cl.6.2 of the settlement agreement, Kroll's contractual promise was limited to accounting for sums awarded by a court judgment, because of the word "award" which appears twice in that sentence, and therefore it would not extend to any amounts paid by way of settlement of legal proceedings on the same bases. Although that point loomed large in the submissions made on behalf of Mr Clark, both in writing and orally, there was no suggestion that I could or should decide the point now, not least because any such finding could not bind Kroll who are the party principally concerned with the issue. I would simply note that on a first view the argument that the clause is not limited in the way that has been suggested seems to me eminently arguable, and indeed the argument that, by having a settlement of a pending claim or against the background of imminent judgment, it would be possible to avoid the application of cl.6.2 is not an altogether happy one.

14 In this case, as I have indicated, there was an admission of liability by the prosecuting authorities in open court in the legal proceedings before the mediation took place. That of itself illustrates how difficult it might be to draw which Miss Vaughan-Neil invites me to draw. But in any event, all of that remains to be argued another day. It cannot be said that the argument put forward by the claimants on this point is sufficiently weak

that that of itself should lead the court not to make an order under CPR31.7 – if anything, the converse – nor am I persuaded that where litigation involves more than one issue, the CPR 31.17 test cannot be satisfied in relation to one issue which would not arise if the court determined another issue a particular way. That appears to be a recipe for chaos in which, at any trial where liability and quantum were both in issue, it would not be possible to obtain CPR31.17 on quantum material until the issue of liability had been determined. In those circumstances I am not persuaded by the preliminary objections to the application.

15 I therefore turn to consider the question of whether the documents are relevant. It does seem to me that the four categories of documents are capable of informing an assessment by the court (which is arguably one of the courses which the claimants might establish was necessary) as to how the settlement figure was arrived at and/or how the settlement agreements should be interpreted. The court is not concerned at the moment with anything more than what is arguable. I accept there is a great deal to be said the other way, but it was of interest when Mr Whitehouse described using the CDCs as a "bargaining chip", inevitably raising the question about what they were being bargained for. I am persuaded, therefore, that material that shows what was being claimed in the pleadings, what was being released in the settlement agreement, and the back and forth in the mediation, are all material capable of being relevant to arguable issues as to whether the court can or should apportion any amount of the settlement amounts in respect of CDCs. They are material which may well support the claimants' case.

16 As to necessity, there is considerable evidence before me as to attempts to obtain this material first of all from Kroll (who have taken the position that none of it is in their possession, custody, or control), from the Lord Advocate, and from the Scottish Court. There has been no suggestion that there is any other means of obtaining it other than by way of orders made against Mr Clark and Mr Whitehouse.

17 On the material before me, I am satisfied that Mr Clark and Mr Whitehouse would not be breaching any obligation under Scots law by providing copies of the record, given the legal advice as to Scots law placed before me. As I have indicated, the order of this court will be sufficient to protect Mr Clark and Mr Whitehouse against any complaint that they have not complied with the obligation of confidentiality.

18 So far as the categories of documents are concerned, the evidence that Mr Clark has filed suggests that they are likely to be relatively small in number and readily identifiable. That is certainly true of Category A, the settlement agreements, which will be a single document in each case and, as I say, which will show what claims were released if nothing else, and therefore what the Scottish authorities were obtaining in return for their promise to pay. That so even if, as is said by Mr Clark and Mr Whitehouse and seems very likely to be the case, there is no apportionment within the settlement agreement.

19 Category B concerns the record in the civil proceedings brought in the commercial court in Edinburgh, which it is clear is simply a reference to the pleadings served. As I have indicated, that will show what was claimed. It will also show whether there was any particular and special argument advanced in response to the CDCs as opposed to other claims on which the court might have to take a view about how seriously the Lord

Advocate thought that there was some separate answer to that part of the claim. The pleadings will be readily identifiable. While it may be that the principle of open justice does not allow direct access to the court file as such (as on my understanding it would in this jurisdiction), nonetheless as I have indicated, there is no legal impediment to Mr Clark and Mr Whitehouse producing them.

20 Category C is documents exchanged between the parties in the mediation or provided by a third party to both parties in the mediation. It may well be that there are no such documents, in which case of course, ordering compliance with this request will not be at all onerous, but the documents are, it seems to me, material that may well show both the context to any settlement agreement, whether any claims were abandoned or traded along the way. Although obviously the evidence served by Mr Clark as to events at the mediation will require most serious consideration down the line, I do not think it is sufficient to close off the argument that contemporaneous documents may well be of assistance in informing the court as to the realities of the position, which may well provide the basis for an alternative court apportionment if the claimants are able to persuade the court that that is a legally viable option.

21 Category D is any notes of mediation sessions involving exchanges with the other side. Once again, those ought to be readily identifiable (if they exist at all) and limited in number.

22 It does seem to me that the four categories sought are discrete; and ordering them will not place an undue burden on Mr Clark and Mr Whitehouse in identifying and producing them. As I have indicated, I am satisfied my order will be a sufficient protection on confidentiality, but nonetheless any order I make is going to allow a period prior to production for the parties to seek to agree some interim confidentiality arrangement. That will have to be subject to any overriding order of this court in due course. If it cannot be agreed there will be liberty to apply to me on paper, but if, for example, this material comes forth and shows there is absolutely nothing in the claimants' case I would expect the matter to be capable of being resolved without any wider circulation of the material produced.

23 So far as the other discretionary factors are concerned, as I have indicated I am far from persuaded by Miss Vaughan-Neil's argument that the claim is hopeless or speculative because of her construction of cl.6.2. I do not at all seek to downplay the great stress that Mr Clark and Mr Whitehouse have been put through, but 35 years of experience suggests to me that dismissing this application will not end this case, it will simply proceed on a basis whereby the court is asked to draw inferences and Mr Clarke and Mr Whitehouse are asked to give evidence. The reality is, I think, that the best way of bringing this matter to a speedy and cheap conclusion with the finality that Mr Clark and Mr Whitehouse understandably hope for is to lance this boil at an early stage rather than have the claimants' curiosity and belief in the forensic power of these documents continuing to grow, the longer they are unable to see them.

24 In those circumstances, I am satisfied the order should be made. It obviously will be made on the basis that the costs of Mr Clark and Mr Whitehouse in complying with the order will be met by the claimants, and the saving for privilege which appears in CPR 31.17 will, of course, apply.

LATER

25 It now falls to me to deal with the applications for costs. The usual rule on a case where third parties face applications of this kind is that they recover their costs, but that is without prejudice to the court's power at an appropriate stage to reallocate those costs as between the parties. That power is not limited, as Miss Higgs KC's submissions might have suggested to those of the applicant but applies to all costs so ordered.

26 I am not persuaded it is appropriate to depart from that general rule in this case, and indeed I rather feel it might be adding insult to what would be considerable injury to deprive Mr Clark of his costs. The reality is that these applications come against a background of hugely sensitive litigation where there were confidentiality obligations assumed by Mr Clark towards the Scottish authorities, and in those circumstances, whilst it might be said that some of his resistance to the order was perhaps a little more vigorous than might have been optimal, I do not feel able to say it falls outside the range of reasonable responses.

27 In the first instance, I am going to order the claimants to pay Mr Clark's costs, but as between the claimants and the defendants, both the claimants' costs and the costs I am ordering the claimants to pay Mr Clark will be costs in the case.

CERTIFICATE

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This transcript has been approved by the Judge.