

Gareth H Hughes; "GHH2"; /04/05

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No 03 - E - 0106

In the matter of the Liquidation of The Home Insurance Company

EXHIBIT "GHH2" TO THE AFFIDAVIT OF
GARETH HOWARD HUGHES

This is the exhibit "GHH2" referred to in my Affidavit dated April 2005. The copy documents in this exhibit are listed below.

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(1) 8 May 2003 Appointment Order	1
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Sworn at

This 1 day of April 2005

Before me,



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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT



MR JUSTICE PUMFREY
The 8th day of May 2003

IN THE MATTER OF THE HOME INSURANCE COMPANY
AND
IN THE MATTER OF THE INSOLVENCY ACT 1986

MINUTE OF ORDER

UPON the Application of The Home Insurance Company ("the Company") acting by its Rehabilitator Paula Taft Rogers, as appointed by the Superior Court of the State of New Hampshire on 5 March 2003 ("the Applicant")

AND UPON HEARING Counsel for the Applicant

AND UPON READING a copy of a Petition to wind-up the Company ("the Petition") and the witness statement of Paula Taft Rogers dated 7 May 2003



AND UPON the Applicant through its Counsel undertaking *as soon as practicable*

- (i) to present the Petition for the winding-up of the Company before the Court;
- (ii) to have filed the witness statement of Paula Taft Rogers; and
- (iii) to ~~forthwith~~ issue an Ordinary Application in the form of a draft Ordinary Application presented to the Court

IT IS ORDERED THAT Gareth Howard Hughes and Margaret Elizabeth Mills both Chartered Accountants and Licensed Insolvency Practitioners of Ernst & Young LLP of Becket House, 1 Lambeth Palace Road, London SE1 7EU be appointed joint provisional liquidators of the Company (the "Joint Provisional Liquidators") and that any act required or authorised to be done by a provisional liquidator be done by either or both of the above mentioned Joint Provisional Liquidators

AND IT IS FURTHER ORDERED THAT

1. the Joint Provisional Liquidators shall jointly and severally have power to carry out the following functions namely:
 - (1) to locate, protect, secure, take possession of, collect and get in the property and assets (of whatever nature) to which the Company is or appears to be entitled within England and Wales;
 - (2) to locate, protect, secure, take possession of, collect and get in the books, papers and records of the Company including the accounting and statutory records in England and Wales;
 - (3) to investigate the affairs of the Company so far as it is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales;
 - (4) to do all such things as may be necessary or expedient for the protection of the Company's property or assets within England and Wales.
2. Without prejudice to the generality of the powers set forth in paragraph 1 above, the Joint Provisional Liquidators do have the following powers:
 - (1) to carry on the business of the Company in England and Wales to the extent necessary to process and settle claims against the Company and effect reinsurance recoveries (including but not limited to paying reinstatement premiums);
 - (2) to enter into commutations with any creditors or debtors of the Company in respect of business carried on by the Company in England and Wales;
 - (3) to consider whether it would be desirable to implement a scheme of arrangement pursuant to Section 425 of the Companies Act 1985 between the Company and its creditors or any of them and, if so, to develop proposals for such a scheme of arrangement;
 - (4) if they see fit, to nominate an informal creditors' committee from among the members of the general body of creditors of the Company, such informal creditors' committee to assist the Joint Provisional Liquidators in the discharge of their duties;
 - (5) if thought appropriate, to finalise the terms of a scheme of arrangement and explanatory statement to be issued to the Company's creditors, or any of them, if reasonably satisfied that such scheme has a reasonable prospect of being approved by the requisite majority of creditors and sanctioned by the Court and, subject to such approval and sanction, to implement such scheme;
 - (6) to investigate the affairs of the Company and obtain such information as is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales;

- (7) to employ any employees of the Company in England and Wales, to pay such employees of the Company or of any other company or entity providing the services of its employees to the Company or concerned in the business of the Company within England and Wales, and to dismiss any such employees of the Company;
- (8) to continue to operate the existing bank accounts of the Company within England and Wales and to open and operate new bank accounts within England and Wales as appropriate and to pay monies into such accounts and authorise payments from such accounts;
- (9) to discharge rent on behalf of the Company and other current expense of the Company within England and Wales;
- (10) to incur and pay out of the assets of the Company within England and Wales the normal administrative expenses of the Company and any other payment which they are empowered to make pursuant to this Order which are necessary or incidental to the performance of the Joint Provisional Liquidators' duties and functions;
- (11) to terminate, complete, or perfect, any contracts or transactions relating to the business of the Company within England and Wales;
- (12) to bring or defend any action or other legal proceedings in the name and on behalf of the Company within England and Wales;
- (13) to effect and maintain insurances in respect of the business and property and assets of the Company within England and Wales as they see fit;
- (14) to do all acts and to execute in the name and on behalf of the Company, all deeds, receipts or other documents (and for that purpose using, where necessary, the Company's seal) pursuant to the powers conferred herein;
- (15) to engage and retain and/or employ any solicitors, counsel, lawyers, accountants, investment advisors, actuaries, run-off and claims consultants, loss adjusters, surveyors, and/or other qualified persons to assist them in the performance of their duties and functions;
- (16) to grant or accept a surrender of a lease or tenancy of any of the property of the Company within England and Wales, and to take a lease or tenancy of any property required or convenient for the business of the Company within England and Wales;
- (17) to rank and claim in the bankruptcy, liquidation or insolvency of any person (including but not limited to any body corporate) indebted to the Company and to receive dividends, and to accede to trust deeds for the creditors of any such person;
- (18) to change the situation of the Company's registered office in England and Wales;
- (19) to pay premiums due or to become due under contracts of reinsurance entered into by the Company in England and Wales and to enter into new and/or replacement contracts of reinsurance for the protection of the Company in relation to liabilities of the

Company under current policies of insurance or reinsurance issued by the Company within England and Wales;

- (20) to enter into agreements with third parties for the provision of run-off and related services to the Company in relation to the Company's insurance and reinsurance business within England and Wales;
- (21) to sell or otherwise dispose of the property of the Company within England and Wales by public auction or private treaty;
- (22) to enter into a protocol, memorandum of understanding or other similar arrangement with the US Liquidator (as hereinafter defined) and/or insolvency officeholders appointed in other jurisdictions in respect of the Company for the purposes of co-ordinating the management and administration of the liquidation and affairs of the Company worldwide in the best interests of creditors; and
- (23) to do all other things incidental to the exercise of the foregoing powers.

AND IT IS FURTHER DIRECTED THAT

1. The Joint Provisional Liquidators:
 - (1) shall exercise their powers under paragraphs 1 and 2 above after consultation with the Rehabilitator of the Company, save where this Court shall otherwise direct and save where to do so would cause them to contravene English law, until such time as a liquidator of the Company is appointed by order of the Superior Court of the State of New Hampshire ("the US Liquidator"); and
 - (2) following the appointment of the US Liquidator shall exercise their powers under paragraphs 1 and 2 above as requested and approved by the US Liquidator, save where this Court shall otherwise direct and save where to do so would cause them to contravene English law.
2. No disposition of the Company's property by or with the authority of the Joint Provisional Liquidators in either case in the carrying out of their duties and functions and the exercise of their powers under this Order shall be avoided by virtue of the provision of Section 127 of the Insolvency Act 1986.
3. The costs of the Company in this application and in its petitioning to wind the Company up be paid as costs in the Petition.
4. There shall be liberty to apply to the Court for such further orders or directions whether in relation to the exercise of the above powers or otherwise as may appear to the Joint Provisional Liquidators to be necessary or appropriate.

M or LD

NOTICE TO OFFICERS OF THE COMPANY

You are required by Section 235 of the Insolvency Act 1986 to give the Joint Provisional Liquidators all of the information as they may reasonably require relating to the Company's property and affairs and to attend upon their instructions as they may reasonably require.

Dated: 8 May 2003

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**ACE COMPANIES' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS BY THE LIQUIDATOR**

The Liquidator has impeded discovery in this case by withholding several hundred critical documents that — based on the information provided in the Liquidator's privilege logs and follow-up correspondence— are not protected by any privilege. The documents at issue (the "Subject Documents") make up nearly three-quarters of the total number of documents that the Liquidator has withheld on privilege grounds.¹ Accordingly, respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., move this Court for an order compelling Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home"), to produce the Subject Documents. In support of the Motion, the ACE Companies respectfully state as follows:

Introduction

1. The majority of the Subject Documents should be produced because any privilege that may have originally attached to them was waived when the Liquidator shared the documents

¹ The ACE Companies have annexed, as Exhibits 1 and 2, the versions of the Liquidator's privilege logs that were provided on February 14, 2005. A listing of the Subject Documents, which are 550 in number, is attached to this Motion at Appendix 1.

with third parties outside of the attorney-client relationship between the Liquidator and his counsel. The relevant provisions in Rule 502(b) of the New Hampshire Rules of Evidence generally restrict the attorney-client privilege to communications between or among the client (or the client's representatives) and the lawyer (or the lawyer's representatives). The Liquidator waived any applicable attorney-client privilege by sharing documents and information with employees of Ernst & Young LLP ("E & Y"), which cannot be considered the "lawyer," a "client," a "representative of the lawyer" or a "representative of a client" under Rule 502(b).

2. The Liquidator has claimed that a small number of the Subject Documents are also protected under the attorney work-product doctrine. However, the sharing of such documents with a third party caused a waiver of any work-product protection as well.

3. The balance of the Subject Documents were not privileged in the first instance and must be produced because they do not constitute communications between the Liquidator and his counsel (or between representatives of the Liquidator) that were "made for the purpose of facilitating the rendition of professional legal services" to the Liquidator.

4. In sum, the Liquidator has withheld documents that are clearly relevant to the subject matter of this dispute, but has failed to carry his burden of demonstrating that the strict requirements for privilege are satisfied. Therefore, the ACE Companies respectfully request that the Court order the production of the Subject Documents.²

² As discussed below, the information provided in the privilege logs demonstrates that the majority of the Subject Documents are not privileged and should be produced without any need for an in camera review. The Liquidator also appears to have waived the privilege with respect to other documents that are identified below in Paragraph 24, but the ACE Companies respectfully request that the Court review those documents in camera to confirm that they are not privileged.

Background

5. On the day of the October 4, 2004 status conference with the Court and in keeping with the Supreme Court's broad mandate in its September 13, 2004 Order, the ACE Companies served their First Set of Interrogatories to Liquidator and First Request for Production of Documents by Liquidator (collectively, the "Discovery Requests"). The Discovery Requests track the allegations in the Liquidator's Motion for Approval of the Proposed Agreement.

6. The Liquidator provided a privilege log on December 21, 2004 and a supplemental privilege log on January 5, 2005 for the documents withheld from production. (Copies of these privilege logs are attached as Exhibits 3 and 4, respectively.) The privilege logs are 82-pages long and contain 442 separate entries. Also, many of the 442 entries have multiple sub-entries for e-mails or attachments, which are considered separate documents. In total, the two logs listed 784 documents. Thus, the number of documents withheld may equal or exceed the number of documents produced.³

7. The December 21 log included a "legend" identifying the initials used on the log. The E & Y employees listed on the legend are Benjamin Cairns ("BC"), Matthew Harrison ("MH") and Sarah Ellis ("SE"). (See Ex. 3.)

8. Following receipt of the privilege logs, the ACE Companies, as required under New Hampshire law, attempted to "meet and confer" by addressing the deficiencies in the Liquidator's privilege logs in a letter dated January 19, 2005. (A copy of the letter is attached hereto as Exhibit 5.) Among other things, counsel for the ACE Companies pointed out to counsel for the Liquidator that under New Hampshire law the attorney-client privilege is limited

³ In order to keep track of the documents, the parties have adopted the practice of using parentheses to refer to the sub-entries. For example, item number 13 in Exhibit 3 has two entries, a December 18,

by Rule 502(b) and that the Liquidator has the burden of proving that the documents listed on the privilege logs were shared only with the individuals covered under Rule 502(b). (*See id.* at 1-2.) Counsel for the ACE Companies also noted that the Liquidator had not established the link to an attorney or legal advice with respect to certain enumerated documents. (*Id.* at 2.)

9. Counsel for the Liquidator took nearly one month, until February 14, 2005, to respond to the ACE Companies' letter. In the February 14 letter (a copy of which is attached hereto as Exhibit 6), counsel for the Liquidator clarified some of the privilege claims, but not others. The Liquidator also produced about 152 pages of documents that had been withheld before, implicitly acknowledging that his previous assertions of privilege were unfounded. (*See id.* at 1-2.) The Liquidator, however, did not address the fundamental issue of waiver, nor did he provide any basis for claiming privilege as to documents that were sent to third parties.⁴

10. By letter dated February 18, 2005 (just four days after the Liquidator's service of the revised privilege logs), counsel for the ACE Companies noted that "[w]e continue to be troubled by the positions that the Liquidator has taken" on privilege issues. (February 18 letter, a copy of which is attached as Exhibit 7, at 1.) However, the February 18 letter focused on certain areas where the ACE Companies hoped the parties could reach a compromise and avoid Court intervention. Among other things, the counsel for the ACE Companies pointed out that the Liquidator still had not provided a basis for his assertion of attorney-client privilege regarding documents that were not authored or received by an attorney. (*See id.*)

2003 e-mail and an e-mail attachment also dated December 18, 2003. The parties have referred to the first entry as 13(1) and the one below it as 13(2). This Motion follows the same convention.

⁴ The Liquidator also enclosed the revised privileged logs that are attached as Exhibits 1 and 2 to the Motion. The revised logs have 443 entries and list 764 documents.

11. Nearly a month later, counsel for the Liquidator responded to the ACE Companies' February 18 letter. (See March 11, 2005 letter attached as Exhibit 8.) The Liquidator produced a few documents, again acknowledging that his earlier assertion of privilege was improper, but the March 11 letter did not adequately address the issue of documents that were not authored or received by an attorney. (See *id.* at 1-4.)

12. On March 21, 2005, counsel for the ACE Companies noted that the parties had reached an impasse on this issue as well as the Liquidator's failure to justify a claim of privilege regarding documents that were disclosed to third parties. (See March 21 e-mail, a copy of which is attached as Exhibit 9.)

Request for Relief

I. New Hampshire Law On Privilege

13. The Liquidator has the burden, as the party resisting discovery, to demonstrate that any communication or document withheld from production is actually privileged and, if so, that the privilege has not been waived. See, e.g., *State v. Gordon*, 141 N.H. 703, 705, 692 A.2d 505, 506 (1997); *Moore v. Medeva Pharmaceuticals, Inc.*, No. Civ. 01-311-M, 2003 WL 1856422, at *2 (D.N.H. Apr. 9, 2003) (applying New Hampshire law). The attorney-client privilege in New Hampshire is statutory and, as such, it "must be strictly construed." *State v. LaRoche*, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

II. Communications Involving E & Y Are Not Privileged and Must Be Produced

14. Rule 502(b) states that a party may withhold "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," but only if the communications are (1) between the client (or the client's representative) and the lawyer (or the lawyer's representative); (2) between the client or the lawyer (or their representatives)

and a lawyer (or the lawyer's representative) representing another party in a pending action concerning a matter of common interest; (3) between representatives of the client or between the client and a representative of the client; or (4) among lawyers and their representatives representing the same client. N.H. R. EVID. 502(B).

15. In other words, the Subject Documents must be produced unless the Liquidator proves that the E & Y employees are "representatives," under Rule 502(b), of either the client's lawyers (*i.e.*, the New Hampshire Attorney General's Office, Rackemann, Sawyer & Brewster, or Clifford Chance) or the client (*i.e.*, the Liquidator, Home or the Joint Provisional Liquidators ("JPLs")).⁵ As demonstrated below, the Liquidator cannot carry that burden.⁶

A. E & Y Is Not A "Representative Of The Lawyer" Under Rule 502

16. Under Rule 502(a), a representative of the lawyer is "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." N.H. R. EVID. 502(A)(4). There is no evidence in this case that E & Y was employed by the lawyers involved in the Home liquidations to assist in the "rendition of professional legal services." E & Y is primarily an auditing and accounting firm and was presumably engaged by the "client" (either the Liquidator,

⁵ E & Y cannot be considered a "lawyer" for purposes of Rule 502(b) because it was not providing legal services in this matter, and it is not the "client" because the client is defined as an entity that "is rendered professional services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." N.H. R. EVID. 502(A)(1). E & Y is a service provider rather than the recipient of legal advice from the various lawyers involved here. The Liquidator may argue that the E & Y employees listed on the privilege logs are effectively the "client" because the JPLs are also E & Y employees. That argument, however, would be unavailing because the U.K. court appointed Gareth Hughes and Margaret Mills, individually, and did not appoint E & Y as the JPLs. E & Y is a third party engaged by Mr. Hughes and Ms. Mills as the JPLs.

⁶ Any work-product protection attaching to the Subject Documents would also be waived if the Court were to hold that the E & Y employees are third parties. *See State v. Dedrick*, 135 N.H. 502, 507-08, 607 A.2d 127, 130-31 (1992) (holding that work-product had been waived through disclosure); *State v. Settle*, 124 N.H. 832, 836, 480 A.2d 6, 8 (1984) (same). *See generally U.S. v. Nobles*, 422 U.S. 225, 239 (1975) ("Like other qualified privileges, [the work-product privilege] may be waived.").

Home or the JPLs) to provide those types of services. Therefore, E & Y employees do not meet the definition of a "representative of the lawyer" under Rule 502(a).

17. The First Circuit dealt with a similar situation in *Cavallaro v. U.S.*, 284 F.3d 236 (1st Cir. 2002), and held that a client had waived the attorney-client by sharing documents with its accountant, E & Y. As noted in *Cavallaro*, the general rule is that "disclosing attorney-client communications to a third party undermines the privilege." *Id.* at 246-47. "An exception to this general rule exists for the third parties employed to assist a lawyer in rendering legal advice." *Id.* at 247. That exception, however, is limited to cases where "[t]he involvement of the third party [is] nearly indispensable[,] or serve[s] some specialized purpose[,] in facilitating the attorney-client communications." *Id.* at 249. The *Cavallaro* court found that the privilege was waived because E & Y was not employed to assist the lawyer in rendering legal advice to the client and was instead acting in its capacity as an accounting firm.

18. The Court should reach the same conclusion here because a closer examination of the Liquidator's privilege logs confirms that the E & Y employees were not engaged to assist in the rendering of legal advice to the clients.

1. Documents Where E & Y Employees Are The Author, Sole Recipient Or One Of A Limited Number Of Recipients

19. E & Y employees are listed as the author, sole recipient or one of a limited number of recipients on only 165 of the Subject Documents, which is about 30 percent of the total number of Subject Documents. Even from the sparse descriptions provided in the logs, it is clear that many of those communications do not meet the threshold requirement for the assertion of attorney-client privilege, which is that they must relate to the rendering of legal advice. For example, document numbers 19(1) and 19(2) on the December 21 log are described as e-mails between the Special Deputy Liquidator, Peter Bengelsdorf, and Sarah Ellis of E & Y regarding

"RW's View of Actuarial Model." ("RW" is Rhydian Williams of Equitas, Ltd., who has submitted an affidavit to this Court in support of the Proposed Agreement.) These e-mails between a representative of the client and a third party touch on actuarial issues, not legal issues, raised by another third party. Two Clifford Chance attorneys are listed as "cc's," but it is well established that the mere copying of an attorney on a non-legal matter does not make the communication privileged. *See Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996) ("[D]ocuments prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged ...").

20. Moreover, even if the Liquidator could carry his burden of showing that the communications were made for the purpose of providing legal advice, there is no indication that Mr. Bengelsdorf was communicating with Ms. Ellis so that E & Y could lend "indispensable" or "specialized" assistance in the rendering of legal advice. To the contrary, it is clear that Ms. Ellis was being consulted on an actuarial matter, which is in keeping with E & Y's expertise.⁷

21. In Appendix 2 to this Motion, the ACE Companies have listed all the documents that — as with the documents discussed above — should be produced because they do not involve the rendering of legal advice or, at the very least, do not reflect that E & Y assisted in the rendering of legal advice. Many of the documents discuss actuarial or accounting issues and simply list attorneys as "cc's." For example, document number 92(2) on the December 21 log is an e-mail from Matthew Harrison of E & Y to Gareth Hughes, one of the JPLs, regarding "OSLR Figures." "OSLR" refers to "outstanding loss reserves," which is a figure that accountants or actuaries will often calculate for reinsurers. Although two Clifford Chance

⁷ Document numbers 132(1), 132(2), 133, 221(1), 221(2), 222 and 306(2) on the December 21 log and 8(2) on the January 5 log appear to be duplicates of 19(1) and 19(2).

attorneys were copied on the e-mail, it is clear from the context that this was for informational purposes and that no legal advice was being sought. *See Pacamor*, 918 F. Supp. at 511.

22. Document numbers 13(2), 20, 127(1), 127(2), 146, 197, 202, 207(1) and 207(2) on the December 21 log and document number 46 on the January 5 log similarly involve accounting or actuarial issues. At least one of the documents, document number 197 on the December 21 log, apparently discusses how much of a distribution the AFIA Cedents will receive, which is a key issue in determining the fairness and reasonableness of the Proposed Agreement.⁸

23. In sum, the ACE Companies respectfully request that the Court order the immediate production of the documents listed in Appendix 2 because the Liquidator's privilege logs demonstrate that (a) there was no legal advice being provided in those documents; and (b) even assuming the lawyers were rendering legal advice, the third-party E & Y employees were consulted for the purpose of advising on accounting or actuarial issues, not for the purpose of providing "indispensable" or specialized assistance to the lawyers rendering legal advice.

24. Appendix 3 to this Motion lists the balance of the 165 documents where E & Y employees are the author, sole recipient or one of a limited number of recipients. Given that the E & Y employees were clearly not assisting the lawyers in rendering legal advice with respect to the documents in Appendix 2, it is likely that the Liquidator also waived the attorney-client privilege for the documents in Appendix 3 (which involve many of the same individuals and subjects). Because the ACE Companies have shown a "reasonable probability" that these

⁸ The rest of the documents in Appendix 2 are described as "discussions with Mike Durkin" or "discussions with Rhydian Williams." The Liquidator may not attempt to hide the contents of discussions that E & Y employees had with third parties by relying on the fact that the documents relating to those conversations were circulated to attorneys.

communications are not privileged, an in camera review is necessary. See *Bennett v. ITT Hartford Group, Inc.*, 150 N.H. 753, 846 A.2d 560, 567 (2004).

2. **Documents Where E & Y Employees Are Shown On The Privilege Logs As "CC's" Or One Of Multiple Recipients**

25. The privilege logs also reveal that E & Y employees often received the communications for informational purposes only. E & Y employees are shown on the logs as "cc's" or one of multiple recipients on 367 of the Subject Documents (*i.e.*, two-thirds of the total number of Subject Documents).⁹ As discussed above, a third party will be deemed to assist a lawyer in rendering legal advice in very limited circumstances where the third party's involvement is "nearly indispensable" or "serve[s] some specialized purpose" in facilitating attorney-client communications. *Cavallaro*, 284 F.3d at 249. Even assuming, for the sake of argument, that the documents in Appendix 4 relate to the rendering of legal advice, it cannot be said that the E & Y employees were "indispensable" or served a "specialized purpose" because it is obvious that they received the communications simply for their information.

26. For example, document number 12(1) on the December 21 log, which is an e-mail regarding "discussions with Richard Leedham," was sent by a Clifford Chance attorney to seven people, including Sarah Ellis of E & Y. A related e-mail, document number 12(2), was sent by Jonathan Rosen to Gareth Hughes, with a "cc" to six people, including Ms. Ellis. There is no suggestion that Ms. Ellis was acting on the e-mail or lending "indispensable" assistance on legal matters, and the context proves otherwise. Document numbers 12(1) and 12(2) are illustrative of the hundreds of other documents in Appendix 4, all of which should have been produced by the Liquidator.

⁹ These documents are set forth in Appendix 4 to the Motion.

B. E & Y Is Not A "Representative Of A Client" Under Rule 502

27. Rule 502 states that "a representative of a client" is "one having authority to obtain professional legal services, or to act on advice pursuant thereto, on behalf of a client." N.H. R. EVID. 502(A)(2). The New Hampshire Evidence Manual notes that Rule 502(a)(2) reflects the "most restricted position" regarding the definition of a client representative, which is the "control group" test. 1 N.H. EVID. MANUAL § 502.02[7]. *See also National Tank Co. v. The 30th Judicial Dist. Ct. ("NATCO")*, 851 S.W.2d 193, 197 (Tex. 1993) (noting that the definition of a client representative in the Texas statute, which is the same as Rule 502(a)(2), "adopts the 'control group' test previously recognized by many federal courts").

28. The "control group" test "generally protect[s] only statements made by the upper echelon of corporate management." *Id.* There are sound public policy reasons for narrowly defining which employees may be considered client representatives:

The "control group" test is preferable to the principal alternative, which is that the privilege cover[s] any employee communication to counsel directed by the employer and referring to the performance of his duties. This approach would permit a corporation to insulate all of its normal fact gathering about a matter by using the medium of communication with counsel for it.

1 N.H. EVID. MANUAL § 502.02[7].

29. In this case, the E & Y employees cannot be considered the "upper echelon" of the client because they are not even employees of the client. *See Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988) (holding, without further consideration, that the "control group" definition cannot apply to third parties). Some courts have gone beyond the holding in *Langdon* by examining whether employees of a third party may be client representatives, but they have also required express instructions from the client providing the third party "with discretion to either accept or reject the legal advice." *NATCO*, 851 S.W.2d at 199. Even if this Court were to

hold that the "control group" test applies to third parties, there is no evidence that the E & Y employees were provided with the requisite authority.

30. Accordingly, the Liquidator cannot rely on Section 502(a)(2) to argue that the privileged was maintained when communications were shared with E & Y employees.

**III. Another Group Of Documents Withheld
By The Liquidator Were Never Privileged**

31. In addition to the documents for which any arguable privilege was waived, the Liquidator has withheld fifteen documents that were never privileged at all because there is no indication in the privilege logs that they were communications between the lawyer and the client (or the client's representatives) "made for the purpose of facilitating the rendition of professional legal services to the client." N.H. R. EVID. 502(b).¹⁰

32. The main flaw in the Liquidator's assertion of privilege is that the documents in Appendix 5 involve only non-lawyers. The Liquidator may try to argue that the communications are "between representatives of the client" under Rule 502(b), but there are several problems with such an argument. First, several of the documents — document numbers 22(3), 94 and 203(2) on the December 21 log and 25(3) and 25(4) on the January 5 log — were also sent to Sarah Ellis of E & Y, who is demonstrably not a client representative. Second, the Liquidator has not shown how the communications in Appendix 5 were expressly "made for the purpose of facilitating the rendition of professional legal services to the client." N.H. R. EVID. 502(b). This is an essential component of the statute; otherwise, a client could cloak all the communications of its employees under the mantle of attorney-client privilege.

¹⁰ The documents are listed in Appendix 5 to this Motion.

33. When the ACE Companies brought some of these and other documents to the Liquidator's attention, his counsel purported to address the ACE Companies' concerns in the March 11 letter. The letter, however, only confirms that documents were withheld improperly.

34. Counsel for the Liquidator admitted in the March 11 letter that two e-mails (document numbers 24(1) and 24(2) on the January 5 log) should have been produced and enclosed them with the letter. (The e-mails are annexed to this Motion as Exhibit 10.) A review of the two e-mails shows that the Liquidator lacked any basis for withholding the documents originally and it raises suspicion about the Liquidator's other claims of privilege.

35. The Liquidator's attempted justification in the March 11 letter for withholding other documents in Appendix 5 falls far short and instead supports the ACE Companies' assertions. For example, counsel for the Liquidator claimed that document number 203(2) on the December 21 log was properly withheld because document numbers 203(1) and 203(2) "comprise essentially one email sent to counsel." (Ex. 8 at 2.) However, counsel for the Liquidator also admitted that document number 203(2) was forwarded to counsel "for information" in document number 203(1). (*Id.*) The mere forwarding of an unprivileged e-mail to counsel "for information" does not make the underlying e-mail a communication for the purpose of legal advice. It also provides another reason for holding that document number 203(1) is not privileged, since clearly no legal advice was being sought.¹¹

36. In the March 11 letter, counsel for the Liquidator also tried to portray other documents — namely, document numbers 136(1), 179(1) and 301(1) on the December 21 log and document numbers 84(1) on the January 5 log — as privileged because they related to allegedly privileged communications. (Ex. 8 at 2.) Those documents, however, cannot be

characterized as facilitating the rendition of any legal services by the Liquidator's counsel because they were after the alleged rendition of legal services on which the Liquidator relies.¹²

37. Finally, in the March 11 letter, counsel for the Liquidator stated that document numbers 25(3) and 25(4) on the January 5 log were properly withheld because they are e-mails "addressed to counsel." (Ex. 8 at 2.) However, the descriptions for document numbers 25(3) and 25(4) list only Jonathan Rosen, Gareth Hughes, Sarah Ellis and Matthew Harrison as senders or recipients. None of those individuals is a "lawyer" for purposes of Rule 502(b).

WHEREFORE, the ACE Companies respectfully request that the Court:

- A. Enter an Order compelling the Liquidator to produce to the ACE Companies the documents listed in Appendices 2, 4 and 5;
- B. Enter an Order compelling the Liquidator to produce to the Court, for in camera review, the documents listed in Appendix 3; and
- C. Grant such other and further relief as this Court deems just and proper, including, but not limited to, the fees and costs incurred by the ACE Companies in bringing this Motion.

¹¹ The ACE Companies have moved for the production of document number 203(1) on the separate and independent ground that any applicable privilege was waived.

¹² The ACE Companies do not concede that the underlying documents are privileged. For example, any privilege attaching to document numbers 179(4) and 301(2) on the December 21 log was waived because they were sent to E & Y employees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via facsimile and First Class mail on March 22, 2005

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APPENDIX 1

SUBJECT DOCUMENTS

December 21 Log				
11	12(1)	12(2)	13(1)	13(2)
14(1)	14(2)	15	17(1)	17(2)
17(3)	17(4)	17(5)	18(1)	18(2)
18(3)	18(4)	19(1)	19(2)	20
21(1)	21(2)	22(1)	22(2)	22(3)
23(2)	24(1)	25(1)	25(2)	26(1)
27	29	30	33(1)	33(2)
33(3)	34(1)	34(2)	36(1)	36(2)
38(1)	38(2)	38(3)	39(1)	39(3)
40(1)	40(2)	42	43	48
49	51	52(1)	52(2)	52(3)
53	58	59	60	62(1)
62(2)	62(3)	63	64(1)	64(2)
65	68(1)	68(2)	68(3)	71(1)
71(2)	71(3)	71(4)	71(5)	72
76(1)	76(2)	77(1)	77(2)	78(1)
78(2)	79	86	90(1)	90(2)
90(3)	92(2)	93	94	96(1)
96(2)	111	112(1)	112(2)	112(3)
113	116	120(1)	120(2)	122
123	124	125(1)	125(2)	125(3)
126(1)	126(2)	127(1)	127(2)	128(1)
128(2)	128(3)	128(4)	129(1)	129(2)
129(3)	129(4)	130(1)	130(2)	130(3)
130(4)	130(5)	131(1)	131(2)	131(3)
132(1)	132(2)	133	134(1)	134(2)
135(1)	136(1)	136(2)	138(1)	138(2)
139	140(1)	142(1)	142(2)	144
145(1)	145(2)	146	147	148
150(1)	150(2)	150(3)	152	153
154	155	156	157(1)	157(2)
157(3)	160	162	164(1)	164(3)
165(1)	165(2)	165(3)	166(1)	166(2)
166(4)	169	170(1)	170(2)	174
176(1)	176(2)	177(3)	178(2)	179(1)
179(2)	179(4)	182(1)	182(2)	183(2)
185	186	187(2)	187(3)	189(1)
189(2)	190	191(1)	191(2)	192(1)
193	194	195(1)	195(2)	195(3)

195(4)	195(5)	196	197	198(1)
198(2)	200	201	202	203(1)
203(2)	204	205(2)	205(3)	206(1)
206(2)	207(1)	207(2)	208	209(1)
209(2)	209(3)	209(4)	210(2)	210(3)
211(2)	211(3)	212	213	214
215	216	217(1)	217(2)	217(3)
218	219(1)	219(2)	219(3)	219(4)
219(5)	220(1)	220(2)	220(3)	220(4)
220(5)	221(1)	221(2)	222	223(1)
223(2)	224(1)	225(3)	226(1)	226(2)
226(3)	227	228(1)	228(2)	229
230	231	232	233	235(1)
235(2)	236	237(1)	237(2)	238(1)
238(2)	238(3)	239(1)	239(2)	239(3)
239(4)	239(5)	240(1)	240(2)	241
242	244	245(1)	245(2)	245(3)
245(4)	246	248(1)	248(2)	248(3)
249	252(1)	252(2)	252(3)	253
254(1)	254(2)	254(3)	255(2)	255(3)
255(4)	256(2)	256(3)	257(2)	259
260	262(1)	262(2)	262(3)	262(5)
263(1)	263(3)	264(1)	264(2)	264(3)
265	268	270	273(1)	273(2)
273(3)	273(4)	273(5)	276(1)	276(2)
276(3)	277(1)	277(2)	278	279
281	284(2)	286(1)	286(2)	286(3)
286(4)	287	288	293(1)	293(2)
293(3)	293(4)	294(1)	294(2)	294(3)
295(1)	295(2)	296(1)	296(2)	297(1)
297(2)	298	299	301(1)	301(2)
302(1)	302(2)	302(3)	303(1)	303(2)
303(3)	303(4)	304(1)	304(2)	304(3)
304(4)	304(5)	305(2)	306(2)	307(2)
309	310	311(1)	311(2)	311(3)
312(1)	312(2)	313(1)	313(2)	314
315	316(1)	316(2)	317(1)	317(2)
318(1)	319(1)	319(2)	319(3)	319(4)
319(5)	320	323(1)	323(2)	323(3)
323(4)	324(2)	324(3)	324(4)	325(1)
325(2)	325(3)	326(1)	326(2)	328
329	330	332	333	334(1)
334(2)	335(1)	335(2)	336(1)	336(2)
336(3)	337(2)	337(3)	337(4)	340(2)
341(2)	342(2)	342(3)	343(1)	343(2)

344	346	352(1)	352(2)	353
354	359			

January 5 Log				
1(1)	1(2)	2(1)	2(2)	2(3)
3	4(1)	4(2)	5(2)	6(2)
8(2)	11(1)	11(2)	12	13(1)
13(2)	13(3)	14(1)	14(2)	14(3)
14(4)	14(5)	15(3)	15(4)	15(5)
16(1)	16(2)	17(1)	17(2)	17(3)
17(4)	18	19	20	21
22	23(2)	24(3)	25(1)	25(2)
25(3)	25(4)	25(5)	26(1)	26(2)
27	28(1)	28(2)	29(1)	29(2)
29(3)	30	32(4)	32(5)	32(6)
33(1)	33(2)	34(1)	34(2)	34(3)
38	39(1)	39(2)	40	41
42(2)	42(3)	43(1)	43(2)	44(1)
44(2)	45	46	51(1)	52(1)
52(2)	53(1)	53(2)	54(1)	54(2)
54(3)	54(4)	55(1)	55(2)	56(1)
56(2)	57(1)	57(2)	57(3)	58(1)
58(2)	58(3)	58(4)	59(3)	59(4)
59(5)	60(4)	60(5)	60(6)	62(1)
63(1)	65	66	68	69(1)
69(2)	70	74	75	76(2)
77(1)	77(2)	78(2)	78(3)	78(4)
79	80(1)	80(2)	81(1)	81(2)
83	84(1)	84(2)		

APPENDIX 2

**WAIVER WHERE E & Y EMPLOYEES ARE AUTHOR,
SOLE RECIPIENT OR ONE OF LIMITED NUMBER OF RECIPIENTS**

December 21 Log				
13(2)	19(1)	19(2)	20	68(1)
68(2)	68(3)	92(2)	127(1)	127(2)
132(1)	132(2)	133	146	176(1)
176(2)	197	202	207(1)	207(2)
221(1)	221(2)	222	233	244
264(1)	264(2)	264(3)	306(2)	342(2)
342(3)				

January 5 Log				
1(1)	1(2)	2(1)	2(2)	2(3)
8(2)	46			

APPENDIX 3

**IN CAMERA REVIEW OF DOCUMENTS WHERE
E & Y EMPLOYEES ARE AUTHOR, SOLE
RECIPIENT OR ONE OF LIMITED NUMBER OF RECIPIENTS**

December 21 Log				
22(1)	22(2)	23(2)	24(1)	25(1)
25(2)	27	38(1)	39(1)	40(1)
40(2)	43	59	60(1)	62(2)
62(3)	63	64(1)	64(2)	71(5)
72	76(2)	96(2)	120(2)	134(1)
134(2)	135(1)	138(1)	138(2)	139
142(1)	142(2)	154	164(1)	166(1)
166(2)	169	177(3)	178(2)	179(4)
182(1)	182(2)	187(3)	189(1)	189(2)
192(1)	195(1)	201	203(1)	206(2)
218	223(1)	223(2)	224(1)	225(3)
226(2)	226(3)	228(1)	228(2)	229(1)
236	237(1)	238(1)	238(2)	238(3)
239(1)	239(2)	239(3)	239(4)	239(5)
240(1)	242	245(4)	252(1)	252(2)
262(1)	262(2)	262(3)	263(1)	273(5)
276(1)	276(2)	277(1)	286(4)	287
301(2)	305(2)	307(2)	317(1)	337(2)

January 5 Log				
5(2)	6(2)	11(1)	11(2)	14(1)
14(2)	16(1)	16(2)	17(1)	17(2)
17(3)	17(4)	18	25(1)	25(2)
27	32(4)	32(5)	32(6)	44(1)
44(2)	45	53(1)	53(2)	59(3)
59(4)	59(4)	60(4)	60(5)	60(6)
63(1)	66	68	69(1)	69(2)
70	83			

APPENDIX 4

**WAIVER WHERE E & Y EMPLOYEES ARE SHOWN
AS "CC'S" OR ONE OF MULTIPLE RECIPIENTS**

December 21 Log				
11	12(1)	12(2)	14(1)	14(2)
15	17(1)	17(2)	17(3)	17(4)
17(5)	18(1)	18(2)	18(3)	18(4)
21(1)	21(2)	26(1)	29	30
33(1)	33(2)	33(3)	34(1)	34(2)
36(1)	36(2)	38(2)	38(3)	39(3)
42	48	49	51	52(1)
52(2)	52(3)	53	58	62(1)
65	71(1)	71(2)	71(3)	71(4)
76(1)	77(1)	77(2)	78(1)	78(2)
79	86	90(1)	90(2)	90(3)
96(1)	111	112(1)	112(2)	112(3)
113	116	120(1)	122	123
124	125(1)	125(2)	125(3)	126(1)
126(2)	128(1)	128(2)	128(3)	128(4)
129(1)	129(2)	129(3)	129(4)	130(1)
130(2)	130(3)	130(4)	130(5)	131(1)
131(2)	131(3)	140(1)	144	145(1)
145(2)	147	148	150(1)	150(2)
150(3)	152	153	155	156
157(1)	157(2)	157(3)	160	162
164(3)	165(1)	165(2)	165(3)	166(4)
170(1)	170(2)	174	183(2)	185
186	187(2)	190	191(1)	191(2)
193	194	195(2)	195(3)	195(4)
195(5)	196	198(1)	198(2)	200
204	205(2)	205(3)	206(1)	208
209(1)	209(2)	209(3)	209(4)	210(2)
210(3)	211(2)	211(3)	212	213
214	215	216	217(1)	217(2)
217(3)	219(1)	219(2)	219(3)	219(4)
219(5)	220(1)	220(2)	220(3)	220(4)
220(5)	226(1)	227	230	231
232	235(1)	235(2)	237(2)	240(2)
241	245(1)	245(2)	245(3)	246
248(1)	248(2)	248(3)	249	252(3)
253	254(1)	254(2)	254(3)	255(2)
255(3)	255(4)	256(2)	256(3)	257(2)

259	260	262(5)	263(3)	273(1)
273(2)	273(3)	273(4)	276(3)	277(2)
278	279	281	284(2)	286(1)
286(2)	286(3)	288	293(1)	293(2)
293(3)	293(4)	294(1)	294(2)	294(3)
295(1)	295(2)	296(1)	296(2)	297(1)
297(2)	298	299	302(1)	302(2)
302(3)	303(1)	303(2)	303(3)	303(4)
304(1)	304(2)	304(3)	304(4)	304(5)
309	310	311(1)	311(2)	311(3)
312(1)	312(2)	313(1)	313(2)	314
315	316(1)	316(2)	317(2)	318(1)
319(1)	319(2)	319(3)	319(4)	319(5)
320	323(1)	323(2)	323(3)	323(4)
324(2)	324(3)	324(4)	325(1)	325(2)
325(3)	326(1)	326(2)	328	329
330	332	333	334(1)	334(2)
335(1)	335(2)	336(1)	336(2)	336(3)
337(3)	337(4)	340(2)	341(2)	343(1)
343(2)	344	346	352(1)	352(2)
353	354	359		

January 5 Log				
3	4(1)	4(2)	12	13(1)
13(2)	13(3)	14(3)	14(4)	14(5)
15(3)	15(4)	15(5)	19	20
21	22	23(2)	24(3)	25(5)
26(1)	26(2)	28(1)	28(2)	29(1)
29(2)	29(3)	30	33(2)	34(1)
34(2)	34(3)	38	39(1)	39(2)
40	41	42(2)	42(3)	43(1)
43(2)	51(1)	52(1)	52(2)	54(1)
54(2)	54(3)	54(4)	55(1)	55(2)
56(1)	56(2)	57(1)	57(2)	57(3)
58(1)	58(2)	58(3)	58(4)	62(1)
65	74	75	76(2)	77(1)
77(2)	78(2)	78(3)	78(4)	79
80(1)	80(2)	81(1)	81(2)	

APPENDIX 5

NO PRIVILEGE ESTABLISHED

December 21 Log				
13(1)	22(3)	93	94	136(1)
136(2)	179(1)	179(2)	203(2)	301(1)
January 5 Log				
25(3)	25(4)	33(1)	84(1)	84(2)

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4.27(3) [Repayment of deposit etc.] If a winding-up order is made after a provisional liquidator has been appointed, any money deposited under this Rule shall (unless it is required by reason of insufficiency of assets for payment of remuneration and expenses of the provisional liquidator) be repaid to the person depositing it (or as that person may direct) out of the assets, in the prescribed order of priority.

(See General Note after r. 4.31.)

4.28 Security

4.28(1) [Application of Rule] The following applies where an insolvency practitioner is appointed to be provisional liquidator under section 135.

4.28(2) [Cost of providing security] The cost of providing the security required under the Act shall be paid in the first instance by the provisional liquidator; but—

- (a) if a winding-up order is not made, the person so appointed is entitled to be reimbursed out of the property of the company, and the court may make an order on the company accordingly, and
- (b) if a winding-up order is made, he is entitled to be reimbursed out of the assets in the prescribed order of priority.

(See General Note after r. 4.31.)

4.29 Failure to give or keep up security

4.29(1) [Powers of court] If the provisional liquidator fails to give or keep up his security, the court may remove him, and make such order as it thinks fit as to costs.

4.29(2) [Directions for replacement] If an order is made under this Rule removing the provisional liquidator, or discharging the order appointing him, the court shall give directions as to whether any, and if so what, steps should be taken for the appointment of another person in his place.

(See General Note after r. 4.31.)

4.30 Remuneration

4.30(1) [To be fixed by court] The remuneration of the provisional liquidator (other than the official receiver) shall be fixed by the court from time to time on his application.

4.30(2) [Matters to be taken into account] In fixing his remuneration, the court shall take into account—

- (a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;
- (b) the complexity (or otherwise) of the case;
- (c) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;
- (d) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and
- (e) the value and nature of the property with which he has to deal.

4.30(3) [Source of payment of remuneration etc.] Without prejudice to any order the court may make as to costs, the provisional liquidator's remuneration (whether the official receiver or another) shall be paid to him, and the amount of any expenses incurred by him (including the remuneration and expenses of any special manager appointed under section 177) reimbursed—

- (a) if a winding-up order is not made, out of the property of the company; and
- (b) if a winding-up order is made, out of the assets, in the prescribed order of priority,

or, in either case (the relevant funds being insufficient), out of the deposit under Rule 4.27.

4.30(3A) [Power of retention] Unless the court otherwise directs, in a case falling within paragraph (3)(a) above the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting his remuneration and expenses.

4.30(4) [Provisional liquidator other than official receiver] Where a person other than the official receiver has been appointed provisional liquidator, and the official receiver has taken any steps for the purpose of obtaining a statement of affairs or has performed any other duty under the Rules, he shall pay the official receiver such sum (if any) as the court may direct.

(See General Note after r. 4.31.)

4.31 Termination of appointment

4.31(1) [Termination by court] The appointment of the provisional liquidator may be terminated by the court on his application, or on that of any of the persons specified in Rule 4.25(1).

4.31(2) [Directions on termination] If the provisional liquidator's appointment terminates, in consequence of the dismissal of the winding-up petition or otherwise, the court may give such directions as it thinks fit with respect to the accounts of his administration or any other matters which it thinks appropriate.

4.31(3) (Omitted by the Insolvency (Amendment) Rules 1987 (SI 1987/1919), r. 3(1), Sch., Pt 1, para. 44 as from 11 January 1988.)

GENERAL NOTE TO RR. 4.25-4.31

These rules set out the procedure governing an application to the court for the appointment of a provisional liquidator under IA 1986, s. 135, and the associated questions of furnishing a deposit (where the official receiver is appointed) or security (where the provisional liquidator is an insolvency practitioner), and the liquidator's remuneration.

Rule 4.25(1) was substituted by the Insolvency (Amendment) Rules 2002 (SI 2002/1307, effective May 31, 2002), so as to include the persons mentioned in sub-paras (f) and (g).

The court may in an appropriate case refer the fixing of remuneration under r. 4.30 to one or more assessors: *Re Independent Insurance Co. Ltd* [2002] EWHC 1577 (Ch); [2002] 2 B.C.L.C. 709. (For further proceedings, see *Re Independent Insurance Co. Ltd (No. 2)* [2003] EWHC 51 (Ch), [2003] 1 B.C.L.C. 640, where the principles for the fixing of remuneration and making of interim payments are discussed in detail.)

There is no provision in the rules governing the priority in which the remuneration and expenses of a provisional liquidator should be paid, either *vis-à-vis* the company's debts or in relation to each other; but in *Re Grey Marlin Ltd* [2000] B.C.C. 410 and in *Smith v UIC Insurance Co. Ltd* [2001] B.C.C. 11 the rules governing a liquidator's remuneration and expenses were applied by analogy.

The provisions in rr. 4.28 and 4.30 are directory, although subject to the overall discretion conferred by r. 4.31(2) (and formerly also by r. 4.31(3)); and so a court will not normally make an order that an unsuccessful petitioner should pay the remuneration of a provisional liquidator: *Re Walter L Jacob & Co. Ltd* (1987) 3 B.C.C. 532. (See, however, *Re Secure & Provide plc* [1992] B.C.C. 405, where such an order was made against the Secretary of State following the failure of a petition under s. 124A, and compare *Re Xyllyx plc (No. 2)* [1992] B.C.L.C. 378.)

The court has power under r. 4.31(2) to direct that a provisional liquidator who has been discharged before the hearing of the petition shall be paid remuneration out of the company's assets: *Re U O C Corporation, Alipour v U O C Corporation* [1998] B.C.C. 191.