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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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IN THE MATTER OF:

THE LIQUIDATION OF
THE HOME INSURANCE COMPANY

Docket No.: 03-E-106

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HEARING ON MOTIONS

Before:

Hon. Kathleen A. McGuire
Presiding Justice
on Thursday, May 12, 2005
at Concord, New Hampshire

* * * * *

Official Court Reporter: Brenda K. Hancock, CCR, RPR

* * * * *

APPEARANCES:

Referee:

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Joint Provisional
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1 organizing your discussions, and if you have some general
2 questions that she can't answer, she can bring those to me
3 as well.

4 (Discussions between counsel held off the record)

5 IN OPEN COURT, ON THE RECORD:

6 THE COURT: Okay. Apparently, ACE and the Liquidator are
7 disagreeing as to whether the affiant, the JPL, who was
8 the affiant in support of the agreement, has to share
9 documents, documents that he shared among members of his
10 firm, and I wrote an order that said, yes, so long as
11 those documents comply with or are within the scope of the
12 discovery guideline that I gave you earlier.

13 What's the problem, Mr. Leslie?

14 MR. LESLIE: Your Honor, we wanted to confirm the Court's
15 intention on this issue. Gareth Hughes is the Joint --
16 the Lead Joint Provisional Liquidator. His hourly rate
17 exceeds \$1,000 an hour. It's literally impossible for
18 him, as one person, to deal with all the legal issues in
19 this proceeding.

20 The Home liquidation, the U.K. proceeding, are
21 judicial proceedings; they are not corporations.
22 Everything we do relates to this proceeding here or in the
23 U.K. The effect of the Court's order is to eliminate a

1 privilege as to any communication from counsel which Mr.
2 Hughes shares with any other member of his staff. It's
3 equivalent to, and I'm concerned about its impact on Roger
4 Sevigny sharing my advice with Alex Feldvebel. It's
5 impossible for Commissioner Sevigny to personally
6 supervise The Home's proceeding and to, by himself, accept
7 legal advice, evaluate that legal advice and act on that
8 legal advice without consulting with his staff.

9 So, too, it is impossible for Mr. Hughes to
10 fulfill his functions if he must personally perform every
11 function that involves any legal issue. Mr. Steinberg,
12 his counsel, is present from Clifford Chance. The effect
13 of this order is to cause a waiver, as is the case with
14 some of these documents. Mr. Steinberg gave advice to Mr.
15 Hughes, which he then shared with his right-hand person,
16 Sarah Ellis, which is akin to Mr. Feldvebel --

17 THE COURT: Well, I had previously said to you that the ACE
18 Companies are entitled to production of all non-privileged
19 documents and information relied upon in developing his
20 affidavit.

21 MR. VAN TOL: Your Honor, may I add just one point? This is,
22 as I take it, effectively, a motion for reconsideration.
23 The standard for that is, as you're well aware of, is have

1 you overlooked anything in the pleadings. Mr. Leslie
2 didn't even bother to identify one, and your order says,
3 "based upon the pleadings..."

4 THE COURT: I read the pleadings yesterday.

5 MR. VAN TOL: So, there's nothing. If Mr. Leslie does not like
6 the consequences, your Honor, I respectfully submit he
7 should go appeal your order, rather than burdening the
8 Court right now, because we want to get through this day.

9 THE COURT: No. We are here to resolve this today.

10 I still don't understand what your problem is,
11 Mr. Leslie.

12 MR. LESLIE: Your Honor, my concern with the order is, it's an
13 order of the Court supervising The Home liquidation that
14 construes the attorney-client privilege as being waived in
15 an instance in which either the judicial appointee, the
16 Liquidator, the Special Deputy Liquidator, or in an
17 English proceeding, the Joint Provisional Liquidator,
18 shares privileged information with someone on his staff.

19 THE COURT: I'll read it one more time, okay? "ACE Companies
20 are entitled to production of all nonprivileged documents
21 and information relied upon in developing the affidavits
22 by Gareth Howard Hughes."

23 MR. LESLIE: Your Honor, I'm referring to the order that the

1 Court most recently entered, that, based upon the
2 pleadings, the Court finds that the documents shared need
3 to be -- that the issue, as presented, was the issue of
4 the applicability of whether the privilege was waived as
5 to the subject documents.

6 THE COURT: Right. I said they are discoverable, so long as
7 these documents are relevant, as provided in the Court's
8 "Guidance Regarding the Scope of Discovery".

9 MR. VAN TOL: Your Honor, as you know, this is a very narrow
10 order. It is not going to have the consequences that Mr.
11 Leslie says. If JPL's in the future don't want to effect
12 a waiver by sharing privileged documents, they should get
13 their whole staff appointed. That's point one.

14 Point two, we are not trying at all to interfere
15 with Mr. Hughes' ability to consult with his staff. We
16 acknowledge that. What he cannot do is take a privileged
17 communication between himself and his lawyer and share it
18 with a third party. If he does, it's a waiver, and you so
19 found.

20 THE COURT: Look, here's what I'm saying. I'm not even saying
21 whether he's waived or not. If there's a document in
22 there that he relied upon in forming his affidavit, then
23 it's discoverable, okay?

1 MR. LESLIE: Yes, your Honor.

2 THE COURT: That's what it says.

3 MR. LESLIE: That, we, of course, are quite comfortable with.

4 I think the issue here is whether the Court's most recent
5 order was intended -- as I have just heard the Court
6 explain it, it was not intended as a ruling on the waiver
7 question, but it is an order that directs the Liquidator
8 and the Joint Provisional Liquidator to produce documents
9 that were utilized by the JPL in putting together the
10 affidavit --

11 THE COURT: Yes, correct.

12 MR. LESLIE: -- and that are not, otherwise, privileged.

13 MR. VAN TOL: Well, your Honor --

14 THE COURT: Well, no. Any document -- I don't say it's
15 privileged, therefore -- I mean, if he relied upon those
16 documents, if it's a document he relied on, then he
17 produces it, it's discoverable. I'm not even going to
18 whether he has waived it. If there was a waiver or not,
19 and if there is a privilege, it's overcome, okay?

20 MR. LESLIE: To the extent he relied on it for purposes of the
21 affidavit.

22 THE COURT: Exactly. Is everything clear?

23 MR. LEE: Yes, your Honor. I just wanted to clarify that that

1 relates to the documents that are encompassed by Appendix
2 4, and what we don't want to see is the Liquidator posture
3 with those documents and decide which ones they do or
4 don't want to produce. Our view is that all of those
5 documents are relevant. They were all identified as being
6 responsive to the document requests of the ACE Companies,
7 and they are not privileged ipso facto. They are relevant
8 to the issues before the Court.

9 THE COURT: Well, I don't know what is in them. I've given you
10 the guidelines. That's the order that I've made, that if
11 they are within the scope of discovery, as I've given that
12 to you earlier, that is to say, that the information was
13 relied upon, and, I guess, if the privilege wasn't waived,
14 if they are privileged, the privilege is overcome, and I'm
15 not even going as to whether or not they are waived.

16 MR. LESLIE: To the extent those documents were used by the JPL
17 in putting together the affidavit.

18 THE COURT: Relied upon, exactly.

19 MR. LESLIE: Okay.

20 THE COURT: Exactly, exactly.

21 MR. LEE: Thank you, your Honor.

22 MR. LESLIE: Thank you, your Honor.

23 (Discussion between counsel held off the record)

1 THE COURT: All right. We'll work that out, then. Can you do
2 that, Attorney Rogers?

3 MS. ROGERS: Yes, as long as, you know, I have some idea of
4 what the schedule is and how quickly the documents will be
5 turned over.

6 MR. LESLIE: The documents will be delivered tomorrow morning,
7 unless you prefer to have them first reviewed. I would
8 assume it would be advantageous to deliver them as soon as
9 possible.

10 MS. ROGERS: The sooner the better, and I do have the
11 deposition schedule. Yup, that's fine.

12 THE COURT: So, you can discuss that afterwards, and that will
13 solve that problem.

14 MR. LESLIE: We will deliver the documents tomorrow.

15 MR. VAN TOL: Yes, your Honor.

16 THE COURT: Okay. Take it from tomorrow, then.

17 MR. LESLIE: There were also disputes over Appendix 4
18 documents. The Liquidator will review the Appendix 4
19 documents to identify any that were relied upon in
20 developing the affidavits and, if so, they will be
21 produced. As to Benjamin Moore, the Liquidator will
22 supplement answers to the interrogatories, as we
23 discussed, and we have a general understanding of what we

1 need to do.

2 As to Interrogatories 3, 4, 5, 7 and 8, we will
3 provide a list of inwards reinsurance proof of claims to
4 Benjamin Moore and ACE, and we'll produce proofs of claim
5 where Home did not cede to risk to the reinsurer, and
6 Benjamin Moore's agreed to drop Interrogatory Number 6,
7 which related to legal fees and the like. Correct?

8 MR. BOUFFARD: That's correct.

9 MR. LESLIE: Thank you. As to the Joint Provisional
10 Liquidator, the Joint Provisional Liquidator will confirm
11 in writing that the scope of production made by the Joint
12 Provisional Liquidator is congruent with the Liquidator's
13 production, and, 2, that privileged documents were not
14 withheld from that production to the Liquidator, which is,
15 in fact, the case. The Joint Provisional Liquidator will
16 identify any documents relied upon in developing the
17 Hughes affidavit and will supplement production
18 appropriately.

19 THE COURT: Okay.

20 MR. VAN TOL: Your Honor, if I may, just for the benefit of the
21 Court and Ms. Rogers, some of the documents in Appendix 2,
22 I know, and Appendix 5 were shared with Ernst & Young, and
23 I believe we have a ruling from your Honor on that issue,

1 so that we would respectfully submit that that should be
2 factored in the analysis of whether or not these documents
3 are privileged; not just whether they constitute
4 attorney-client privilege in the first instance, but
5 whether that privilege was somehow overcome or waived by
6 sharing it with Ernst & Young.

7 MR. LESLIE: I believe the Court has ruled that, to the extent
8 that document was relied upon in the affidavit, the
9 privilege was waived but not otherwise waived.

10 MR. VAN TOL: I make that comment subject to everything else
11 that's happened today.

12 THE COURT: I'll try to make an order that encompasses all of
13 these issues, including Equitas's and Zurich's position
14 that they haven't waived jurisdiction, and that I agree
15 with that and so forth.

16 MR. GORDON: Your Honor, are you ordering the production? I
17 understood you to say that it would be voluntary. I
18 understand if we have documents that we don't want to
19 produce, it might go to his credibility, but I don't
20 understand that we are going to be subject to any kind of
21 compulsion.

22 THE COURT: Well, we are kind of in an awkward situation here.
23 I wanted you to voluntarily turn over certain documents