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CR-2023-006026

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

IN THE MATTER OF EVERSHOLT RAIL (365) LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

JEREMY ROBERT WEBB AND ZELF HUSSAIN
(in their capacity as Joint Liquidators of Eversholt Rail (365) Limited (in liquidation))
Applicants

AND

(1) EVERSHOLT RAIL LIMITED
(2) NORTON ROSE FULBRIGHT LLP
Respondents

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Adam Deacock (instructed by **DLA Piper UK LLP**) for the **Applicants**
Daniel Bayfield KC and Paul Fradley (instructed by **Norton Rose Fulbright LLP**) for the Respondents

Hearing date: 4 July 2024

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Approved Judgment

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

This judgment was handed down remotely at 02.30pm on 29 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

ICC Judge Burton :

1. This judgment follows a one-day hearing of the Applicants' application pursuant to section 235(2)(a) and section 236(3) of the Insolvency Act 1986 (the "Act") for the Respondents to provide copies of documents set out in a draft order accompanying the application.

2. The company in respect of which this application is made, Eversholt Rail (365) Limited ("365Co") and the first respondent, Eversholt Rail Limited ("ERL") are both part of the Eversholt UK Rails Group. The Group owns and maintains railway engines and carriages that are leased to various train operating companies. ERL provides asset management and administrative services to companies within the Eversholt UK Rails Group.

3. The second respondent is ERL's firm of solicitors, Norton Rose Fulbright LLP ("NRF") which the Applicants contend also acted for 365Co.

4. 365Co was a special purpose vehicle whose role it was to hold some of the Group's train fleet. It leased a single fleet of Class 365 rolling stock units comprising 160 vehicles including 40 trains from two head lessor companies (the "Head Leases" and "Head Lessors").

5. At all material times 365Co had three directors. Each was also a director of ERL and other Group companies. They were Mary Kenny, Andrea Wesson and Andrew Course (the "365Directors"). 365Co had no employees. Its operation was entirely dependent on services provided by ERL pursuant to a services agreement dated 25 February 2010 (the "Services Agreement").

6. 365Co's directors corresponded on 365Co's behalf using ERL email addresses. All of 365Co's documents were held by ERL. 365Co's documents were not separately filed, stored or segregated by ERL.

7. Minutes of a meeting of the board of directors of 365Co held on 18 October 2018 (the "2018 Meeting" and the "2018 Minutes") record, among other things, the 365Directors:

    i) considering a list of specified documents (the "2018 Documents");

    ii) acknowledging that rental payments due to be received by 365Co from train operating companies would be insufficient to meet the rental payments due under the Head Leases, the next of which would fall due in July 2019;

    iii) considering various options available to the Head Lessors and potential options available to 365Co to help to avoid the anticipated default under the Head Leases; and

    iv) concluding, among other things, that it was appropriate for 365Co to repay to ERL a £5 million, interest-bearing loan before the end of 2018.

8. The proposed solutions considered at the 2018 Meeting did not resolve the company's funding crisis. On 19 August 2019 it entered creditors' voluntary liquidation with the Applicants, licensed insolvency practitioners with PricewaterhouseCoopers LLP ("PWC") appointed as liquidators (the "Liquidators").

9. The order sought by the Applicants has been updated since the application was first issued. Paragraph 1 of the proposed order would require ERL to provide:

> "copies of all documents (save insofar as any such document has already been provided in unredacted form) in its possession custody or control relating to the business, dealings, affairs or property of 365 (including for the avoidance of doubt any such documents relating to 365 on its own or together with any other person or entity) ("365 business") including but not limited to: …"

and there is then a list of 12 items, commencing with:

> "all documents created for the purpose of carrying out services pursuant to the Services Agreement dated 25 February 2010"

and:

> "all correspondence entered on behalf of 365 (whether on its sole behalf or on behalf of it and any other company) or relating to 365 business".

10. The application is supported by the evidence of Carla Matthews, Head of Contentious Insolvency & Asset Recovery at PWC. Ms Matthews provided three witness statements dated 30 October 2023, 5 April 2024 and 29 June 2024. ERL's evidence is set out in two statements of one of its directors, Lee Warsop dated 5 December 2023 and 16 February 2023, and in the second witness statement of Mark Craggs, one of NRF's partners, dated 1 July 2024. NRF's evidence is set out in the first witness statement of Mark Craggs dated 5 December 2023.

Relevant legal principles

11. The legal principles that apply to an application to court under sections 235 and 236 of the Act were not in dispute. Section 235(2) provides that specified persons, including those employed by the company under a contract for services shall:

> "(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and
>
> (b) attend on the office-holder at such times as the latter may reasonably require."

12. Section 236 of the Act applies to a broader category of persons:

> "any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company"

and provides, at section 236(3), that the court may require such persons to attend court or submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control

relating to the company or that relate to the promotion, formation, business, dealings, affairs or property of the company.

13. Mr Deacock's skeleton argument provides the following, uncontroversial summary:

> " 54. The authorities show that it is entirely in the Court's general and unfettered discretion whether an order under s. 236 IA 1986 is made: *Shierson v Rastogi* [2003] 1 W.L.R. 586 per Mance LJ at [52]. However, that discretion has typically been exercised having regard to the following principles:
>
> 54.1. The power is conferred to enable an office-holder to discover the true facts concerning the affairs of the insolvent so that they may be able as quickly, effectively and with as little expense as possible to complete their duties: *Picard v Fim Advisers LLP* [2010] EWHC 1299 (Ch) per Kitchen J at [28] ;
>
> 54.2. The exercise of the discretion involves balancing the reasonable requirement of the office-holder to obtain information against the possible oppression to the person sought to be examined: *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch. 90 per Sir Nicholas Browne-Wilkinson V-C at p. 99C ; *British and Commonwealth Holdings* per Lord Slynn at p. 439D;
>
> 54.3. That balancing depends on the relationship between the importance to the office-holder of obtaining the information, and the degree of oppression to the person sought to be examined.
>
> 54.4. The views of office-holders should be afforded great weight by the Court, but they are not decisive: *Cloverbay* at pp. 101D, 104C;
>
> 54.5. The case for making an order against individuals who have a statutory duty to cooperate with office-holders under s.235, is usually stronger than the case for making an order against a third party: *Cloverbay* at pp. 102H-103C;
>
> 54.6. an order for the production of documents is less likely to be oppressive than one for an oral examination: ibid at p. 103C;
>
> 54.7. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee or contractor with the company but all these will be relevant factors, together no doubt with many others *British and Commonwealth Holdings* at 439-440."

14. At page 439g of his judgment in *British and Commonwealth Holdings* Lord Slynn expanded upon the balancing exercise:

> "… it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved - on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or 'oppressive' to the person concerned.
>
> The protection for the person called upon to produce documents lies, thus, … in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the liquidator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements…"

15. In *Re Corporate Jet Realisations Ltd* [2015] BCC 625, after reviewing the authorities, Registrar Briggs (as he then was) noted that although the purpose of section 236(2)(c) is to provide an office holder with the means "to obtain a comprehensive understanding of the property and affairs of the company over which he is appointed" that power is not without limitation, the first of which is that the office holder must show that he has a reasonable requirement for the material sought.

Privilege

16. In *Re Transform Medical Group (CS) Limited* [2020] EWHC 2064 (Ch) Andrew Hochauser QC (sitting as a deputy High Court Judge) held that section 236 (and also section 234) of the Act did not permit privilege to be abrogated. At paragraph 71 of his judgment he stated:

> "It is well-established that privilege, as a fundamental human right, is not capable of being abrogated by statute unless by express words or necessary implication. Unless a statute makes it clear by express words that privilege is abrogated, it will be a rare case indeed where the court will hold that it has such an effect by implication. Sections 234 and 236 of the 1986 Act do not by express words or necessary implication make it clear that privilege is abrogated"

17. Mr Bayfield helpfully summarised the uncontroversial, relevant principles from paragraphs 72 to 74 of the same judgment:

> "The Court will be slow to find that privilege has been impliedly excluded: [72].
>
> 'On their true interpretation, there is nothing in sections 234 and 236 of the 1986 Act that necessitates the overriding of privilege': [73].
>
> When exercising its discretion under section 236 the Court is carrying out a balancing exercise, but to permit privilege to be abrogated by sections 234-236 "would be antithetical to the

> well-established principle that 'once privilege is established… [it] is an absolute right, and there is no balancing act to be performed by the court'": [74]".

18. Mr Deacock referred the Court to *Passmore on Privilege* (4th Edition) at page 581 where the author considers joint or common interest privilege:

> "6-002 In broad terms, where a joint or common interest is established, then privileged communications can be shared between the parties to the shared interest without losing the ability to assert privilege in those documents against any third party. While there are recognised categories of joint interests, and broadly workable tests for identifying a common interest, the real challenge in this area is to identify the categories of relationships that entitle one party to the shared interest (be it a joint or common interest) to demand access to a privileged communication relating to that interest where the communication is held by one party only thereto. Where a joint interest exists, then the right to demand such access is usually an integral part of that relationship (albeit a right that tends to be asserted in the course of litigation between the joint interest holders and also one that is usually limited to the period when those parties' interests were aligned); where there is merely a common interest—or, as judges are wont to say, a "community of interest"—one has to distinguish between the type of relationship that merely allows the sharing of privileged material between the parties to that interest (without thereby losing the ability to assert the privilege against third parties to their interest—this is usually referred to as "common interest privilege"), and one that confers the additional entitlement that allows one party thereto to demand access to a privileged document held by the other."

19. At paragraph 6-006, the authors identify three types of joint interests:

> "The first is where the joint interest is expressly recognised by virtue of the fact the parties sharing the same interest retain the same lawyer to represent them—i.e. where there is a joint retainer. The second is where the joint interest arises by reference to the relationship that exists between the parties thereto. Here, one also sees several recognised categories of relationship that are accepted as giving rise to a joint interest, as well as some overlap between these first two categories in that relationships akin to a joint retainer are recognised. The third situation in which the privilege consequences summarised above arise, while arguably not strictly a joint interest, is in respect of a category of commercial relationships where either the nature of the parties' relationship or the nature of the contractual arrangements between them entitles one party to that relationship to access privileged communications held by the other."

20. The authors opine that where a joint interest in the subject matter of privileged communications is established, certain consequences usually follow. Mr Deacock highlights in particular:

> "first, privilege cannot be asserted by any of the parties who enjoy the joint interest in respect of that communication against any other party thereto, notwithstanding that all those parties are entitled to assert privilege over it as against the rest of the world;
>
> … fourthly, parties who enjoy a joint interest will usually also enjoy a right of access as against all other parties thereto in respect of a privileged communication held by any other party thereto that concerns their joint interest: that right is usually available generally and if not then always where they are in litigation with each other;"

21. In *The Law of Privilege* (Third Edition) the authors provide at paragraph 6.09 examples of joint interests:

> "Whilst not a rigidly defined concept, examples of situations where such a joint interest has been held to arise are between:
> - a trustee (properly so-called) and beneficiary;
> - a parent company and its wholly-owned subsidiary;
> - a company and its shareholders;
> - a limited liability partnership and its members;
> - a company and its directors; and
> - partners".

22. In *Love v Fawett and Northam Worldwide* [2011] EWHC 1686 (Ch) Mr Justice Morgan considered an objection to certain parts of the claimant's witness statement on the basis, inter alia, that certain communications between the defendants and a solicitor were confidential so that they attracted legal professional privilege. At paragraph 17 of his judgment he held that the fact that the claimant, Mr Love acted as an agent for the second defendant, Northam and the fact that Northam was expected to bear the costs of the solicitor, Mr Barry's retainer did not make it a case of joint retainer. He continued:

> "The next question is whether Mr Love and Northam had a joint interest for present purposes. What are the relevant purposes behind this question? The relevant purpose, in my judgment, is to identify when a communication between Mr Barry and Northam is confidential to those two and when it is not confidential so that (in the latter case) Mr Barry is entitled to pass the information in question onto Mr Love and indeed Mr Love is entitled to have access to the matter communicated."

Documents held by ERL

23. In circumstances where a company has properly maintained its books and records, following appointment, a liquidator would usually be given access to all of them. It would be a very rare case indeed where a liquidator would need to see everything, but

they can pick and choose what they require, and some documents, particularly those that concern the period leading up to the company's insolvency, are likely to help the liquidator to gain a better understanding of the company's demise and whether any further investigation into its transactions is required.

24. By this application, the Liquidators are asking the Court to exercise its power, described in *British and Commonwealth Holdings* as "extraordinary" to compel ERL to deliver up *all* documents "relating to" 365Co which it holds.

25. In addition to the far-reaching scope of the first paragraph of the proposed order, two of the sub-paragraphs merit highlighting, where documents falling within the scope of the sub-paragraph are included in the Liquidators' non-exhaustive request:

> "1.4.4 any legal advice or other legal services provided by [ERL's] in house legal team personnel relating to 365 business;
>
> 1.4.5 any legal advice or other legal services procured by ERL from NRF or any other person or entity and relating 365 business; (sic)"

26. Ms Matthews' witness statements and the copy correspondence in evidence that passed between the Liquidators and ERL provide almost no information to explain to the court *why* the documents in question are reasonably required. Ms Matthews provides instead, various examples of areas where, despite the documents already disclosed by ERL, the Liquidators consider:

> "it is apparent that records provided are not a full set of records or, where they do provide records, all material and relevant content has been redacted so they are of limited use, such as the additional board meeting packs that were provided on 25 May 2023."

27. She continues:

> "It has therefore become necessary for the Joint Liquidators to seek an order of the court to determine the scope of the Joint Liquidators' legal entitlement to the information and records requested as it has become apparent that engaging in protracted correspondence with NRF is not a time or cost-efficient way to deal with the issues between the parties."

28. This appears to misapprehend the purpose of an application to Court under sections 235 and 236 of the Act. It is not the for the Court to "determine the scope" of a liquidator's entitlement to documents and information. The scope is set out in the statute, supplemented by relevant legal authority. The purpose of an application under either section is to compel the respondent to provide the information and/or documentation that a liquidator is able to satisfy the Court, they reasonably require.

29. A review of the various requests made of ERL for documents, and the responses received, fails to persuade me that, as asserted by Ms Matthews, an application to court was necessary. The pattern seen in the extracts from correspondence that follows, is that during the first three years of the liquidation, ERL responded in a cooperative manner to all focussed requests for documents. However, when the

Liquidators and their solicitors latterly insisted that ERL should deliver up absolutely everything they held "in relation to" 365Co they resisted, urging the Liquidators to provide more tailored requests. By their correspondence, ERL sought to understand what the Liquidators reasonably required and in March 2023 suggested a meeting to try to facilitate their cooperation by narrowing the requests. In response, the only explanation given then, and now in Ms Matthews' witness statements, is that all of the documents that are the subject of the Liquidators' far-reaching application against ERL, are required to enable the Liquidators "to reconstitute the company's records" and "for the purpose of their investigations".

30. Thus the Liquidators persistently failed to apprehend that when exercising its powers pursuant to sections 235 and 236 of the Act, the court will only compel a third party to disclose information and deliver up documents that are reasonably required. The court would require compelling evidence to understand why a liquidator needs to reconstitute and thus see absolutely all of a company's records. No temporal limitation is proposed in relation to any category of the documents sought and no explanation is given in the evidence as to why such a potentially enormous number of documents, so broadly described and covering such a long period of time are needed.

31. There is also no evidence to explain why the Liquidators felt unable to be more specific or targeted in their requests. Mr Bayfield suggested that it was perhaps because the Liquidators wished to remain coy about the areas of concern to them or about the transactions that they consider merit further scrutiny. If that is the case, it seems to me that it is not likely to have come as a surprise to specialist insolvency lawyers at ERL's solicitors, NRF, that the Liquidators would wish to examine very carefully the circumstances under which £5 million was repaid to a connected company shortly before its liquidation. I have seen no evidence of conduct on the part of ERL to suggest, nor any assertion that ERL would be likely to take steps to withhold, conceal or destroy information or documents concerning any area of particular interest or concern to the Liquidators. As the following summary reveals, ERL was cooperative from the start, only refusing to accede to far-reaching and inadequately explained requests.

A summary of the requests and responses from ERL

32. Shortly after the Liquidators' appointment, NRF delivered by hand to PWC an USB stick containing a large number of 365Co's contractual documents.

33. On 13 February 2020, the Liquidators wrote to ERL requesting that it provide documents and information set out in an appendix which the Liquidators wished to see in order to consider ERL's proof of debt. Their letter included the following, general request for documentation (the "General Request"):

> "The Liquidators request that you provide full and complete details of any and all of the Company's property which is in your possession or under your control (including the books, papers or records of the Company) ("Property") and arrange with the Liquidators for such property to be delivered up to us. These records have previously been requested from the Company.
>
> To the extent that you had any Property of the Company within your control over the past five years but which you no longer

> possess or control, please identify such Property to us and provide full details of how such Property has transferred from you and to which person or entity such Property was transferred or released.

34. Subsequent emails passing between ERL and PWC around March and April 2020 show ERL explaining that due to various operational challenges and the Covid-19 pandemic that was then gripping the country, they were struggling to get all of the information together. ERL replied substantively on 19 April 2020 stating that over the next few days, they would proceed to upload to PWC's nominated data site, the various documents referred to in their reply. The reply, whilst detailed and supplemented by a significant amount of information and documentation, appears only to address the Liquidators' request for documentation to support ERL's claim in the liquidation and not to respond to the General Request.

35. In August 2020, PWC wrote again. No reference was made to the General Request. Instead, they identified further information said to be required in order to consider and verify ERL's proof of debt. ERL replied on 30 November 2020 with another detailed schedule addressing each item of PWC's request with attached documentation.

36. During 2021, ERL emailed the Liquidators asking for an update regarding 365Co's liquidation.

37. The Liquidators replied in October 2021 saying that in order to conclude their review of ERL's claim, they required further, specific information and documentation regarding the "Heavy Maintenance Procurement Agreement". When chased for the information in January 2022, ERL explained that they had been busy with the financial year end and said that they hoped to be able to provide the information requested by the end of February 2022. PWC replied on 4 February 2022, confirming that would be acceptable but requesting that ERL provide, within the same time frame, specific information regarding 365Co's stock of spare parts. Before the requested deadline for the provision of the further proof-of-debt information and spare-parts information arose, on 22 February 2022, PWC wrote again. This time they asked for information regarding the current ownership of the Class 365 fleet. They said that having obtained a copy of the 2018 Minutes, they noted that they referred to the 2018 Documents and also to a letter provided to the Liquidators regarding HSBC's obligation to purchase the fleet for £90 million in accordance with the terms of "the original 1994 agreement". PWC's letter concluded with a request to receive within 21 days, "some additional information from company books and records which demonstrates that this took place, together with a copy of the 1994 agreement". Notably, the letter did not request a copy of the 2018 Documents nor did it refer to the earlier General Request.

38. ERL replied on 3 March 2022, providing an excel spreadsheet with responses to the questions raised in October 2021 with two additional, supporting excel documents. In relation to ownership of the Class 365 fleet, ERL provided detailed information and supporting documentation. In relation to the request for information regarding the original 1994 fleet agreement with HSBC, ERL provided an acknowledgement, invoice and bills of sale evidencing that the sale took place. They explained that the 1994 agreement was amended many times and that due to the volume of the relevant documentation, it had all been sent to PWC on the pen drive delivered by hand to PWC's offices by NRF at the start of the liquidation. On 22 March 2022, ERL sent

the Liquidators the Class 365 leasing documents, stating again that they had already been provided to PWC in 2019.

39. On 5 April 2022, the Liquidators wrote to the 365Directors at ERL's address, asking them to explain why £5 million was repaid by 365Co to Eversholt Rail Leasing Limited shortly before 365Co's liquidation and for copies of any supporting documentation, including the 2018 Documents.

40. Two of the 365Directors, Andrea Wesson and Mary Kenny replied on 26 April 2022. They pointed out that the Liquidators' letter had referred to the wrong group company, as the loan was repaid to ERL not Eversholt Rail Leasing Limited. They provided an explanation why the loan was repaid in the amount and at the time it was repaid. They provided copies of the 2018 Documents.

The requests extend to NRF who respond on their own behalf and on behalf of ERL

41. Four months later, on 25 August 2022, PWC wrote to NRF stating that following sight of an invoice submitted by NRF to the Liquidators for advice to 365Co, it was clear that NRF provided advice not only to ERL but also to 365Co. The letter referred to section 236(2)(c) of the Act and requested that NRF provide by 8 September 2022 (14 days after the date of the letter):

    i) details of all matters in relation to which NRF acted for 365Co;

    ii) a full copy of NRF's files covering the period that it acted for 365Co (which, though the wording is unclear, I assume was a request only for files relating to 365Co during that period);

    iii) a copy of all books, papers or records of 365Co that NRF may be holding;

    iv) any additional information regarding other advisors and possible employees who might have been working for 365Co including its finance director; and

    v) "details of any other matters relating to the Company's assets and affairs that might be relevant".

42. On 5 September 2022, NRF responded to the Liquidators' letter dated 25 August 2022 stating:

> "We wish to place on the record that we at NRF and our client, ERL, have provided full cooperation to the liquidators of Eversholt Rail (365) Limited (365 Co) prior to, and throughout, the liquidation. We collectively briefed the liquidators prior to their appointment and have been at pains to ensure that they received all relevant documentation and have had all information required to perform their functions whenever the opportunity has arisen, including following their appointment.
>
> ERL has responded to all of the liquidators' questions and has even offered to meet with representatives of the liquidator to discuss any outstanding matters. Further, in March 2022, NRF re-sent certain documents to the liquidators, at their request,

> relating to 365 Co's leasing structure that had originally been provided to the liquidators on a memory stick following their appointment but, seemingly, had been mislaid in the meantime.
>
> Against that context, we note that the liquidators nevertheless apparently prefer to conduct their fact-finding with a high degree of formality and continue to maintain an adversarial tone, including in your letter under reply. This is regrettable."

43. The letter expressed surprise and implied disappointment that three years into the liquidation, NRF should only now be receiving requests to provide such basic information regarding 365Co as details of 365Co's finance director. NRF stated that at all times their client had been ERL and was never 365Co. Responding to the Liquidators' request for NRF to provide copies of all of its invoices to ERL including those involving advice relating to 365Co, they stated:

> "Not all solicitors who have been involved on ERL matters over the years remain with NRF today. Further, it will not be apparent to us from the face of invoices or the simple narratives accompanying them – and without carrying out a much more detailed interrogation of underlying documents, records and correspondence (many of which are likely to be subject to legal professional privilege) – whether a particular invoice for matters four years or more ago included work relating to 365 Co.
>
> This request is incredibly broad in scope. Complying with it – if, indeed, we were able to – would involve a great deal of time and effort, which would be unduly burdensome. We are not prepared to undertake this exercise in circumstances in which you have not explained why it is that you apparently require sight of our historic invoices for our third-party client.
>
> We suggest that it would be far more efficient if you simply confirm if there is a particular matter on which you require additional information."

44. NRF continued:

> "In the interests of continuing to cooperate with the liquidators' investigations, we have responded to your wide-ranging and non-tailored requests for information and documents below, to the extent that we are able. If there are specific matters on which you justifiably require information, and it is apparent to us why that information is needed for the purposes of the liquidation, we would be pleased to consider any additional requests."

45. Having then provided a response to each part of the Liquidators' request, their letter concluded, addressing the Liquidators' demand to be provided with details of any other matters relating to 365Co's assets and affairs "that might be relevant". NRF stated:

> "You have not explained why it is that you apparently reasonably require any of the requested information and documents. Therefore, we do not know why you consider it to be relevant. We do not understand – in this context, and over three years into the liquidation of 365 Co – how we can reasonably be expected to know what "other matters… might be relevant", from the liquidators' perspective."

46. The Liquidators appear to have passed the matter to their solicitors, DLA who replied on 22 September 2022:

> "The information you hold is believed to be of importance to enquiries being undertaken by the Joint Liquidators and we therefore request that you provide your response expediently and by no later than Friday 30 September 2022. If for any reason particular items of information and documentation cannot be provided by this date, then please let us know by return specifying the reason for further time being required for the applicable documentation or information and informing us of the date by which these will be provided."

47. The letter concluded by reminding NRF that the Liquidators would be entitled to seek the assistance of the Court to compel cooperation of third parties holding information to which the Liquidators are entitled.

48. NRF replied on 30 September 2022, noting that DLA had failed to acknowledge or engage with the detail set out in NRF's earlier letter of both NRF's and ERL's extensive cooperation to date. NRF explained, again, that 365Co was not NRF's client:

> "We had hoped that confirmation in these terms from a reputable firm of solicitors with a long-standing relationship with the Eversholt Rail Group would be sufficient for the liquidators' purposes."

49. They then addressed each factor that had apparently led the Liquidators to conclude that NRF's statement regarding the identity of its client was not correct. Finally, in relation to the wide request for documentation, NRF stated:

> "In relation to the liquidators' requests for information and documentation that we have been unable to accede to, we direct you to the explanations provided in our letters of 5 September 2022 and 29 January 2020.
>
> To reiterate, it would be most helpful – and efficient, in view of the interests of the creditors of 365 Co generally – if the liquidators simply identified any particular matter on which they require information. We will then consider any specific request for information and take instructions from ERL as to whether or not it is prepared for us to disclose the information in question – assuming, of course, that the requested information exists. In contrast, however, the liquidators so far have not only failed to identify any such matter, but failed to

> explain why they apparently reasonably require the wide categories of information that they have requested. Following our prior letter, the liquidators will be aware that the currently-requested information ranges over a period of approximately a decade and, in the period prior to the liquidation of 365 Co, involves wider restructuring considerations within the Eversholt Rail Group extraneous to, and unrelated to, 365 Co, i.e. certain such information relates to ERL and other group companies, including advice that is both privileged and confidential.
>
> In the circumstances, it seems odd that you have simply reiterated wholesale requests made previously, relying on unsubstantiated assertions about NRF's solicitor-client relationships and/or fanciful speculation about addressees of our legal advice on unspecified matters and/or a third party with whom that advice might have been shared."

50. On 19 October 2022, DLA wrote to NRF regarding documents believed to be held by ERL. The letter included another blanket request that ERL deliver up all records including, without limitation, all financial and accounting records of 365Co which were in their custody or control, as well as a request that ERL deliver up wide categories of documents for the four-year period leading up to its liquidation. Some of the listed categories were slightly more specific than others. However, the letter concluded with:

> "A list of all other records which your client holds in relation to its dealings with the Company (including board minutes, correspondence, emails, other accounting and commercial records), together with details of any third parties (including professional advisers to your client or the Company) who may currently hold any such records".

51. The explanation given for the request was:

> "The information your client holds is believed to be of importance to work being undertaken by the Joint Liquidators to recover (and re-constitute as applicable) the Company's records and to investigate pre-liquidation affairs and dealings of the Company."

52. The letter concluded with a statement that where the requested assistance was not voluntarily provided, the Liquidators may apply to Court pursuant to sections "234" and 236 of the Act to require compliance. The provision of such documents was described, notably four years into the liquidation, as a "phase one priority".

53. ERL's position was restated in a lengthy letter sent by NRF to DLA on 28 April 2023, highlighting both its proactive and reactive cooperation to the date of the letter, despite the Liquidators' failure to advance any requirement or explanation for their requests. They nevertheless provided further information.

54. Six months later, on 3 October 2023, DLA replied:

> "The fact that records and information of 365 and/or concerning 365's affairs are intermingled does not make those records confidential as against 365 and the Joint Liquidators are entitled to receive all such records on the basis that they relate to the affairs of 365 and fall within the scope of sections 235 / 236 of the Act.
>
> 1.2 It is clear that ERL holds substantial records concerning 365 which have not been produced. It is evident from your comments at the top of page 6 of your 28 April Letter that records are being withheld, without proper legal justification, by ERL in circumstances where they are intermingled. Such records are required by the Joint Liquidators in order to reconstitute the records of 365 and ascertain and investigate important affairs and dealings of 365 in the period prior to 365 being placed into liquidation. ERL is therefore required to deliver up all such records.
>
> 1.3 As has been clearly set out in our previous correspondence, pursuant to sections 235 and 236 of the Act, the Joint Liquidators are entitled to seek the delivery up of:
>
> (a) records of 365 which are controlled by or in the possession of ERL; and
>
> (b) records and information of ERL which concern the business, affairs, dealings or property of 365."

55. Thus it can be seen that four years into the liquidation, the parties were at an impasse: ERL and NRF maintained their willingness to provide documents in response to focussed requests explaining why they were reasonably required, whilst the Liquidators persisted in their demand that ERL and NRF provide absolutely everything they held "relating to" 365Co's business, complaining when apparent omissions came to light. DLA's letter concluded with notice of the Liquidators' intention to issue this application.

56. As noted before the above summary, the application, as issued and even after recent amendment, includes an equally wide description of all documents in ERL's possession, "including but not limited to" a list of specific categories of documents, many of which are themselves, broad. The words "relating to" suggest that the Liquidators' requirements extend beyond documents required to reconstitute what was within 365Co's own corporate knowledge.

57. Whilst the Court will give considerable weight to a liquidator's assertion of what he reasonably requires, as heralded at the start of this judgment and demonstrated by the extracts set out above, in this case, the Liquidators' evidence is largely devoted not to explaining or justifying their requirement, but to explaining why documents not yet disclosed by ERL "evidently" exist and asserting that such information and records "constitute records of 365Co and/or cover 365Co's business, dealings, affairs or property". Ms Matthews refers to such documents that will be "extremely valuable to the Joint Liquidators in progressing their investigations into 365 but have not been provided."

58. Such blanket statements provide no assistance to enable the Court to move to the second stage of the exercise it is asked to perform, where it must weigh in the balance the Liquidators' apparent need to see, in this case, pretty much everything held by ERL and NRF "relating to" 365Co since its incorporation, against any asserted inconvenience or oppression caused to the Respondents in providing it.

59. In my judgment, the application against ERL, as framed, is fundamentally misconceived. Mr Deacock's submissions revealed the error. He asked rhetorically why the Liquidators should not be in the same position that they would have been in, if 365Co had held its own records.

60. The answer is straightforward: the Liquidators are not in the position they would like to be in, because that was not how the ERL Group operated. They must work within the confines of the circumstances of the company to which they have been appointed.

61. Mr Deacock highlighted that the Services Agreement requires ERL to produce documents on 365Co's request. However, a review of the application and evidence reveals that the Liquidators' application has not been framed by reference to ERL's obligations under the Services Agreement or as an application for specific performance of those obligations. It is an application brought pursuant to both sections 235 and 236, supported by evidence referring to the Liquidators' unexplained need, but considered entitlement to reconstitute all of 365Co's books and records.

62. In light of ERL's significant cooperation to date (Mr Warsop's evidence refers to it having committed 420 man hours to the task) it strikes me as unfortunate that the Liquidators did not, at an early stage following their appointment, proactively request a meeting with ERL to discuss how and when it performed services for 365Co, where the relevant documents might be filed, to discuss possible search terms and to identify the relevant individuals whose accounts should be searched. Not only was such a request not made, but Ms Matthews' evidence states that she chose not to accept ERL's March 2023 offer of a meeting:

> "as an in-person meeting would be more appropriate once the documents sought by the Liquidators have been reviewed. That is usually the most expedient approach to take when investigating the affairs of a company, as it enables questions to be focused on specific enquiries arising from the records themselves."

63. This approach appears to fail to take into account that on her own evidence, 365Co's liquidation was not a "usual" scenario: (i) all of the company's documents were held by a third party; and (ii) the third party appeared both proactively, and in response to specific requests, to be willing to assist the Liquidators.

64. A meeting finally took place on an "open" basis on 26 June 2024, a few days before this hearing (following an earlier meeting in February 2024, which was expressed to be without prejudice, having been inconclusive). Ms Matthews states that the Liquidators requested the meeting on 26 June 2024 "so the parties had an opportunity to try and narrow the issues as between them prior to" the hearing. I understand that the parties met for almost seven hours. Whilst it was originally proposed that the parties would agree a note of the meeting to be provided to the court, instead, Ms Matthews filed a third witness statement setting out the Liquidators' view of the meeting. Even that one-sided statement demonstrates the willingness of ERL's

directors to provide information and that the discussion highlighted to the Liquidators the type of information that ERL might hold which the Liquidators may consider to be relevant. The Respondents suggested that it would be appropriate, following the meeting, to adjourn the hearing. The Liquidators did not agree. Nor did they seek to amend their application, by narrowing the relief sought.

65. If a reasonable requirement is identified, then the question of the burden on the respondent in complying must be viewed in the light of that requirement. Having concluded that the evidence fails to explain why all or any of the documentation sought by the widely-drawn application is reasonably required, there is no cause for me even to start to consider any alleged inconvenience or oppression on the part of ERL.

66. At the start of this judgment I highlighted two sub-paragraphs of the draft order that seek any legal advice or legal services provided by ERL's in-house lawyers "relating to 365 business" and any legal advice or legal services procured by ERL from NRF or any other person or entity "and relating 365 business" (sic). As with the rest of the application, the relief sought is unjustified in its breadth or purpose, extending even to advice which may have been sought without 365Co's knowledge and in circumstances where 365Co itself might not have been entitled to the advice.

67. Whilst I heard submissions on the scope of joint interest privilege, there is no limitation to the request by reference to such privilege. Consequently, no further, separate consideration needs to be given to these parts of the application against ERL.

68. The application against ERL fails and shall be dismissed.

The Liquidators' application for NRF to disclose information and documentation relating to 365Co

69. The order sought against NRF is in the following terms:

> "copies of any documents sought at paragraph 1 above [*i.e. from ERL*] which are held by [NRF] and relate to 365 business, except insofar as the same have already been provided in unredacted form by [ERL] or [NRF] and … a summary of any advice given save insofar as is set out in the documents disclosed."

70. The section of Ms Matthews' first witness statement (from paragraph 49) concerning the Liquidators' enquiries of NRF for information and records relating to 365Co includes a slightly more detailed explanation of the scope of the Liquidators' investigations and why they desire copies of some of the information and documentation believed to be held by NRF:

> "The legal advice (and contemporaneous factual records and information that was considered for the purpose of providing such advice) is likely to assist with the following (non-exhaustive) ongoing areas of investigation:
>
> 47.1 The re-leasing opportunities for the 365 Fleet in 2018 (as referred to in the 365 board minutes) and the ability of 365 to

> continue to trade as a going concern whilst these opportunities were pursued;
>
> 47.2 The financial position of 365 throughout the relevant period;
>
> 47.3 The steps taken by the 365 Directors once it became apparent that re-leasing opportunities for the Class 365 fleet were no longer achievable;
>
> 47.4 Payment of creditors and other financial and commercial dealings of 365 prior to its entry into insolvent liquidation; and
>
> 47.5 Taking steps to put 365 into liquidation."

71. However, the Liquidators' application is not restricted to documents addressing these areas of concern and despite being amended shortly before the hearing, no further limitations on the documents sought from NRF – temporal or otherwise - were introduced.

72. As with the application against ERL, the evidence in support of the application against NRF focusses on the Liquidators' *entitlement* as opposed to their reasonable requirement for documents held by NRF:

> "… it is evident that ERL acted extensively for 365 in relation to its business. 365 received legal advice in connection with the management and operation of 365 as a going concern, whether directly or indirectly from ERL In-House Legal or NRF and therefore the Joint Liquidators are properly entitled to receive a complete copy of the records held by ERL and NRF in connection with that advice in accordance with sections 234, 235 and 236 of the Act (as applicable)."

73. Mr Craggs clearly stated in correspondence and repeated in his evidence that NRF's client was ERL. In his first witness statement, he summarises his firm's correspondence with DLA, in which DLA appear, over time and notwithstanding NRF's unequivocal statement regarding the identity of their client, to have made contradictory claims that 365Co was NRF's client or the basis upon which 365Co was the "*de facto* client". The Liquidators highlight that ERL's claim in the liquidation included sums in respect of services provided by NRF to 365Co. However that part of ERL's claim was subsequently withdrawn and explained as an error.

74. No provision was sought in this application for the cross-examination of witnesses. In applications such as this, without cross-examination, the court will accept the evidence of witnesses unless inherently implausible or contradicted by the facts or documentary evidence. Despite DLA's insistence in correspondence that the board minutes suggested to the Liquidators that NRF's *de facto* client was 365Co, during the hearing before me, no submissions were made to the effect that Mr Craggs' evidence should not be believed.

75. Instead, legal submissions were made regarding joint interest privilege. The first difficulty for Mr Deacock, when making those submissions, was that he was unable to

point to any specific category or categories of documents sought by the application to which such privilege would apply.

76. The Respondents recognise that privilege is not abrogated by sections 235 and 236 of the Act. They also recognise that insofar as advice was given by NRF for the benefit of 365Co then ERL cannot assert privilege against the Liquidators. But they urge the Court to exercise caution before determining, more generally, that there was joint privilege in advice obtained by ERL from NRF. Starting with the limited areas in which the court has been prepared to recognise a joint interest for the purposes of privilege, ERL and 365Co were not in a relationship of parent company and subsidiary. They were "sister" companies. As far as the other examples are concerned, the Services Agreement expressly provides at clause 3.8 that nothing in the agreement will be deemed to constitute a partnership, joint venture or other cooperative entity between the parties, nor constitute either party the agent of the other, for any purpose.

77. Secondly, as matters stand, no evidence has been put before the court of legal advice obtained by ERL being habitually disseminated to 365Co. The fact that 365Co might have been the subject of advice given by NRF to ERL does not appear, from the authorities cited to me, to be enough to give rise to joint interest privilege.

78. Ultimately, regardless of the potential merits of any argument that could be raised regarding common or joint interest privilege, as with ERL, the breadth of the order sought against NRF is currently so wide and unsupported by any evidence to explain the Liquidators' reasonable requirement to see all the documents falling within it, that the application against NRF must fail.

Conclusion

79. The Liquidators' application is dismissed.