



Neutral Citation Number: [2022] EWHC 922 (CH)

Case No: CR-2021-000044

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 13/4/2022

Before :

MRS JUSTICE JOANNA SMITH DBE

Between :

**THE SECRETARY OF STATE FOR BUSINESS,
ENERGY AND INDUSTRIAL STRATEGY**

Claimant

- and -

- (1) RICHARD JOHN ADAM
(2) RICHARD JOHN HOWSON
(3) ZAFAR IQBAL KHAN
(4) KEITH ROBERTSON COCHRANE CBE
(5) ANDREW JAMES HARROWER DOUGAL
(6) PHILIP NEVILL GREEN CBE
(7) ALISON JANE HORNER
(8) CERI MICHELE POWELL

Defendants

Mr Mark Cunningham QC, Mr David Mohyuddin QC, Ms Anna Lintner and Mr Benjamin Archer (instructed by **Womble Bond Dickinson**)
for the **Claimant**

Mr Andrew Thompson QC and Mr Philip Morrison (instructed by **Herbert Smith Freehills**) for the **Fourth to Eighth Defendants**

Hearing date: **8 April 2022**

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 13 April 2022.

MRS JUSTICE JOANNA SMITH:

1. This is an application by the Fourth to Eighth Defendants, all Non-Executive Directors (the “**NEDs**”) of Carillion PLC (“**Carillion**”) prior to its collapse. Together with the First to Third Defendants, the NEDs are the subject of disqualification proceedings pursuant to the Company Directors Disqualification Act 1986 commenced by the Claimant in January 2021. The application seeks an order restricting the scope of the case that the Claimant may advance at trial against the NEDs to the content of a Schedule (“**the Schedule**”) attached to the draft order, alternatively an order requiring the Claimant to serve particulars of his case, as if commenced under CPR part 7.
2. In circumstances where the issues raised in the application require a swift decision if the timetable laid down at the Case Management Conference on 26 November 2021 is not to be jeopardised, I have prepared this judgment over a weekend and I will be inviting the parties to provide their comments on it as swiftly as possible so that it may be handed down and an order made without delay.

THE BACKGROUND TO THE APPLICATION

3. In accordance with rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987/2023 (“**the Rules**”), the Claimant’s case against the NEDs is set out in an affidavit from Ms Cheryl Lambert dated 12 January 2021 (“**the Lambert Affidavit**”).
4. The allegations of unfit conduct against the NEDs fall into two categories. The first, referred to in the Lambert Affidavit as the “**NED Allegation**” and set out in paragraphs 18, 20, 22, 24 and 26 of the affidavit against each of the NEDs respectively, is recognised by the Claimant to be novel but said to be justified owing to the scale of Carillion’s collapse and the consequent focus on what the Claimant describes as the NEDs’ “contributory responsibility for the misconduct of the executive directors”.
5. The NED Allegation asserts that by reason of the NEDs’ failure to discharge certain duties they owed as directors, they “bear responsibility” for the unfit conduct of the other directors which resulted in (amongst other things) material misstatement of profits in Carillion’s financial statements for the Financial Years 2015 and 2016. It is the Claimant’s primary case under this allegation that the NEDs’ duties (“**the Duties**”) (as identified in paragraph 1159 of the Lambert Affidavit in the form of strict duties) were “inescapable and personal” and that they breached those duties “*per se*”, amongst other things, by their failure to know Carillion’s true financial position. Alternatively it is alleged that the NEDs breached their duties by failing to heed a series of warning signs referred to in the Claimant’s evidence.
6. The second category of allegations against the NEDs are referred to as “**Direct Allegations**”, namely Allegations 5, 6, 7 and 8. These are identified in the Lambert Affidavit as being “in addition” to the NED Allegation, albeit “inextricably tied” to the failings of the NEDs as described in the NED

Allegation. With the exception of Allegation 7, which is made against Mr Green alone, these allegations are made against each of the NEDs. Further, they are all formulated in the same way; they each allege that the NEDs caused Carillion to take certain steps in circumstances where they ought to have known that such steps were inappropriate.

7. Taking Allegation 5 by way of example, the allegation (as formulated in paragraph 1164 of the Lambert Affidavit) is that the NEDs:

“...caused Carillion plc to prepare and publish Financial Statements for the year ending 31 December 2015 which they respectively **ought to have known (but did not owing to their breaches of duty)** did not give rise to a true and fair view within section 393 of the Companies Act 2006 and did not comply with IAS 11...” **(emphasis added)**.

8. This is said to have come about “as a result of” the NEDs’ failure “to discharge their duty to keep themselves properly and promptly informed” (that being the first of three duties alleged in paragraph 1159 of the Lambert Affidavit). Allegations 6, 7 and 8 are all in similar form.

9. The Direct Allegations have always been formulated as “additional” to the NED Allegation. However, it is the NEDs’ case that the way in which they are set out in the Lambert Affidavit appears plainly to indicate that they are “parasitic” on the NED Allegation, in the sense that they are dependent upon establishing breaches of the Duties identified in paragraph 1159 of the Lambert Affidavit. A Response to a Part 18 Request For Further Information served by the Claimant on 4 February 2022 (updated on 7 February 2022) appeared to confirm this understanding, expressly confirming that the Claimant does not rely on (i) any facts and matters in respect of the Direct Allegations save for those relied upon in relation to the NED Allegations and (ii) any breaches of duty in relation to the Direct Allegations beyond those relied upon for the purposes of the NED Allegations.

10. However, since then, it appears that confusion has crept in. In a letter dated 17 February 2022, the Claimant’s solicitors said this:

“6.1 Your clients’ breaches of the duties set out at paragraph 1159 of Lambert 1 form the basis for the NED Allegation. **However the breaches do not form the “basis” for the Direct Allegations.**

6.2 Whilst it is our client’s case that it was your clients’ breaches of the duties (forming the basis of the NED Allegations) which resulted in them additionally committing the misconduct particularised in the Direct Allegations, **it is not part of our client’s case to allege any breach of duty in respect of the Direct Allegations”**

(emphasis added).

11. Mr Thompson QC on behalf of the NEDs says that it now appears from this letter that the Direct Allegations are said to be separate and independent allegations of misconduct, not involving any allegation of breach of duty. If that is so, then they

are entirely undefined and unparticularised: what is the conduct which is alleged to be unfit and by what standard is that conduct to be judged?

12. The NEDs' solicitors responded to the 17 February 2022 letter on 23 February 2022 pointing out that the suggestion that it was not part of the Claimant's case to allege any breach of duty in respect of the Direct Allegations appeared to be "a fundamental change to [the Claimant's] case, involving the wholesale abandonment of the case advanced in Lambert 1 as regards the Direct Allegations and its replacement with something else, the effect of which is at present entirely unclear to us". This prompted a firm rejection from the Claimant on 4 March 2022, together with a yet further formulation of his case (apparently reverting back to the "parasitic" approach as previously understood) as follows:

"Our client simply alleges by those paragraphs (e.g. the language "[a]s a result") that it was your clients' breaches of the Duties (forming the basis of the NED Allegation) which resulted in their additional unfit conduct particularised in the Direct Allegations. In other words, our client does not allege that if (for instance) your clients knew the true financial position of Carillion plc that their conduct particularised in the Direct Allegations would nevertheless have followed. It was their respective breach of the Duties which, as we have said, resulted in that additional unfit conduct. It is for that reason that our client avers the unfit conduct particularised in the Direct Allegations is "inextricably tied" to your clients' breach of the Duties (see paragraph 1164 of Lambert 1)".

13. It is against this background of apparently shifting formulations that the NEDs have made the application, concerned to obtain both clarity as to the case being advanced against them and certainty that (once this case is identified) it is the only case that will be advanced against them at trial – subject to any formal amendments made to the Claimant's case to which they have consented or in respect of which the court has granted permission.
14. Attached to the application is the Schedule, prepared by the NEDs, in which they have sought to set out their understanding of the Claimant's case as it has been put against them in the Lambert Affidavit and subsequent Responses to Requests for Further Information.
15. The Schedule deals with both the NED Allegations which are, for the most part, not in dispute and to which I shall return later in this judgment, and the Direct Allegations. As to the latter, there is very significant disagreement between the parties as to what constitutes a fair summary of the Claimant's case and the Claimant has responded to the Schedule with its own revised version, clearly illustrating the extent of the disagreement between the parties.
16. In his written submissions, Mr Cunningham QC on behalf of the Claimant confirmed that the Direct Allegations "were the consequence of the NEDs failure to discharge the Duties...that are the subject of the NED Allegation" but went on to say that nevertheless "the Direct Allegations are additional, distinct and the subject of the NEDs' direct personal responsibility. No mention of the Duties is made in the Direct Allegations and these allegations are not presented as sub-allegations of the NED Allegation". During his oral submissions, Mr Cunningham formulated the stand-alone Direct Allegations as involving the

following elements: (i) the NEDs were acting as Directors; (ii) who approved the accounts; (iii) those accounts were false – as evidenced by the totality of the Lambert Affidavit; and (iv) the NEDs should have known that they were false.

17. Pausing there, the suggestion that “No mention of the Duties is made in the Direct Allegation” (which is redolent of the assertion by the Claimant’s solicitors in the 17 February 2022 letter that the Duties do not form the basis for the Direct Allegation) again appears to me to be confusing and inconsistent given the clear link made in paragraph 1164 of the Lambert Affidavit (and other similar paragraphs) between the allegation that the NEDs “ought to have known” and the assertion that they did not know “owing to their breach of the Duties”. The same difficulty arises in Mr Cunningham’s oral formulation, which also makes no reference to any breach of duty. If the Claimant does not rely on any breach of duty for his stand-alone case based on the Direct Allegations, what is the basis for the allegation that the NEDs “ought to have known”? What standard of conduct is being applied?
18. The Claimant’s revised Schedule does not appear to me to grapple with this issue at all. Instead, it returns to the case that it was the NEDs’ “antecedent breaches of the Duties (forming the basis of the NED Allegation) which resulted in the additional unfit conduct...”.
19. During the course of his written and oral submissions, Mr Cunningham confirmed that the specific conduct relied upon in relation to the Direct Allegations as against each NED is that conduct set out in paragraphs 19.1-19.3, 21.1-21.3, 23.1-23.4, 25.1-25.3 and 27.1-27.3 of the Lambert Affidavit; in other words, causing Carillion to (i) prepare and publish defective 2015 Financial Statements (Allegation 5); (ii) prepare and publish defective 2016 Financial Statements (Allegation 6); (iii) make the unwarranted 2016 final dividend payment (Allegation 7); and (iv) (in Mr Green’s case only) make a misleading market announcement on 1 March 2017.
20. Mr Cunningham submitted, and I agree, that this conduct has always been clearly identified in the Lambert Affidavit, although I doubt that the Claimant’s insistence on including cross references to evidence on this topic at paragraph 28 of his revised Schedule has assisted in ensuring clarity. Mr Thompson described it as apparently seeking to ensure “wriggle room” for the Claimant’s case at trial.

DECISION ON THE APPLICATION

21. As I made clear during the hearing, I do not consider that it would be fair or just to impose upon the Claimant a formulation of his case which he does not recognise. I agree with Mr Cunningham that this would be a most unusual course for the court to take and (insofar as the Schedule proposed by the NEDs does not reflect the Claimant’s existing case) would have the effect of striking out that case through the back door.
22. However, I do not doubt that (in the circumstances I have set out above) more clarity is required as to the way in which the Claimant intends to advance his case against the NEDs on the Direct Allegations at trial. It is not acceptable for the

Claimant to say one thing in his Rule 3(3) affidavit and quite another thing in correspondence and in court. Mr Cunningham submitted that the Claimant's approach has been consistent throughout, but I am bound to say that the apparent introduction of a stand-alone case on the Direct Allegations, independent of any breach of the Duties, does not appear to me to be consistent with the case as set out in the Lambert Affidavit.

23. Mr Cunningham reiterated at the outset of the hearing that these proceedings are of a very serious nature, involving the sudden and precipitate collapse of the second largest building company in the UK. Their purpose is the protection of the public in both the narrow sense of excluding unfit directors from being directors, and the wide sense of deterring similar conduct and raising standards. However, that does not mean that there is justification for leaving the Defendants in the dark as to the precise nature of the case that will be advanced against them at trial or justification for creating confusion around the scope of that case. The Claimant is not exempt from the rules that govern civil litigants.
24. As Falk J observed in *Re Keeping Kids Company* [2021] EWHC 175 (Ch) at [798]:

“A disqualification order involves penal consequences, and a defendant to disqualification proceedings must know and have proper notice of the case they have to meet. The substance of the case that the defendant is required to meet must be set out (*Re Lo-Line Electric Motors Ltd* [1988] (Ch) 477 at pp.486-487 per Sir Nicholas Browne-Wilkinson VC; *Re Sevenoaks Stationers (Retail) Ltd* [1991] (Ch) 164 at pp.176-177 per Dillon LJ; *Secretary of State for Trade and Industry v Goldberg* [2003] EWHC 2843 at [51] per Lewison J). The defendant should be able to ascertain with clarity exactly what the allegations are and on what evidence the applicant intends to rely...”.
25. In that case, the Judge also observed that the difficulties she had in understanding the single allegation were “compounded by the way in which the case was developed at trial, with a significant focus on aspects that were either not dealt with in the Official Receiver’s report or at least not clearly framed as parts of the ‘single allegation’” (para [796]). The Judge made a similar point at paragraph [899] when she observed that the central difficulties in the case had been caused by “a lack of clarity about exactly what the allegation or allegations meant, and a tendency for criticisms made of the defendants to expand and alter”. The Judge pointed out that “great care” should be taken to ensure that allegations are “clearly framed, both so that the defendants can fairly understand and prepare for the case they have to meet, and so that the court can properly address it”.
26. To my mind, the differing formulations of the Direct Allegations that are now being advanced by the Claimant suggest that, absent action being taken at this stage by the Court, similar problems are likely to be encountered by the Judge at the trial of these proceedings.
27. In this context, I note also a related discussion that has been taking place between the parties around the question of whether the Claimant will seek to rely on duties under section 174 of the Companies Act 2006. In a letter of 19 January 2022, the Claimant confirmed that he did not intend to allege any breach of the duty to

exercise reasonable skill, care and diligence. He also confirmed in a Response to a Part 18 Request that he does not put in issue the reasonableness of the NEDs' conduct in allegedly failing to understand the true financial position of Carillion. However, in a letter of 4 April 2022, the Claimant asserted that section 174 "is relevant to the standard" against which the NEDs would be judged by the court. He went on to say that "...the relevant standard fixed by the Court is a matter for skeleton arguments and legal submission in due course".

28. Mr Thompson rightly points out that if and insofar as the Claimant intends to allege breach of section 174 of the Companies Act 2006, that must be done well in advance of the hearing and should have been done in the Lambert Affidavit, so as to ensure a proper opportunity on the part of the NEDs to respond (*Official Receiver v Atkinson* [2020] EWHC 2893 per Falk J at [24] and [26]).
29. Mr Cunningham confirmed in his oral submissions that the Claimant has no intention to rely upon breaches of section 174 of the Companies Act 2006 at trial, but pointed to the recognition by Falk J in *Atkinson* that the ultimate question is one of unfitness and that in the circumstances it would not be appropriate to prevent any party at trial from referring the court to the tests in section 174, because of their potential relevance to the question of unfitness, even where no allegations of breach of that section have been made.
30. To my mind, this discussion only serves to highlight the lack of clarity around the standard by which the NEDs are to be judged in relation to the Direct Allegations. At present, and in light of the differing formulations of the Claimant's case, there is no clear anchoring of those allegations. If they are not to be anchored in the breach of Duties set out in paragraph 1159 of the Lambert Affidavit how are they to be anchored? By what standard are the NEDs to be assessed? What is it that the NEDs need to respond to in their evidence? A general proposition that reference may be made at trial to section 174 in connection with establishing the appropriate standard (presumably in connection with identifying how or why it is alleged that the NEDs "ought to have known") does not seem to me, in the circumstances of this case (which are very different from those with which Falk J was concerned in *Atkinson*), to be sufficient.
31. In this context, Mr Thompson drew my attention to *Secretary of State v Goldberg* [2003] EWHC 2843 per Lewison J who, whilst advocating a broad brush approach by the Court to the statutory test, nevertheless said at [42]:

"The identification of the standard of conduct laid down by the law is important for two reasons. First because the question of unfitness to do something can, as it seems to me, only be judged against an expectation of what is required of a person doing, or attempting to do, that thing".
32. In all the circumstances, I have little doubt that the Claimant must be required to set out in a clear and (hopefully) final form (subject to amendments that may be prompted by evidence served in the future by the Defendants) the case on which he wishes to rely at trial against the NEDs in respect of the Direct Allegations. I have considered whether I should simply order that the Claimant be restricted to the case as advanced in the Lambert Affidavit, but on balance I consider that would be unfair to the Claimant, particularly given that the Claimant continues to

insist that he is not going to rely on any evidence in relation to the Direct Allegations over and above the evidence on which he intends to rely for the NED Allegation.

33. There is some urgency around the identification of the Claimant's case owing to the fact that, pursuant to the Case Management Order of 26 November 2021, the Defendants are all obliged to serve their evidence in reply to the Lambert Affidavit by 25 July 2022. As Mr Whiteoak explains in his statement in support of the application, clarity is required in order for the NEDs properly to consider the scope of their responsive evidence.
34. It is in neither the Claimant's nor the Defendants' interests that the trial date in this case be lost, and I indicated to counsel during the course of the hearing that I have no intention of allowing that to happen (obviously barring some previously wholly unforeseen event).

THE FORM OF ORDER

35. As I have said, I am not going to order that the Claimant's case is reflected by the Defendants' Schedule and I do not presently consider that the Claimant's case as now articulated is properly set out in his revised Schedule. I am not going to order formal Points of Claim which I have little doubt would cause delay and may have ramifications for other Defendants who were not before the court at this hearing.
36. Instead, in the broad exercise of my discretion pursuant to CPR 3.1(2)(m), I am going to order that the Claimant must particularise the Direct Allegations in an appropriate form; I consider this to be entirely consistent with the requirements of the overriding objective and the need for robust case management. I did not understand Mr Cunningham to suggest that it was not within my power in a disqualification case to make such an order.
37. I do not expect these particulars to be lengthy or time-consuming to draft (particularly given Mr Cunningham's assertion on more than one occasion during the hearing that the case was a straightforward one) and I can presently see no reason why they should take more than 14 days to prepare (although I appreciate that some leniency may be necessary owing to the impending Easter vacation).
38. However, I do expect that the particulars will provide the NEDs with the clarification and certainty that they need. In the event that they do not do so, then I intend to make provision in the order for the matter to be brought straight back to me, on paper if thought appropriate, for further guidance.
39. My understanding at present is that the Direct Allegations are capable of being parasitic on the NED Allegation but that, in addition, they are said to be capable of standing alone, without reference to the alleged breach of Duties relied upon for the purposes of the NED Allegation (although if I am wrong, then this issue may itself need to be explored by particulars and would be a yet further ground for concern over lack of clarity). I do not believe that the NEDs have any difficulty in understanding the purely "parasitic" allegations.

40. Accordingly, at present, I am minded to order that insofar as the Direct Allegations are not parasitic upon the NED Allegation and insofar as they are said to be stand-alone independent allegations which do not rely upon any alleged breach of the Duties identified in paragraph 1159 of the Lambert Affidavit, the Claimant must:

particularise (with the level of particularity on which he will seek to rely at trial):

- i) The conduct on which he relies in seeking to establish unfitness (if I have understood it correctly, this will consist of four different events as identified above, which do not need to be embellished by reference to evidence. However, given the issues that have been raised during the hearing, I think it sensible that this issue be finally resolved on paper);
- ii) The facts on which he will rely in asserting that such conduct amounts to unfit conduct, including:
 - a) The facts (not evidence) on which the Claimant will rely in asserting that the NEDs “ought to have known” – in respect of each of the Direct Allegations this will involve identifying the facts which it is alleged the NEDs ought to have known and identifying how and why it is said that the NEDs ought to have known those facts;
 - b) Any standard against which the Claimant will allege at trial that the NEDs’ conduct must be judged.

41. However, I am conscious that neither side has provided me with detailed input as to this and that I should not make an order in these terms without giving the parties an opportunity to comment on it. Accordingly, on the basis that I will certainly make an order for the provision of further particulars, I invite both sides to provide me with their constructive suggestions for such particulars by 4pm on Tuesday 12th April 2021. In circumstances where the parties have just argued the case before me and there is a considerable degree of urgency in dealing with this, I see no unfairness in placing some time pressure on the parties in this regard. As may be appreciated from my own formulation, I do not anticipate lengthy or convoluted requests, just as I do not wish to see lengthy or convoluted answers.

42. Once the Claimant has provided these particulars, I envisage that a further Schedule be drawn up and agreed between the parties designed to reflect the entirety of the Claimant’s case on the Direct Allegations (alternatively that the Claimant’s case on the Direct Allegations be added to the existing Schedule dealing with the NED Allegation, which I address below). If necessary, this may be approved by the Court on another occasion.

43. I appreciate that the Claimant has maintained throughout that further particulars are not necessary and will be disappointed that I disagree. However, in circumstances where I am satisfied that there is a genuine lack of clarity around his case, I hope that he will understand that it is in his best interests now to remedy the position with as much clarity and precision as he can muster. Continuing lack of clarity is only likely to cause yet further delay and further expense.

44. As for the NED Allegation, the scope of this allegation is very close to being agreed, as reflected in the latest iteration of the Schedule and, given the history of this case and the desirability of achieving certainty going forward, I consider it sensible to make an appropriate order as to its status. However, I am not prepared to do so in the terms preferred by the NEDs (as set out in their version of the Schedule). The Claimant has proposed what appears to me to be reasonable wording for a Schedule reflecting his case and I am going to order that the Schedule in the form most recently proposed by the Claimant (together with the concessions as to a few words here or there made during the hearing by Mr Cunningham and without the section on the Direct Allegations) should stand as the Claimant's case on unfitness at trial, subject to any application to amend that case and subject to any answers provided by the Claimant to the Fourth RFI served by the NEDs. I am also going to order that insofar as any changes are made to the NED Allegation by reason of amendment or the answers to the Fourth RFI (when they are served), those changes (even though identified elsewhere) should be added to the Schedule in due course so as to assist the trial judge and the parties in having the full case clearly set out in one place.
45. I am satisfied that this is a fair order to make in relation to the NED Allegations where Mr Cunningham confirmed that the Claimant's proposed Schedule accurately reflects the Claimant's case. I cannot see that it undermines the Rule 3(3) affidavit in circumstances where it plainly provides more detailed particulars than are provided in that affidavit of the NED Allegation and preserves the Claimant's right to refer to the Lambert Affidavit for the purposes of the evidence. I invite the Claimant to provide the court with a final version of the Schedule as revised to reflect the points I have referred to above. This may then be attached to the final order.
46. It will be necessary to deal with the question of the (very substantial) costs arising on this application in due course and a further hearing may prove necessary. However, for now, I am keen to ensure that an order is made dealing with the issues I have identified above and I invite the parties to liaise over an appropriate draft.
47. I presently anticipate that I shall hand this judgment down remotely on the afternoon of Wednesday 13th April and that I shall make an appropriate order including the directions I have referred to above at the same time. There will be no hearing and I am in any event aware that Leading Counsel on both sides would not be available for such a hearing. Insofar as the parties are unable to agree on any of the directions, they should identify areas of disagreement which I shall then determine on the papers immediately prior to making my order.