Case No: 2008-1082/2009-897/2009-604

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Neutral Citation Number: [2011] EWHC 3221 (Comm)

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

Date: 28/11/2011

Before :

MR JUSTICE HAMBLEN

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Between :

Andrew Brown & others	**Claimants**
- and -	
Innovatorone Plc & others	**Respondents**

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- -

Mr J Powell QC, Mr G Chapman, Mr Shail Patel and Mr Can Yeginsu (instructed by **Enyo Law LLP**) for the **Claimants**
Mr P Carter in Person
Mr B Steidl in Person
Mr D Gates in Person
Mr A George (instructed by Kingsley Napley LLP) appeared on behalf of the **Sixth Defendant**
Miss S Carr QC and Mr T Chelmick (instructed by Byrne & Partners) appeared on behalf of **the Seventh Defendant**
Mr J Fenwick QC, Mr B Hubble QC and Mr B McGurk (instructed by Beachcroft LLP) appeared on behalf **of the Eighth Defendant**
Mr N Meares (instructed by Blount Petre Kramer) appeared on behalf of Vermillion International Investments Limited
Hearing dates: 21 and 24 November 2011

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JUDGMENT
(Approved)

MR JUSTICE HAMBLEN:

Introduction

1. This is an application by the claimants to re-re-amend the Particulars of Claim.

2. The background to the present application is set out in my ruling of 2nd November 2011 in which I determined that certain averments made by the claimants in opening required to be pleaded.

3. Following that ruling, the present application was issued on 8th November 2011 and the main hearing of the application took place on 21st November 2011, Day 20 of the trial. This led to a further short hearing on 24th November, Day 23 of the trial. The trial is presently due to carry on until mid-February 2012 and the defendants are due to start giving evidence from 29th November 2011.

4. The amendments fall under three heads. Firstly, there is an amendment to the conspiracy claim in paragraph 331 of the Re-Amended Particulars of Claim ("RAPOC"). Secondly, there is an amendment to paragraph 244 of the RAPOC in relation to the claim made against Mr Roper in misrepresentation. Thirdly, and most controversially, there is an amendment to schedule GS13 to the RAPOC, adding 29 new allegations of backdated documents.

The relevant principles

5. I was referred to the often cited dictum of Lord Justice Peter Gibson in *Cobbold v Greenwich Borough Council* which has for some time been set out under the heading "General principles for grant of permission to amend" in the White Book at 17.3.5. It states as follows:

> "The overriding objective of the CPR is that the court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but justly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party [or parties] caused by the amendment can be compensated for in costs, and the public interest in the [efficient] administration of justice is not significantly harmed."

6. In recent years the courts have been more willing to recognise that prejudice may be caused by amendments which cannot be compensated for by costs, particularly in the context of late amendments. As Lord Griffiths stated in *Ketteman v Hansel* [1987] AC 189 at page 220E "... justice cannot always be measured in costs ..."

7. If, for example, an amendment requires an adjournment, that may well cause significant prejudice regardless of any award of the costs of the adjournment. Parties to litigation have a legitimate expectation that trials will be conducted on the dates fixed for trial by the court and that the trial will not be put back or delayed without good reason. The disruption caused thereby to other litigants is also now recognised as a relevant factor to take into account.

8. As stated by Lord Justice Waller in the case of *Worldwide Corporation v GPT Limited* [1998] EWCA Civil 189 at pages 12 to 13:

> "... in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked around' at the last moment. Furthermore, the courts are now much more conscious that in assessing the justice of a particular case, the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales."

9. A party against whom an amendment is sought to be made may well be reluctant to request an adjournment precisely because of the disruption and prejudice it will cause. Prejudice may nevertheless be suffered if, for example, the party will be significantly hampered in the preparation for, and conduct of, the trial.

10. As Lord Justice Waller observed in the *Worldwide* case at pages 11 to 12:

> "Equally when a case has been prepared with witness statements and experts' reports on one way of putting the case, it is harsh to criticise advisors of the defendants for asserting that they would need some period in which to examine the extent to which the amendments affected them and their witnesses. The periods laid down for production of witness statements and experts' reports are there so that they can be served on the other side in good time and so that the conduct of a trial can be as expeditious as possible. Forcing a party to look again at those statements and the experts' reports at the same time as conducting the trial is not fair or conducive to the efficient conduct of the trial."

11. In the light of considerations of this kind, it has been stated that a heavy onus lies on a party making a very late amendment to justify it. Lord Justice Waller stated in the *Worldwide* case at page 21:

> "We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both both to him, his opponent and other litigants, requires him to be able to pursue it."

12. That passage was cited in the later Court of Appeal case of *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735, in which Lord Justice Lloyd stated as follows at paragraph 72:

> "As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

13. He also observed at paragraph 104:

> "The matters which need to be considered for this purpose include the terms of the amendment, the previous history as regards amendment, including the sequence of events in April 2010 which led to the first amendments, the absence of any evidence explaining why the re-amendment was sought to be made so very late, and the various factors relevant to prejudice to each side…."

14. As the authorities make clear, it is a question of striking a fair balance. The factors relevant to doing so cannot be exhaustively listed since much will depend on the facts of each case. However, they are likely to include:

(1) the history as regards the amendment and the explanation as to why it is being made late;

(2) the prejudice which will be caused to the applicant if the amendment is

refused;

(3) the prejudice which will be caused to the resisting party if the amendment is allowed;

(4) whether the text of the amendment is satisfactory in terms of clarity and particularity.

The conspiracy amendment

15. The amendment consists of clarifying that the claimants' conspiracy case does not relate to Mr Evans after his death and only relates to Mr Gates in relation to the GT1 and GT2 schemes. It does not involve a fundamentally new or different case.

16. The defendants, and in particular Ms Carr on behalf of Mr Bailey, object that the claimants' case is still unclear in that it remains obscure whether they are alleging a single conspiracy or a multiple conspiracy.

17. The claimants contend that that is an unsound distinction and that a single conspiracy may be said to have multiple overlapping agreements at various times, and that a multiple conspiracy might equally be said to have common victims and overlapping perpetrators. The question in every case, they submit, is whether a defendant is liable in the tort of conspiracy.

18. I agree with the claimants that their conspiracy case is sufficiently pleaded once one has regard not just to the RAPOC but also to the Reply and the Further Information which has been provided. The amendment adds to the clarity of that pleading and narrows the assertions made, at least as far as Mr Gates is concerned. The objections which are raised go more to the existing plea of conspiracy than to the amendment.

19. In my judgment no prejudice would be caused by the amendment. Indeed, the amendment helps the position of Mr Gates and, having regard to the various considerations which I have outlined, I am satisfied in the exercise of my discretion that I should grant permission to make this amendment.

Paragraph 244

20. This amendment consists of making it clear that no cause of action against Mr Roper is alleged in relation to the misrepresentation by silence that was allegedly made at meetings in January 2005.

21. Again, this is the amendment that cannot cause any prejudice to Mr Roper, since it involves the removal of a possible cause of action, and ultimately was not opposed by him, and I accordingly grant permission to make that amendment.

The backdating allegations and schedule GS13

22. It was this amendment that gave rise to the most dispute between the parties. The existing schedule GS13 comprises 14 headings involving allegations of backdating, although under a number of those headings there are various agreements and documents which are referred to. The amendment introduces a further 29 allegations of particular documents being backdated.

23. This amendment has been vigorously opposed by all the defendants, particularly on the grounds of the prejudice which they say would be caused if it were allowed.

(1) The history of the amendment and the explanation as to why it is being made late

24. The defendants point out that substantially all the documents upon which the amendments are based were provided in disclosure which took place in August 2010 and that many will be likely to have been provided before then as part of Innovator's disclosure. The claimants have therefore had the relevant documents for a considerable period of time and the Claimants accordingly submit that there can be no good reason for the lateness of the amendment.

25. The claimants' main response is to submit that in order to make the backdating allegations, a detailed analysis was required of all the documents taken together and that this is a very substantial exercise. It was carried out with the assistance of leading counsel in relation to the YTC scheme between November 2010 and April 2011, and was then carried out in relation to the other schemes, leading ultimately to the amendments and the changes to the schedule which are now put forward.

26. It is pointed out by the claimants that the documents may have been familiar to the defendants but they were not to them, and they have had to go through all of the documents in this painstaking and time-consuming way.

27. I accept that the analysis of the documentation is a substantial task, there are a large number of documents to be considered and I accept that this is a task which takes time. However, the claimants have a responsibility to have this case ready for trial in good time. The date for this trial was fixed a long time ago on the basis that the parties would be ready by this date and it is the claimants' responsibility to be so.

28. The other point made by the claimants is that they did not appreciate that there was a need to plead these allegations. I have already determined, in

my earlier ruling, that they were wrong about this, and that too is a matter for which they must be responsible.

29. In summary, this is a case where there is an explanation for the lateness of the amendments and to an extent the delay is understandable. Nevertheless I do not accept that a good reason has been shown for why these amendments are coming forward so late. The claimants have a responsibility to get their case ready in time, particularly a case such as this, involving allegations of dishonesty.

(2) The prejudice which will be caused to the claimant if the amendment is refused.

30. The claimants point out that they are not alleging any new cause of action through these amendments. Their case is that they wish to provide further examples to back up their existing case in relation to the backdating of documents. This case goes essentially to the allegations made of dishonesty. Dishonesty is relevant to the conspiracy claim, which is made against all the active defendants except Mr Roper, and also to the dishonest assistance claim, which is made against all of those defendants. In addition, some of the documents have relevance to the claimants' case in relation to the fulfilment of the IM conditions.

31. The claimants say that although it involves no fundamental change of case, these are important documents for the purpose of their presentation of the case at trial and that they will be prejudiced if they are not allowed to advance them.

32. The fact that there is no new cause of action brought into play by the amendments is said by the defendants to be a factor against allowing the amendment. In this connection I was referred to the Court of Appeal decision in *Savings & Investment Bank Limited v Fincken* [2004] 1 WLR 667, in which Lord Justice Rix said in relation to the amendments considered in that case at paragraph 75:

> "It is not as though the liquidators' case in these proceedings has been inadequately analysed so that the amendment requested, although late, is necessary to give coherence to that case, in order that 'the real dispute can be adjudicated upon'. On the contrary, the amendments are merely further examples of that 'real dispute'"..."

33. Similarly in this case, it is said that the amendments are merely further examples of the “real dispute” but are not essential to it.

34. I accept that prejudice will be caused to the claimants if the amendments

are refused. It will tie their hands in relation to their wish to investigate and pursue these allegations in the evidence at trial. However, it has to be acknowledged the prejudice is not as great as it would be if the amendment concerned a new and important cause of action or was central to the case.

(3) The prejudice which will be caused to the defendants if the amendment is allowed

35. All the Defendants contend that prejudice will be caused which cannot be compensated for in costs.

36. In relation to the position of Mr Bailey there is a witness statement from his solicitor, Ms Boulton. It is said that substantial prejudice would be caused to him if he and his legal team were required to deal with these significant and numerous allegations at this late stage of the proceedings. It is estimated that up to 50 hours would be required to address the issues properly. It is pointed out that as a working solicitor there is only a limited amount of time he can devote to the case; that he was planning to be in court for all of the defendants' evidence; that his own evidence is due to start on 14th December and, given the imminence of the commencement of evidence by the defendants, to require him now to address these further allegations would cause significant prejudice. It is also said that he is under considerable personal stress and strain, which prolongs what would otherwise be the time required to deal with detailed matters of this kind.

37. Mr Roper put his own witness statement before the court. He, too, stressed that there was a limited amount of time available for him to deal with these allegations. He and his legal team estimated that it might take up to two months to do all the work required if these applications were to be addressed properly. His evidence is, however, due to start on 8th December and it was contended that to require him to carry out this further work at this late stage would be seriously prejudicial.

38. Collyer-Bristow acknowledged that their position in terms of prejudice was dependent on that of Mr Bailey and Mr Roper. However, they pointed out that they would not be in a position to know exactly how they were affected until they were provided with the answers of Mr Bailey and Mr Roper to these further allegations and that, therefore, there was a timelag effect as far as they were concerned which heightened the prejudice to them.

39. As far as Mr Carter is concerned, he, too, objected to these further amendments. He is the subject of all the proposed amendments and therefore has a particular burden to face. He had explained, in a letter, his position in relation to the earlier allegations of backdating and it would be

unfair to him to require him now to respond to these further numerous allegations, particularly bearing in mind that he is due to start giving evidence on 29th November.

40. Mr Stiedl also objected to these various amendments and he is due to give evidence on 1st December. He, too, contended that he would be prejudiced by being required to deal with these further allegations at such a late stage.

41. In relation to all the personal defendants, I was reminded of what Lord Griffiths said in the *Ketteman* case at page 220 E to F where he said this:

> "... a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other."

42. The claimants submit that in considering the prejudice to the defendants, it is of relevance that they are not asserting a new cause of action or a fundamentally new case and that, therefore, less prejudice would be caused than if that were so.

43. They also point out that although some of the defendants are unrepresented they do have the advantage, on many issues, of a common position with the represented defendants who are assisted by large and experienced legal teams.

44. They also submit that the time which is said would be required to deal with these amendments has been greatly exaggerated.

45. I accept that the defendants will be prejudiced if they have to deal with amendments at this late stage of the proceedings in a manner which cannot be compensated for in costs. That is particularly so if they have to deal with 29 new allegations.

46. I also accept, however, that there is a degree of exaggeration about the time which would be required to deal with the amendments. If one has regard to the evidence relating to the existing backdating allegations, the general point, which is made on behalf of Mr Bailey, Mr Roper and Mr Carter, is that insofar as there are any documents which bear a date different to that on which the agreement was executed, that is because it reflects the fact that the actual agreement was made at that earlier date and therefore does not truly involve any backdating at all. One suspects that is

insofar as any further "backdating" is established by these new allegations a similar general answer will be made. It is also right to observe that when one looks at the detail with which the existing allegations are dealt with in the witness statements, it does not take up a great deal, in proportionate terms, of those witness statements and they are addressed in relatively brief terms. Again, one suspects that if there are to be further witness statements dealing with the new allegations, they too, ultimately, would be addressed in relatively brief terms.

47. Nevertheless, I accept that prejudice would be caused to the defendants by these amendments, particularly if they had to deal with all 29 of the proposed new allegations.

(4) Whether the text of the amendment is satisfactory in terms of clarity and particularity.

48. Various criticisms were made of the amendments as proposed. In particular, it was objected that the amendments do not set out proper or sufficient particulars. The allegations are particularised by reference to the claimants' opening submissions, and in many cases to a number of paragraphs of those submissions, and that is not a proper or sufficient basis upon which to make the case clear.

Conclusion

49. It is, as the authorities make clear, a question of striking a fair balance and that is a fact-dependent exercise. My conclusion, having carefully reviewed the parties' submissions and evidence, is that in relation to the original amendments proposed in GS13, the balance should be struck by allowing only a limited number of those proposed amendments to be put forward.

50. To allow 29 new allegations of backdating to be advanced at this stage of the trial would, in my judgment, be unfairly prejudicial to the defendants, who already face a considerable burden in dealing with this case and are in the midst of preparing for their own evidence.

51. On the other hand, to shut out all these new allegations would, in my judgment, be unduly prejudicial to the claimants. This is an important part of their case and they wish to pursue these allegations at trial and, in relation to a number of the documents, those documents will no doubt have to be addressed in the evidence in any event.

52. In his reply at the 21st November 2011 hearing Mr Powell had a fallback position whereby he identified ten documents which he said were the most

important of those represented by the existing proposed amended schedule.

53. At the conclusion of the hearing I indicated to Mr Powell that I was not prepared to grant permission to amend for more than the narrowed, ten further allegations, but before finally determining whether to do so I required him to set out in a properly particularised schedule exactly what the case was in relation to each of these allegedly backdated documents, and not by reference to opening submissions. I also ruled that one of those amendments, amendment 1B, depended on facts which were already pleaded in relation to 1A, and that in my judgment there could be no objection to that particular amendment and so it should be allowed.

54. That then led to a resumed hearing on 24th November 2011, at which there was a revised schedule GS13, which was set out in a similar form to the existing GS13, with comments and supporting documents identified in a specific column. It was also made clear against whom each allegation was addressed.

55. The defendants maintained their objections to this revised schedule and made a number of points.

56. Firstly, they said that the amendment was still insufficiently clear and in particular that it was not clear how it related to the existing causes of action. However, the amendments as reformulated reflect the existing GS13 and are put in similar terms to the existing allegations, identifying the particular documents relied upon in support of each allegation. No objection had previously been taken to the form of GS13, and GS13 was responded to in both the pleadings and the witness statements. In my judgment the amended version of GS13 can be dealt with in a similar way.

57. As to causes of action, as the claimants have made clear, the amendments do not go to establishing a new cause of action. They essentially go to the case on dishonesty and provide further support, the claimants say, for that general case. In my judgment schedule GS13 as revised is sufficiently clear and particularised to constitute a proper amendment.

58. The next main objection which was taken was that the amendments involved three allegations concerning Arte documents. It was said that hitherto there had been no specific allegations of dishonesty against Mr Bailey and Mr Roper in relation to the Arte scheme, and it would be unfair and unduly burdensome to allow such allegations to be introduced at this stage.

59. However, the Arte scheme is included within the general allegations of dishonesty which are made in relation to dishonest assistance and conspiracy. It is therefore included within the claimants' dishonesty plea and the Arte scheme is something which is already addressed in the witness statements which have been put forward. In all the circumstances I am not satisfied that including these further limited allegations is going to cause undue prejudice.

60. Finally, on behalf of Mr Bailey it was submitted that the amendment relating to Arte has no real prospect of success so far as he was concerned. It was pointed out that none of the documents which are referred to are documents which involve him. However, Mr Bailey was involved in the payments made in relation to the Arte scheme, which are an important element of the dishonest assistance plea, and retained a responsibility for the documents, whatever his involvement in their individual production may have been. I am not satisfied that this is a case where it is so clear that the claim will not succeed that the claimants should be shut out from even pursuing the plea.

61. In summary, having considered the revised amendments, I have reached the conclusion that the claimants should be allowed to make the amendments on the basis of the revised schedule GS13. In terms of the striking of a fair balance, I consider that allowing these limited number of new allegations is the appropriate way to do so in the interests of justice to all parties. I have made it clear that I would not require there to be any pleading to this further schedule but that the defendants would have liberty to put in further witness statements dealing with the specific allegations if they so wished. On that basis, in the exercise of my discretion I allow the amendments on the basis of the revised schedule GS13.