Neutral Citation Number: [2021] EWHC 2827 (Comm)

Case No: CL-2020-000451

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2021

Before:

Mr David Railton QC
(sitting as a Deputy Judge of the High Court)

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Between :

(1) DISCOVERY LAND COMPANY, LLC	**Claimants**
(2) TAYMOUTH CASTLE DLC, LLC	
(3) THE RIVER TAY CASTLE LLP	
- and -	
AXIS SPECIALTY EUROPE SE	**Defendant**

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Mr William Flenley QC and Ms Heather McMahon (instructed by **Davis Woolfe Limited**) for the **Claimants**
Mr Patrick Lawrence QC and Ms Helen Evans (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 13 October 2021

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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.

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DAVID RAILTON QC

Mr David Railton QC:

1. In this action the Claimants claim just under £6 million from the Defendant insurer under the Third Parties (Rights against Insurers) Act 2010. The claim arises from three underlying claims made by the Claimants against various entities providing legal services to them or their assignors and referred to in these proceedings as the Jirehouse Entities. The legal services provided were in connection with the purchase of Taymouth Castle in 2018. Mr Stephen Jones was a director or member of the Jirehouse Entities, and it is common ground in this action that the three underlying claims arose out of his dishonesty, in particular the dishonest dissipation of purchase monies intended to be used for the purchase of the Castle, and the dishonest raising of finance against it.

2. The Defendant was the primary layer professional indemnity insurer of the Jirehouse Entities. The insurance provided by it was written in accordance with the Solicitors Regulation Authority (the "*SRA*") regulatory regime for compulsory primary layer insurance for solicitors in private practice in England and Wales. The policy issued by the Defendant contained an exclusion in clause 2.8 which provided that the Defendant would have no liability for claims involving dishonest or fraudulent acts, errors or omissions committed or condoned by the insured, subject to the proviso that (a) the policy shall cover the civil liability of any innocent insured, and (b) no dishonest or fraudulent act shall be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company, or in the case of a Limited Liability Partnership, all members of that Limited Liability Partnership.

3. Mr Vieoence Prentice was registered at Companies House as a director or member of each of the Jirehouse Entities from 2 June 2017 until his resignation on 15 March 2019. If he were indeed a director or member of the Jirehouse Entities in that period, the proviso to clause 2.8 of the policy would be engaged unless the dishonest or fraudulent acts of Mr Jones were condoned by Mr Prentice. There were accordingly, in this context, two potential defences under the policy to a claim by the Jirehouse Entities available to the Defendant, namely (i) that Mr Prentice was not in fact a genuine director or member of the Jirehouse Entities, and that the arrangements purporting to appoint him as such were a sham, and (ii) that Mr Prentice condoned the dishonest and fraudulent acts of Mr Jones.

4. When the Jirehouse Entities first claimed on the policy, the Defendant (by letter from its solicitors dated 14 August 2019) declined cover on the basis that Mr Prentice was not in fact (or was not to be treated as) a director or member of the Jirehouse Entities at the relevant times (the "*sham partnership*" argument). As made clear in the declinature letter, the Defendant's provisional view (having interviewed Mr Prentice and others) was that Mr Prentice did not himself commit or condone Mr Jones's dishonesty, but it "*reserved all rights to review and revise that provisional view as and when any further information or documentation is provided to us, including on other notified claims*".

5. The Claimants obtained judgments against the Jirehouse Entities on the three underlying claims in July 2019, and shortly afterwards entered into correspondence with the Defendant in relation to the present claim, sending a formal letter of claim pursuant to the *Practice Direction – Pre-Action Conduct and Protocols* on 25 September 2019. In that correspondence the Defendant, by its solicitors, informed the Claimants that it had declined cover on the basis of the Fraud and Dishonesty exclusion (clause 2.8), and subsequently provided a copy of the declinature letter to them. The Defendant made

clear that its coverage investigations continued in relation to "*the extent to which there are grounds to assert that [Mr Prentice] condoned [Mr] Jones's dishonesty*" (letter of 7 February 2020), and that it "*continued to investigate the extent of Mr Prentice's involvement and knowledge regarding Mr Jones's acts and use of client money*" (letter of 2 April 2020).

6. On 20 July 2020 the Claimants issued the present claim against the Defendant. The Defence and Counterclaim served on 16 September 2020 expressly took the "*sham partnership*" point, but otherwise repeated the substance of the reservation in the declinature letter, stating that "*The Defendant does not yet hold full information and documentation on the issue of Mr Prentice's conduct and/or knowledge of Mr Jones's acts. Consequently, the Defendant reserves the right to amend this Defence if and when appropriate*" (paragraph 59).

7. It appears that in about August 2020 the Defendant conducted a review with Leading Counsel as to the question of whether Mr Prentice had condoned Mr Jones's activities. Following that review the Defendant took steps (amongst other things) to access documents held by the Jirehouse Entities on their server. This required the server to be reconstituted by external consultants at considerable expense. As the SRA had intervened and closed the Jirehouse Entities in May 2019, the process needed to be carried out through the SRA, and Devonshires, who were acting for the SRA. Inevitably, following the Court of Appeal decision in *Quinn Direct Insurance Ltd v. Law Society* [2011] 1 WLR 308, there were a number of privilege issues which needed to be considered, and there was in the event a lengthy and expensive process for the identification and review of relevant documents by independent counsel before they could be provided to the Defendant.

8. At the time of fixing the first CMC in this action, in December 2020, the Claimants' solicitors stated in correspondence that it "*has always been acknowledged that [the Defendant] might apply for permission to amend its pleadings once it has obtained third party disclosure*" (email of 15 December 2020). While the Claimants confirmed that they would not simply object to any application to amend as a matter of principle, they made clear that they could not consider the position before any proposed amendments were received, and objected to any delay to the CMC.

9. By the time of the CMC in April 2021, and as a result of the documents which it had by then received from the Jirehouse Entities' server, and from other enquiries made by it, the Defendant considered that it had sufficient material to allege that Mr Prentice condoned Mr Jones's dishonesty. The Defendant made clear at the CMC that it intended to apply to amend its Defence and Counterclaim, and the Court (Mr Peter MacDonald Eggers QC) noted in a recital to the Order made on 16 April 2021 its indication "*that it is expected that the Defendant will make the contemplated application for permission to amend the Defence and Counterclaim by 4pm on 30 July 2021*". The Court gave directions on the basis of the then existing pleadings, including for a 6 day trial (with one reading day) to be fixed for a date not before 1 May 2022. In the event the trial was fixed for 6 days commencing on 11 July 2022, with a reading day on 7 July 2022.

10. As anticipated, the Defendant made its application for permission to amend the Defence and Counterclaim on 30 July 2021, expressly asserting in the draft amended pleading an alternative case that Mr Prentice condoned Mr Jones's dishonesty. A slightly revised

form of the draft amended Defence and Counterclaim was produced by the Defendant on 6 October 2021, and the parties agree that it is that version of the amendments which I should consider. A number of matters are sought to be relied on in support of the condonation case, including Mr Prentice's involvement in various other transactions and matters, as summarised in paragraph 40 of the draft pleading. The result is to extend the length of the original pleading from 25 to 53 pages (with a further 16 pages of annexes). As referred to below, it is apparent that further disclosure and factual witness evidence will be needed to address these matters at trial.

11. The Defendant contends that the Court should exercise its discretion to grant permission to make the amendments, essentially for the following reasons:
    a. The amendments reveal a properly pleaded case of condonation against Mr Prentice with a real prospect of success.
    b. The amendments are based on material which has come to light over time, and in a piecemeal fashion, including from documents held on the Jirehouse Entities server, where the Defendant's access to the information is controlled by the SRA.
    c. The steps taken by the Defendant, and the timing of them, to investigate and then plead the condonation case were reasonable and proportionate.
    d. The amendments do not prejudice the current trial date in July 2022.
    e. While the amendments will lead to further disclosure and additional factual evidence, there is ample time to accommodate the necessary steps before the current trial date.
    f. The material, or substantial elements of it, which is relied on in support of the amendments will be relied on by the Defendant in any event in connection with the existing "*sham partnership*" defence, and it would be unrealistic and prejudicial to the Defendant if it could not at the same time put forward its condonation defence.

12. The Claimants contend that permission to make the amendments (save for a comparatively minor one in relation to aggregation, in respect of which no issue arises) should be refused. The Claimants essentially rely on the following matters:
    a. The amendments are being put forward at a late stage, as a result of delays for which the Defendant has only itself to blame.
    b. In particular, the Defendant failed to take the *Practice Direction – Pre-Action Conduct and Protocols* seriously, including by deciding not to investigate the condonation issues further in late 2019 or early 2020, but only doing so once the present claim was issued.
    c. While it is accepted that there are (wholly foreseeable) issues in getting access to documents on the Jirehouse Entities server, those documents would have been available to the Defendant much earlier had it started its investigation earlier.
    d. A number of matters relied on by the Defendant in the amendments are not in any event based on documents received from the Jirehouse Entities server, but were available to the Defendant from other sources, including in relation to other claims made against the Jirehouse Entities while it was their insurer.
    e. The amendments, if permitted, will either cause the existing July 2022 trial date to be lost, or would put the Claimants at a considerable and unfair disadvantage at trial.

f. The additional steps necessary if the amendments were permitted, including in relation to disclosure, are likely to cause considerable delay and expense.
g. Furthermore, while the Claimants do not contend that the amendments have no real prospect of success, the Court should take into account that aspects of them appear weak.

13. The principles to be applied in considering the Defendant's application to amend are not in dispute. They were conveniently summarised by Carr J in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) as follows (at [38]):

> *38. Drawing these authorities together, the relevant principles can be stated simply as follows:*
>
> *a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;*
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> *b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;*
>
> *c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;*
>
> *d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;*
>
> *e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;*
>
> *f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;*
>
> g) *a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence*

> *if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.*

14. In applying these principles to the current application, it is convenient to start with the effect the amendments might have on the trial date, should they be allowed. As already referred to, the trial date has been fixed for 6 days, with one reading day, for July 2022. For a case which was (as originally pleaded) not intended to give rise to any oral evidence, whether factual or expert, that might have been considered to be a generous estimate. While the amendments do not necessitate any expert evidence, it appears that in view of the factual allegations now made Mr Prentice will be called by the Claimants (and I understand will be so called whether or not permission to make the amendments is granted). In addition the Defendant has indicated that it may call two witnesses who were for a short period of time employed at the Jirehouse Entities to give evidence in support of the new allegations.

15. As to Mr Prentice, Mr Lawrence QC, who appeared for the Defendant on this application, informed me that no more than 2½ days would be required for his cross-examination. While it was necessarily difficult for Mr Flenley QC (who appeared for the Claimants) to give at this stage an estimate for the cross-examination of the two witnesses the Defendant indicated it might call, it appeared unlikely that more than ½ or 1 day would be needed for that purpose. On the current estimate for the July 2022 trial of 6 days, that would leave some 2½ to 3 days for opening and closing submissions.

16. Mr Flenley QC was concerned as to whether that would be sufficient time, in particular for the Claimants to digest matters arising in Mr Prentice's cross-examination, and to prepare appropriate oral and written closing submissions for the Court. He made a number of suggestions as to how the position could be protected, including by (i) extending the trial estimate by 2 days, the Court having indicated at the hearing that it could do so without the need to adjourn the trial (it having previously indicated that it could extend the estimate on that basis by one day only); (ii) the agreement and provision of the trial bundle in good time in advance of the trial, by 4pm on 16 June 2022; (iii) the provision by the Defendant (on who the onus lies to make good its reliance on the exclusion in clause 2.8 of the policy) of its skeleton argument for trial by 4pm on 23 June 2022, with the Claimants' skeleton following a week later by 4pm on 30 June 2022. Mr Lawrence QC was content to agree to each of these suggestions.

17. On the basis of the information currently before me, I consider it doubtful (should the amendments be allowed) that the trial of this case would need 8 days of Commercial Court time, as well as one reading day. In view of the position of the parties, however, if the amendments were to be permitted the trial estimate should be increased as suggested by Mr Flenley QC. I am satisfied that this will be sufficient time for the Claimants to address fairly the amended case at trial. This revised estimate will of course need to be kept under review by both parties, and should they subsequently consider a reduced estimate to be appropriate, they must of course inform the Court accordingly. As for the other suggestions made by Mr Flenley QC, these are all sensible, and are

clearly appropriate in this case as a matter of case management, whether or not the amendments are allowed.

18. This is accordingly, in my judgment, not a case where the trial date is at risk if the amendments are permitted. It is not suggested by the Claimants that the additional steps necessary to be taken by way of pleading in response to the amendments, and further disclosure and evidence in the light of them, would themselves imperil the trial date, which is still over 8 months away. It is however important, if the amendments are to be allowed, that any outstanding disclosure issues are dealt with promptly. This includes any application for third party disclosure which the Defendant may make against the SRA, and which it appears will be necessary whether or not the amendments are permitted. The Defendant has indicated that it intends to make that application in the course of the week beginning 18 October 2021. I address further disclosure and pleading issues below in connection with the order I am asked to make on this application. I am however satisfied that there is adequate time for them to be carried out well in advance of the current trial date.

19. This is accordingly not a case where the application to amend is "*very late*". It is however a late application, and it is necessary to consider the various factors relating to the amendments, and their timing, as outlined in the authorities and summarised by Carr J in *Quah Su-Ling* at [38]. As to the nature of the proposed amendments, I am satisfied on the limited information I have seen that they overall have a real prospect of success. In so far as the Claimants consider that certain aspects of them need clarification or further particularisation, then they should write to the Defendant accordingly, or make an appropriate Request for Further Information.

20. The real complaint by the Claimants however, and the issue at the heart of this application, is the reason for the delay in putting forward the amendments. The Claimants point to the terms of the *Practice Direction - Pre-Action Conduct and Protocols*, the objectives of which are stated to include (in paragraph 3) the exchange by the parties of sufficient information to (a) understand each other's position; (b) make decisions about how to proceed; and (f) reduce the costs of resolving the dispute. As stated in paragraph 6:

> *the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate. The steps will usually include … (b) the defendant responding within a reasonable time—14 days in a straight forward case and no more than 3 months in a very complex one. The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim; and (c) the parties disclosing key documents relevant to the issues in dispute.*

21. The Claimants contend that the Defendant simply did not take the requirements of the *Practice Direction - Pre-Action Conduct and Protocols* seriously both in relation to its "*sham partnership*" defence, and the condonation defence it now seeks to advance. In relation to the "*sham partnership*" defence, the Claimants point to the Defendant's delay after the pre-action letter of 25 September 2019 in producing the letter of declinature,

which was only provided on 24 February 2020. This in turn led to requests by the Claimants for a copy of the transcript of an interview with Mr Prentice referred to in the declinature letter, which was only produced on 9 June 2020, after the Claimants prepared a draft application for pre-action disclosure. The Claimants say that in this respect "*key documents relevant to the issues in dispute*" had to be dragged out of the Defendant, and it did not comply with the *Practice Direction - Pre-Action Conduct and Protocols* in that it did not act within a reasonable period (see paragraph 14(c)). The Claimants further contend that this failure should be taken into account when the Court is giving directions for the management of the proceedings, including on this application (see paragraph 13).

22. In relation to the condonation case, the Claimants' complaint is that the Defendant seemingly took no steps to investigate it until after the claim was issued in July 2020. They contend that the Defendant should have taken steps in and after late 2019 to investigate the position, and to obtain the relevant documents, and it was not reasonable or proportionate for it to sit back and do nothing (if that was indeed what it was doing) until the present claim was issued. Accordingly any delay has been caused by the Defendant's own conduct, and in so far as it may be prejudiced by the amendments not now being allowed, it has only itself to blame.

23. The Defendant's response in relation to these points is essentially that it was reasonable and proportionate for it to rest on its "*sham partnership*" defence unless and until it knew that the Claimants really were proceeding with their claim. It is not clear on the material before me what investigations if any were in fact carried out by the Defendant into the condonation issues between September 2019 and August 2020. As referred to above, the Defendant's letters of 7 February and 2 April 2020 intimated that it was investigating the position, but no evidence has been adduced as to what those investigations were, which would in any event (in the usual course) be likely to be privileged.

24. As to the alleged failures to provide the declinature letter and the transcript of the interview referred to in it within a reasonable time, the Defendant points to the fact that issues of privilege arise in relation to such matters, and they took time to deal with. It contends that it acted reasonably, and that its conduct in relation to those matters is not to be taken into account against it on this application. On the material before me I am not able to conclude that the Defendant acted unreasonably in the timing of the production of these documents to the Claimants.

25. Further, in my judgment it was not an unreasonable position for the Defendant to adopt to hold back from making further investigations into its potential alternative defence of condonation until August 2020. A full investigation into that issue would be expensive and time consuming, as indeed it has proved to be since August 2020. It was not unreasonable to hold off taking stock of the position, and incurring those further costs, until it was known whether or not the Claimants were pursuing the claim. The Defendant had made clear in the declinature letter and subsequent correspondence that it was a matter in respect of which it was reserving its position, and the Claimants were aware that this was an area in respect of which the Defendant might subsequently advance a positive defence. The fact that the Defendant held back from investigating this alternative defence is nonetheless a factor to be taken into account in the overall exercise of discretion on this application.

26. In this connection, it is right to note, as the Claimants have pointed out, that a number of the matters relied on in support of the amendments are not based on (or not solely based on) documents found on the Jirehouse Entities server. In particular, allegations relating to what have been referred to as the "*L&E claims*" appear to have been taken from files made available to the Defendant by the solicitors who were acting for the Jirehouse Entities and the Defendant in the defence of those claims. These files were supplied to the Defendant in March 2021. There is no obvious reason why they could not have been supplied to the Defendant earlier, had the Defendant wished to see them. The Defendant asserts that the relevance of these claims to the condonation issue was not appreciated until it learned of the misappropriation of a deposit (referred to as the "*Good Faith Deposit*") in relation to another claim (the "*Rheno claim*") in mid-2020. There are in turn issues between the parties as to precisely when the Defendant learned enough about the Rheno transaction to be put on enquiry as to Mr Prentice's condonation. There are also criticisms made by the Claimants of the explanation put forward by the Defendant as to the timing of certain elements of the investigation.

27. In the overall scheme of this application, and given my conclusion in paragraph 25 above, it is not necessary for me to make particular findings as to these criticisms. On the basis of the information before me, I do not conclude that the Defendant acted unreasonably in its investigations into the condonation defence after August 2020. On the limited material before me I do however accept the Claimant's general point that the Defendant could have investigated the condonation issues relating to the L&E claims and the Rheno claim earlier than it in fact did. It also seems that its investigations in relation to those matters, in so far as they did not involve documents from the Jirehouse Entities server, could have proceeded more rapidly once the decision to investigate them was made in August 2020. It is also the case that once the Defendant considered it had enough material to plead a condonation case in April 2021, that it could have pleaded it before the end of July 2021. The Defendant's response to this, which I accept, is that it was at that time waiting for as many pieces of the jigsaw to be available as possible before pleading its proposed amendments as comprehensively as it could, and this included waiting for further documents from the Jirehouse Entities server.

28. These are, again, factors to be taken into account in the overall exercise of my discretion. As to that, the starting point is that the amendments contain a properly pleaded case with a real prospect of success. They do not imperil the existing trial date in July 2022, and there is adequate time between now and then to carry out the further interlocutory steps necessary to accommodate them. Other than the inconvenience of having to address the condonation case in the form of an amendment, as opposed to being part of the original case, I do not consider that the Claimants will be materially prejudiced as a result of this case being raised at this stage. These factors point towards permitting the amendments, as does the fact that much of the material on which they are based will feature in any event at the trial of the existing "*sham partnership*" issue.

29. In my judgment the Defendant's conduct in relation to the timing of the investigation of this element of its defence (which I do not consider to be unreasonable), both between late 2019 and August 2020, and then between August 2020 and July 2021, does not in all the circumstances point to a different conclusion. I accordingly grant permission to the Defendant to amend the Defence and Counterclaim in the form put forward on 6 October 2021.

30. As to consequential matters, the Defendant has put forward a draft Order with its skeleton argument, which has (contingently) been largely agreed between the parties. By reference to the paragraphs of that draft Order:
    a. I understand paragraphs 1-4 to be agreed.
    b. Paragraph 5 concerns the costs of the hearing for permission to amend, on which I would invite the parties to make submissions in writing in the light of this ruling.
    c. As to paragraphs 6-8, the Claimants need more time to consider and address the Defendant's proposed list of issues, and draft amended DRD. The date for disclosure in paragraph 7 is agreed; the date for disclosure in paragraph 8 should be 8 December 2021, with (in each case) no separate date for inspection.
    d. As to paragraph 9, the further CCMC should be fixed as soon as possible for a date not before 8 December 2021, with a time estimate of ½ day.
    e. As to paragraph 10, the date for exchange of witness statements should be extended to 28 January 2022, and the dates for ADR should be extended to the end of February 2022.
    f. As to paragraph 11, the trial listing should be extended by 2 days, and the order should include the further provisions outlined in paragraph 16 above in relation to the agreement and production of trial bundles, and the service of skeleton arguments.

31. I would invite the parties to agree a form of Order incorporating the above.