Neutral Citation Number: [2019] EWHC 1023 (QB)

Case No: LM-2017-000087

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

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

Date: 18/04/2019

Before :

MARTIN GRIFFITHS QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

(1) DANIEL DONOVAN
(2) NALED LIMITED **Claimants**

- and –

GRAINMARKET ASSET MANAGEMENT LLP **Defendant**

- -
- -

Dominic Howells (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Jonathan Seitler QC (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing date: 17 April 2019

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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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MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

Martin Griffiths QC (sitting as a Deputy High Court Judge) :

1. This is an application by the Claimants for permission to amend their Amended Claim Form, their Amended Particulars of Claim and their Re-Amended Reply and Defence to Counterclaim. The trial of the action is due to begin on 10 May and the application is opposed in relation to some but not all of the proposed amendments.

The opposed amendments

2. I will say no more about the unopposed amendments, which I allow.

3. The opposed amendments are as follows:

   i) Addition of a new paragraph 14A to the Re-Amended Particulars of Claim, reading:-

   > "By the New Fund Agreement, Mr Donovan [i.e. the First Claimant] and GAM [i.e. the Defendant] agreed to carry on a business in common with a view to profit, namely the business of the joint venture. In the premises, by entering into the New Fund Agreement, alternatively by commencing the joint venture, Mr Donovan and GAM formed a partnership."

   ii) Under the heading "Claim", addition of new sub-paragraphs 56A.2 and 56A.3 to the Re-Amended Particulars of Claim, reading:-

   > "56A.2 an order for the taking of an account of all dealings and transactions between the parties to the joint venture as co-partners; and
   >
   > 56A.3 an order that the Defendant pay to the Claimant the sums certified to be due to him upon the taking of the said account."

   iii) Addition of the following underlined words to the preamble with which paragraph 63 of the Re-Amended Particulars of Claim begins, as follows:-

   > "Alternatively, if (contrary to the Claimant's primary case) there was <u>no partnership and no</u> contract between the parties whatsoever, or if a contract did exist but did not contain the terms pleaded above:" (etc).

   iv) Addition of the following paragraph to the Prayer for Relief at the end of the Re-Amended Particulars of Claim:-

   > "(1A) A partnership account;".

4. Without these amendments, the Claimants' case is a claim for payments due under an alleged contract (the contract being referred to as "the New Fund Agreement") or alternatively as a *quantum meruit* claim. The opposed amendments, however, introduce as the Claimants' new primary case a claim that the First Claimant and the Defendant were partners within the meaning of the Partnership Act 1890 ("the 1890 Act") and that

the First Claimant is entitled to the taking of a partnership account, and payment, accordingly. The proposed amendments to the Claim Form are dependent on the proposed amendments to the Re-Amended Particulars of Claim.

The timing of the opposed amendments

5. Counsel for the Claimants, Mr Howells, who has argued the application powerfully and clearly, frankly admits that this alternative case could have been made at any time, and that the only reason why it is made at this late stage, shortly before the trial is due to begin, is that his predecessor as junior Counsel was not available for the trial due to begin on 10 May; that he himself was recently instructed as a replacement (on 3 March this year); and, bringing his fresh eyes to the case, he suggested putting the case as an 1890 Act partnership case. He did say that, very early on in the litigation, before he was involved, consideration had been given to the point, but at that stage the decision was to focus on the case as an ordinary contract claim. Although he has appeared alone today, his clients have at all times been, and still are, represented by leading as well as junior Counsel.

6. After his instruction, proposed amendments were submitted to the Defendant under cover of a letter dated 25 March. The letter somewhat mischaracterised the amendments, however, as "intended to narrow and clarify the quantum issues and to make minor factual and legal clarifications", rather than stating that they included substantive amendments to the cause of action and the relief claimed. This was unfortunate, because the Defendant, being fully engaged in preparations for the imminent trial, did not immediately appreciate that there was any urgency in engaging with the proposed draft given the other demands of its trial preparation.

7. By 28 March, the Defendant's solicitors had realised that the amendments were not "minor factual and legal clarifications" as alleged, and said so in a letter, observing that the drafts would be considered with Counsel.

8. By letter of 1 April, the Defendant's solicitors asked the Claimants' solicitors to state their position in relation to a timetable for service of the amended pleading and consequential amended pleadings, and in relation to a timetable for "Supplemental witness statements on the issue of whether the relationship between the parties was one of partnership, the nature and scope of that partnership, and whether or not the partnership was dissolved in February 2015 (or since)"; and for "Evidence for the purposes of a partnership account as at February 2015 (or such other date of dissolution that your clients might contend for)"; and for "Evidence as to the value of each party's contribution to the partnership alleged."

9. In a reply dated 2 April, the Claimants' solicitors proposed that the Re-Re-Amended Defence and Counterclaim should be served by 15 April, and denied that any further evidence would be necessary even if the amendments were allowed.

10. The Defendant's solicitors sent a holding response on 3 April, stating that their leading and junior Counsel were not available until the evening of the next day, and followed up with a substantive objection to the opposed amendments in a detailed letter of 4 April, setting out the difficulties and unfairness which (they said) would be caused by the addition of a partnership claim to the Particulars of Claim at such a late stage.

11. The application to amend was issued on 5 April 2019 and listed before me as a matter of urgency because of the closeness of the trial date, which is just over 3 weeks from now.

Procedural history

12. Since timing is one of the factors relevant to the exercise of deciding whether an amendment should or should not be allowed, I will set out the procedural history which has led to this point.

13. The relationship between the Claimants and the Defendant is contested, but it is common ground that, whatever it was, it arose out of an oral agreement. The Claimants say that the agreement (which they call the New Fund Agreement) was reached in early 2013, and subsequently varied, whereas the Defendant says that, while terms began to be discussed in November 2012, the parties had by conduct entered into a contract "at some point between December 2012 and June 2014" (paragraph 9.1 of the Re-Amended Defence). The terms of the agreement are disputed, but they concerned some sort of collaboration in relation to the development of five properties through special purpose vehicles, the properties being identified in paragraph 17 of the Amended Particulars of Claim and paragraph 17 of the Re-Amended Defence as Slough, Farnborough, Elstree, Reading and High Wycombe.

14. It seems that the relationship between the First Claimant and the principal partner at the Defendant (Mr Crader) broke down in early 2015 and the First Claimant stopped collaborating. The various projects proceeded, and the Claimants now claim monies which they say are due to them as a result. A letter of claim was written by the Claimants solicitors in September 2016. Correspondence followed, but did not resolve the dispute.

15. The Claim Form and Particulars of Claim were dated 22 May 2017, and were followed by a Defence (in June 2017) and a Reply (in September 2017).

16. A Case Management Conference took place before His Honour Judge Waksman QC on 1 December 2017, which provided for amendment of pleadings (including the addition of the Second Claimant as a party) and a 5-day trial not before October 2018. Disclosure was ordered, to cover documents relied upon and responsive to any requests for specific disclosure. A date for exchange of evidence of fact was set, as was a timetable for expert evidence.

17. The pleadings were duly amended, starting with an Amended Claim Form and Amended Particulars of Claim on 4 December 2017, and continuing with an Amended Defence and Counterclaim (February 2018) and Amended Reply and Defence to Counterclaim (March 2018). At this point, the case was still a contract claim, with a *quantum meruit* claim in the alternative. There was no reference in any pleading to an 1890 Act partnership.

18. There were some disputes in relation to disclosure, but they were resolved without recourse to the Court, with the Defendant eventually accepting more limited disclosure from the Claimants than it had asked for. The Defendant now says that, had the Claimants' case been put on the basis of an 1890 Act partnership at that point, the Defendant would not have made the concessions that it did, but would have insisted upon disclosure which, in consequence of its concession, it has not had.

19. A year after the CMC, there was a Pre Trial Review before His Honour Judge Pelling QC on 14 December 2018 attended by Leading Counsel on both sides. Shortly before the hearing, the Claimants withdrew their objection to a Re-Amended Defence and Counterclaim. The Re-Amended Defence and Counterclaim was formally served on 10 December 2018.

20. At the PTR, the Claimants sought, and the Defendant did not oppose, an adjournment of the trial date from 11 February 2019 to the current fixture starting on 10 May 2019. A revised date was set for witness statements, and I understand that they have now been exchanged. A revised timetable was set for the expert evidence, and I understand that has also now been completed.

21. In relation to pleadings, the PTR Order of 14 December (following the Re-Amended Defence and Counterclaim dated 10 December), made no provision for amendments, but the Re-Amended Defence and Counterclaim was followed, not surprisingly, by a Re-Amended Reply and Defence to Counterclaim from the Claimants dated 21 December 2018, to which no objection was taken, or is taken. I will return to the implications of that, below.

Principles to be applied on a late application to amend

22. The principles to be applied when an application is made to amend, particularly when it is made late, have been considered in a number of cases. They are not in dispute before me. Two particularly helpful recent summaries are in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) and in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC).

23. Per Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at paras 37-38:-

> "…the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
>
> 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;

> 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 CPR 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."

24. In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC), Coulson J was referred to 20 authorities on amendments, from which he conducted a review of the law at paras 14-19 of his judgment, placing particular emphasis on more recent cases and what he noted as a change in attitude following the introduction of the overriding objective. He summarised the principles in para 19 as follows:-

> "In summary, therefore, I consider that the right approach to amendments is as follows:

> (a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*).
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown*; *Wani*). In essence, there must be a good reason for the delay (*Brown*).
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain Mason*; *Hague Plant*; *Wani*).
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (*Worldwide*), to the disruption of and additional pressure on their lawyers in the run-up to trial (*Bourke*), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (Swain Mason).
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)."

Application of the agreed principles to the present case

25. In applying the principles gathered from the authorities to the present case, I will start with the lateness of the proposed amendments and the explanation given for that (points (a) and (c) in Coulson J's summary above).

26. I do not think it can seriously be disputed that this application to amend is made late, only weeks before the start of the trial, although Mr Howells made a valiant attempt. As Coulson J says, "An amendment is late if it could have been advanced earlier" and

it is admitted that the case could have been put as a partnership case from the outset, which makes it very late for it to be put forward only now.

27. I also accept that allowing the amendment would force the Defendant (again quoting Coulson J) "to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed." Although Mr Howells says that the same factual enquiries should have been made whether or not there was a partnership case, I do not agree. The re-characterisation of the relationship as an 1890 Act partnership represents a substantially different case analysis and will require the evidence to be explored and examined afresh, and may also require the witness statements to have a different emphasis. The quantum issues already covered by the experts on the basis of the ordinary contract and *quantum meruit* claims will also have to be reviewed. I have already mentioned that the Defendant would also want to revisit the scope of disclosure. In the very short time remaining before trial, and in conjunction with the intense preparation already required even if there is no amendment, that imposes a burden on and a disadvantage to the Defendant which amounts to substantial prejudice. The burden is increased by the fact that this Sunday is Easter Day and the Defendant's leading Counsel is, not unreasonably, away next week.

28. So far as the explanation for the lateness of the application is concerned, it is not a very good one. The explanation given for the change is the "fresh eyes" brought to the case by recently instructed junior Counsel. However, "a fresh examination of possible arguments by fresh counsel" was said by Carr J to be "precisely the sort of reason that does not find favour with the courts": *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at para 47, citing *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988. Similarly, in *Wani LLP v Royal Bank of Scotland plc* [2015] EWHC 1181 (Ch), Henderson J said at para 45 "…the Bank submitted, and Mr Hardwick did not dispute, that the instruction of new counsel is not in itself a good explanation for a late amendment."

29. When the explanation for the lateness of the application is weak, as here, the amount of prejudice to the other side that may justify refusal of the application, in the exercise of the Court's discretion and balancing the factors identified in the authorities, will be less than if the explanation has greater merit. It is true that in *Worldwide* the application was made in the course of the trial, and threatened the trial, but in *Quah* the trial date was lost regardless of the result of the amendment application (see para 21 of the judgment) and, in *Wani*, the proposed amendment was argued 7 weeks before the start of the trial and was not, by itself, going to threaten the trial date (see paras 2-3 of the judgment). If a late amendment made without good explanation threatens the trial date, the applicant's position is worse than if it does not, but the lack of a good explanation is relevant to the exercise of discretion and to the balancing exercise even if the trial date can be maintained.

30. That brings me to the effect of allowing the amendments on the trial date (points (b) and (e) in the summary of Coulson J).

31. In the present case, the Defendant maintains that it is prejudiced by the amendment in the ways that I have explained, and that it would need more time than the time remaining before the start of the trial in 3 weeks' time to get itself back into the position

it ought to have been in had the amendment been put forward sooner. However, the Defendant's Counsel considers that the prejudice that would be suffered if the trial were to be adjourned would also be unacceptable. A considerable delay would follow, in a case in which the Court is examining evidence of an oral agreement which had its roots in discussions beginning 6 years ago. The Defendant's Counsel points out that the trial has already been adjourned once, and "To adjourn it again would put us in an awful position". The Defendant will not therefore seek an adjournment if the amendment is allowed, but does contend that it will suffer prejudice, albeit it prefers to suffer that prejudice rather than facing the prejudice of another adjourned trial date.

32. Although the case is not as extreme as if the trial would have to be vacated, therefore, it is a case in which the imminence of the trial increases the prejudicial effect of the proposed amendment.

33. The Defendant's leading Counsel also criticises "The particularity and/or clarity of the proposed amendment", maintaining that the opposed amendments which I have set out "are not tightly-drawn or focused" (quoting point (d) of Coulson J's summary of principles). The amendments do not state what the partnership shares were to be, whether equal or otherwise. They do not set out the terms of the partnership and, in particular, they do not make it clear what was to happen to partnership profits upon a departure if they were receivable after the departure. There is a tension between the pleading in the proposed Re-Amended Particulars of Claim, which suggests a partnership that is still extant, and in paragraph 27A.5 of the Re-Re-Amended Reply, which advances an alternative case based upon a partnership which has now been dissolved. There is no pleading of the duties of the alleged partners towards each other in consequence of the alleged 1890 Act partnership. There is no pleading of the extent of the alleged partnership and, in particular, which properties it covered. For example, it is not clear which if any of the projects entered into after the breakdown of the relationship in February 2015 are said to be covered by the partnership.

34. Finally, I must place in the balance the prejudice to the Claimants if they are not allowed to advance their newly chosen case based on partnership, which (Mr Howells suggests to me) is, they consider, better than their current case. However, this prejudice to the Claimants, although relevant, "is just one factor to be considered (*Swain-Mason*)" and "Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)." (quoting point (f) in Coulson J's summary).

35. Taking all these factors into account, and striking the balance as fairly as I can in all the circumstances, I have decided to refuse the Claimants' application for permission to make the amendments which are opposed.

References to partnership in the Reply

36. The Re-Amended Reply and Defence to Counterclaim dated 21 December 2018, although prepared before Mr Howells was instructed, and signed by his predecessor as junior Counsel, introduced wording which, Mr Howells says, would entitle the Claimants to ask the Court to find that there was a partnership, and possibly even, at a later stage, to issue a Part 8 claim for the taking of a partnership account if such a finding were made, even if I do not allow the opposed amendments to the Particulars of Claim.

37. This wording is in two places in the Re-Amended Reply and Defence to Counterclaim:-

i) In paragraph 7.2.5 (introduced in the amendment of 21 December 2018, after the PTR, and now to be deleted only if I allow the opposed amendments in the Re-Amended Particulars of Claim, which I do not):-

> "Further or alternatively, if and to the extent that the parties' respective obligations were those alleged at paragraph 9.2.2 and (as alleged in the Defendant's letter dated 15 November 2018) the First Claimant was obliged to work with the Defendant *"just as partners in a firm are obliged to work together towards the success of their firm"* and to perform all of the work which was required in setting up a Project, whatever that might entail, the consequence is that the relationship between the parties was one of partnership (including because as alleged at paragraph 10 of the Amended Particulars of Claim the parties had agreed to share and did share costs and/or expenses attributable to the joint venture). In the premises, the Defendant's case based on repudiatory breach of contract and/or renunciation is misconceived for reasons given at paragraph 27A.5 below."

ii) Paragraph 27A.4(ii) originally denied paragraph 51.3 of the Amended Defence and Counterclaim by stating it "betrays a fundamental misunderstanding of the parties' business relationship and the primary allocation of responsibilities". It referred back to paragraphs 11.1 and 11.2 of the Amended Particulars of Claim (pleading certain terms of the New Fund Agreement) and said "The First Claimant did not work for the Defendant. They were partners in a joint venture." An amendment is now proposed, and not opposed, which will re-word this last sentence to read (with new words indicated) as follows:-

> "They were partners <u>alternatively co-venturers</u> in a joint venture."

38. A Reply must be responsive to a Defence. It cannot raise a new claim for new relief: see *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514 and *Practice Direction 16 – Statements of Case* paragraph 9.2. Therefore, I do not see how these passages could properly be used as a basis for inviting the Court to rule that there was an 1890 Act partnership between the Claimants and the Defendant and, based upon that finding, for the Claimants to claim to be entitled to an account of partnership profits, unless those claims are properly incorporated into Particulars of Claim and a prayer for relief in Particulars of Claim. I have refused permission for those claims to be made in the Particulars of Claim and prayer for relief. However, no application is made to strike out, and I make this point by way of observation only.