Neutral Citation Number: **[2022] EWHC 585 (Comm)**

Case No: CL-2020-000451

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21/03/2022

Before:

THE HON. MRS JUSTICE MOULDER

- -

Between:

(1) DISCOVERY LAND COMPANY, LLC

(2) TAYMOUTH CASTLE DLC, LLC Claimants

(3) THE RIVER TAY CASTLE LLP

- and –

AXIS SPECIALTY EUROPE SE Defendant

- -

- -

WILLIAM FLENLEY QC and HEATHER McMAHON (instructed by **DAVIS WOOLFE LIMITED**) for the **CLAIMANTS**

PATRICK LAWRENCE QC AND HELEN EVANS (instructed by **CMS CAMERON McKENNA**) for the **DEFENDANT**

Hearing date: 10th March 2022

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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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THE HON. MRS JUSTICE MOULDER

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am on 21st March 2022.

Mrs Justice Moulder:

Introduction

1. This is the claimants' application (the "Application") for summary judgment, which the claimants says turns on a short point of construction of the insurance policy issued by the defendant insurer.

2. It is supported by the second and third witness statement of Guy Davis of Davis Woolfe Limited, acting for the claimants.

3. The defendant ("Axis") relies on the eighth witness statement of Zoe Burge, partner at CMS Cameron McKenna Nabarro Olswang LLP acting for Axis.

Background

4. The background is that the first claimant is a property development company which wished to buy Taymouth Castle in Scotland. The second claimant was used as one of the acquisition vehicles. The third claimant was owned by the second claimant.

5. In order to carry out the proposed purchase, the claimants instructed solicitors and associated entities called Jirehouse, Jirehouse Trustees Ltd and Jirehouse Partners LLP (together the "Jirehouse entities").

6. Axis issued a policy of professional indemnity insurance (the "Policy") to the Jirehouse entities. Clause 2.8 of the Policy contained an exclusion for fraud or dishonesty.

7. The claimants sent money to the Jirehouse entities in connection with the proposed purchase and lost it due to breaches of duty on the part of the Jirehouse entities.

8. The claimants have obtained 3 judgments against the Jirehouse entities totalling approximately £12.7 million.

9. Subject to the application of any exclusion under the Policy, the Jirehouse entities were entitled to be indemnified by the defendant in respect of judgments up to the relevant limits.

10. As a result of insolvency the rights which the Jirehouse entities had against Axis were transferred by statutory assignment to the claimants.

Policy

11. Clause 2.8 of the Policy provides:

> "the insurer shall have no liability under the policy for…
>
> Any claims directly or indirectly arising out of or in any way involving dishonest or fraudulent acts, errors or omissions committed or condoned by the insured, provided that…
>
> (b) no dishonest or fraudulent act, error or omission 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"

12. The claimants accept (paragraph 12 of their skeleton) that each of the three claims which led to the three judgments arose out of fraudulent acts, errors or omissions committed by Stephen Jones, who was at all material times a director or member of each of the Jirehouse entities.

13. Each of the Jirehouse entities was a body corporate for the purposes of clause 2.8 of the Policy.

14. Axis accepted (paragraph 1(c) of its skeleton) that if Mr Vieoence Prentice was a director or member of the Jirehouse entities and the relevant acts or omissions took place during the period when Mr Prentice was a director or member of the Jirehouse entities, then Axis is liable under the Policy unless it can be shown that Mr Prentice condoned the relevant dishonest/fraudulent acts/omissions of Mr Jones. This is referred to as the "condonation" case.

Chronology

15. The relevant chronology is as follows:

i) The claimants accept that, at the costs and case management conference on 16 April 2021, the defendant indicated that it intended to apply for permission to amend its defence (paragraph 17 of their skeleton).

ii) The defendant served its proposed amended defence on 30 July 2021, making further (minor) revisions in October 2021.

iii) In October 2021, Mr David Railton QC sitting as a deputy High Court Judge granted the defendant permission to amend its defence to plead the condonation case after a full day hearing (the "Amendment Hearing") where judgment was reserved, being handed down on 21 October 2021.

iv) Following permission being granted, an application for third party disclosure was made to the SRA seeking information about complaints of misconduct against the Jirehouse entities. A disclosure order was granted on 3 December 2021.

v) On 1 December 2021, the claimants issued the present application for summary judgment.

vi) On 10 December 2021, the second CCMC took place and this summary judgment application was listed to be heard on 10 March 2022.

vii) The trial is listed for July 2022.

The condonation case

16. The claimants now submit (paragraph 24 of their skeleton) that on a proper construction of clause 2.8, a person in the position of Mr Prentice is only to be treated as having condoned the relevant acts/omissions if he has actual knowledge of the particular acts/omissions; and that it would not be sufficient if Mr Prentice merely condoned Mr Jones running the practice in a way which involved breach of the rules of professional conduct.

17. In particular, the claimants now submit that as a matter of construction the drafters of the Policy must have been aware of the decision and reasoning in Zurich Professional v Karim & Ors (unrep) [2006] EWHC 3355 (QB) (which considered a policy using the standard wording that appears in the SRA's Minimum Terms and Conditions ("MTCs") for the insurance of the primary layer of professional indemnity insurance) but chose to use different wording in clause 2.8 from Karim and the MTCs. Accordingly, the reasoning and conclusion in Karim does not apply and the defendant must allege that Mr Prentice condoned the specific acts, errors or omissions.

18. It is the defendant's case (paragraphs 11 and 12 of its skeleton) that in its amended defence it asserts that Mr Prentice was aware of and condoned the relevant impropriety (including having either actual or "blind eye" knowledge relating to Mr Jones's misuse of client funds). It also pleads that Mr Prentice knew about specific features of the Taymouth Castle transaction but failed to act.

19. The defendant rejects the proposition that its case is only founded on Mr Prentice being aware of the general dishonest operation of the Jirehouse entities rather than having specific knowledge about the Taymouth Castle transaction.

20. Although in oral submissions counsel for the claimants raised objections to the way in which the defendant now pleads its condonation case, the claimants accepted (paragraph 55 of their skeleton) that:

i) the main purpose of the proposed amendments to the defence was to add the condonation case; and

ii) that at the Amendment Hearing the claimants conceded that the proposed amendments were arguable.

21. Axis opposes the Application on 2 bases:

i) the application is an abuse of process; and

ii) summary judgment should not be granted on the merits.

Is the application for summary judgment an abuse of process?

Submissions for the claimants

22. It is accepted for the claimants that:

i) the point of construction which is the subject of the present application was not advanced at the Amendment Hearing and that it could have been advanced at that hearing (see Mr Davies' third witness statement, at paragraph 11);

ii) in the course of argument on the amendment application, leading counsel for the claimants was prepared to assume that the policy wording was sufficiently close to the MTCs that the wording of the MTCs should be applied; and

iii) the construction argument now advanced was not advanced at the Amendment Hearing because the claimants had not thought of the point at that stage.

23. However it was submitted for the claimants (at paragraphs 58 and 59 of their skeleton) that:

i) they should not be criticised because they had to deal relatively swiftly with the amendment application at a time that they were also heavily engaged with disclosure;

ii) "in light of their further analysis of the construction point" the concessions were wrongly made at the Amendment Hearing and in any event, they applied only to the amendment application; and

iii) the claimants would not be prevented from advancing the construction point at trial.

Relevant legal principles

24. It is accepted for the claimants that the court has an inherent power to strike out a claim or application which is an abuse of process.

25. It is further accepted for the claimants that this power is founded on two interests: the private interest of the party not to be vexed twice for the same reason; and the public interest of the state in not having matters repeatedly litigated (paragraph 60 of their skeleton).

26. It is accepted by the claimants that, in this case, the allegation of abuse of process falls within the type of abuse set out in Henderson v Henderson (1843) 3 Hare 100, that is, an attempt to raise in subsequent proceedings matters which were not, but could and should have been, raised in earlier proceedings.

27. It appeared to be common ground that the principles which apply to an application to strike out a claim are set out in the speech of Lord Bingham in Johnson v Gore Wood & Co (No. 1) [2002] 2 AC 1.

28. From the judgment of Lord Bingham it was submitted for the claimants that the relevant principles are that:

i) it is “wrong to hold that because the matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive”: per Lord Bingham at 31C;

ii) the court should reach a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before": per Lord Bingham at 31C–D;

iii) it is not necessary to identify any additional element such as a collateral attack on a previous decision before abuse may be found, but where those elements are present the proceedings will be much more obviously abusive and "there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party": per Lord Bingham at 31B–C; and

iv) the burden of proving abuse rests on the party asserting it: per Lord Bingham at 31B and Lord Millet at 59H to 60A.

29. It is helpful to set out in full the relevant passage of Lord Bingham in Johnson v Gore Wood at 31 B:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily

> excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances." [emphasis added]

30. The claimants accept that the Henderson principle is relevant to successive pre-trial applications for the same relief but submitted (at paragraph 66 of their skeleton) that there is a "tension" in the authorities as to whether the Henderson principle applies "less rigorously" to interlocutory applications - see the Court of Appeal in Woodhouse v Consignia Plc (CA) [2002] 1 WLR 2558 at [56] as compared with Koza Ltd v Koza Altin Isletmeleri AS [2021] 1 WLR 170 at [42].

31. The relevant passages from Woodhouse are as follows:

> "55 The application of 8 November 2000 was undoubtedly a "second bite at the cherry". It was supported by evidence that was available at the time of the first application. There was no good reason for the failure to place that evidence before the court on the first occasion. We accept that the fact that the evidence relied on in support of the application that was made on 8 November could and should have been put before the court in support of the earlier application is material to the exercise of the discretion conferred by CPR r 3.9(1). There is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application. In some contexts, this is partly because, as Chadwick LJ said in Securum Finance Ltd D v Ashton [2001] Ch 291, there is a need for the court to allot its limited resources to other cases. But at least as important is the

general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v Henderson (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits when one would do: see per Sir Thomas Bingham MR in Barrow v Bankside Members Agency Ltd [1996] 1 WLR 257, 260A-D.

56 In our view, although the policy that underpins the rule in Henderson v Henderson has relevance as regards successive pre-trial applications for the same relief, it should be applied less strictly than in relation to a final decision of the court, at any rate where the earlier pre-trial application has been dismissed.

57 To take an example: suppose that an application for summary judgment in a substantial multi-track case under CPR r 24 is dismissed, and the unsuccessful party then makes a second application based on material that was available at the time of the first application, but which through incompetence was not deployed at that time. The new material makes the case for summary judgment unanswerable on the merits. In so extreme a case, it could not be right to dismiss the second application solely because it was a second bite at the cherry. In those circumstances, the overriding objective of dealing with cases justly, having regard to the various factors mentioned in CPR r 1.1(2), would surely demand that the second application should succeed, and that the proceedings be disposed of summarily. In such a case, the failure to deploy the new material at the time of the first application can properly and proportionately be reflected by suitable orders for costs, and, if appropriate, interest. The judge would, of course, be

perfectly entitled to dismiss the second application without ceremony unless it could be speedily and categorically demonstrated that the new material was indeed conclusive of the case." [emphasis added]

32. In the later case of Koza Popplewell LJ considered the authorities including Woodhouse and concluded that the "tension" was "more apparent than real". The relevant passages are as follows:

"41 The Henderson and Hunter principles also apply to interlocutory decisions and applications. In the current case, the judge said that there was a tension between some of the authorities concerned with interlocutory decisions. He referred to the judgment of Nugee J in Holyoake v Candy [2016] 6 Costs LR 1157 which is a helpful summary of those cases and what is said to be a difference of approach between them:"

...

42 In my judgement the tension is more apparent than real. The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in Johnson v Gore Wood & Co [2002] 2 AC 1 that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of

circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in Woodhouse v Consignia plc [2002] 1 WLR 2558 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paras 30-40 above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions.” [emphasis added]

Application of principles

Claimants’ submissions

33. The claimants accept that the question of whether the amendments have a realistic prospect of success is "sufficiently close" to the test for summary

judgment to make the Application in effect "an application for the same relief" (as referred to by Popplewell LJ at [42] above) but submitted (at paragraph 68 of their skeleton) that, applying the broad merits-based approach, the court can and should hear the summary judgment application because it disposes of the defendant's condonation case.

34. The claimants submitted that Woodhouse is authority for the proposition that a second application may succeed if it is in the public interest for it to do so, even if it is contrary to the respondent's private interests in not having to deal with the same matter twice and there is not a good reason for not having taken the point earlier.

35. The claimants submitted that this is precisely the sort of case contemplated by Brooke LJ in Woodhouse at [57] (set out above).

36. It was submitted (at paragraph 72 of their skeleton) that accordingly the Application should succeed because it will dispose of the condonation case and this will result in substantial savings in time and costs at trial.

37. In particular it was submitted for the claimants that:

i) at trial the claimants will be entitled to take the construction point and thus this makes the present case different to cases relating to interlocutory applications concerning issues which are not bound to recur at trial;

ii) if the Application is well-founded, it is in the public interest to decide it now for the reasons set out by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15(vii)] namely that:

> "[where the application gives rise to] a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be";

iii) disposing of the points summarily will save costs and time to trial - at least two days of court time are likely to be saved (see paragraph 76 of their skeleton); and the parties' cost budgets increased by approximately £400,000 and £450,000 respectively largely on account of the amendments;

iv) even if the court were to conclude that the defendant was being improperly vexed with the same matter twice, these private considerations are outweighed by the public interest in curtailing unnecessary litigation and substantial savings;

v) the Application does not amount to unjust harassment of the defendant as the point would otherwise be available at trial (paragraph 81 of their skeleton); and

vi) even if an appeal was sought on the construction issue, the trial could still proceed in July 2022 (paragraph 83 of their skeleton).

38. It was submitted in the claimants' evidence that the claimants had a good reason for not taking the construction point at the Amendment Hearing: Davis 3 para 11. This point was not pursued orally and I understood it not to be pressed. As referred to above, counsel for the claimants accepted that the claimants could have raised the point at the Amendment Hearing.

Defendant's submissions

39. It was submitted for Axis (at paragraphs 28-34 of its skeleton) that:

i) The claimants' submissions before the Deputy Judge at the Amendment Hearing are impossible to reconcile with the claimants' position in the Application, where the claimants now submit that: (a) there is a significant difference between the policy wording in Karim and Goldsmith Williams (A firm) v Travelers Insurance Co Ltd [2010] Lloyds Rep IR 309 and the wording of clause 2.8 of the Policy; and (b) Mr Prentice can only be taken to have condoned the specific acts or omissions if he had actual knowledge of their details.

ii) To allow the claimants to raise these issues now would undermine the finality of the unappealed decision of the Deputy Judge in granting the

Amendment Application. The need to defend this Application has necessarily diverted time and effort away from the substantial task of analysing the substantial disclosure recently provided by the SRA, re-amending the defence, and the preparation of witness evidence (which is due to be served by 31 March 2022).

iii) The claimants have not put forward any satisfactory explanation for their U-turn on the merits of the condonation case; if the position was as clear cut as the claimants now contend, the point should have been taken at the Amendment Hearing: the decisions in Karim and Goldsmith were handed down many years ago.

iv) There is no good reason, therefore, why the claimants should be allowed to abuse the court's process and to prejudice Axis in this way. The overriding objective required the claimants to raise the issue at the appropriate time - namely in October 2021.

Discussion

40. Applying the principles referred to above, the court has to make a "broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

41. Dealing firstly with whether the Henderson principle applies equally to interlocutory hearings, it is clear from Koza that the principle applies to interlocutory hearings as much as to final hearings. I note Popplewell LJ's observation that it may be "harder" for the respondent to persuade the court that raising the point now is abusive as offending the public interest in finality and the efficient use of court resources and fairness to the respondent in protecting it from vexation and harassment. However (as set out above) Popplewell LJ also clearly stated that:

> “There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings”

42. As to the efficient use of court resources, in order to deal with this Application the court had to allocate a further day of court time to the hearing as well as judicial time both pre- and post- the hearing for reading and then judgment respectively. This matter had already occupied a similar amount of time before the Deputy Judge. It was submitted for the claimants that had the point been taken before the Deputy Judge, the Amendment Hearing would have taken two days rather than one. That in my view is not the case: it would have been wholly disproportionate and not in furtherance of the overriding objective to allow an application to amend pleadings to occupy two court days and accordingly this would be most unlikely to have been permitted. I note that the usual time envisaged for such a hearing (absent a contrary order) in the Commercial Court Guide is one hour.

43. In addition to the public interest in the efficient use of court resources, the court has to consider the issue of efficient case management. It was submitted for the claimants that this matter would in any event have to be considered at trial and that costs will be saved if the construction issue is dealt with now. However this is to ignore the fact that it is a “second bite at the cherry” and runs contrary to the principle in Koza that the application of the Henderson principles will often mean that if a point is open and not pursued, the party cannot take the point at a subsequent interlocutory hearing absent a significant and material change of circumstances or the party becoming aware of facts which he did not know and could not reasonably have discovered time of the first hearing.

44. In my view this is how the example of Brooke LJ in Woodhouse, relied on by the claimants in their submissions, should be understood. Brooke LJ in the relevant passage (set out above) referred to "new material" not deployed at the time of the first hearing which makes the summary judgment application "unanswerable" on the merits and was of the view that "in so extreme a case" it could not be right to dismiss the second application solely because it was a second bite at the cherry. However this Application does

not rely on any "new material" in the sense of evidence or authority which was overlooked or not deployed at the time of the first hearing.

45. The arguments presented at the hearing of the Application on the merits of the construction issue now advanced were based on the principles of construction which are well known and well established, and the authority of Karim. The claimants have not produced any new authority which they had overlooked or any evidence as to relevant factual context which was previously overlooked or of which they could be said to have been unaware.

46. The submissions made for the claimants on the merits of the Application do not make the case "unanswerable" in the sense which I infer Brooke LJ had in mind. The submissions on the part of the claimants in support of the Application required a skeleton of some 19 pages (devoted to the merits) and oral submissions by counsel for the claimants which lasted nearly 2 hours (as well as the defendant's submissions, both written and oral, in response).

47. The claimants now submit that the draftsperson must have had in mind the case law of Karim (and Goldsmith) since they are well known to practitioners in this area, and as a result Axis must be taken to have deliberately chosen to depart from the previous form of wording considered in Karim in order to achieve a narrower exclusion. However, the case of Karim was expressly referred to at the Amendment Hearing and in oral submissions counsel for the claimants was prepared to "assume that [the wording of clause 2.8 and that in Karim] are sufficiently close". Counsel said that "They all derive-- they are all solicitors' policies primary … They all derive from the SRA minimum terms."

48. The relevant extract from the transcript of the Amendment Hearing, in context, was as follows:

> "So, my Lord, I do not wish, you will be relieved to hear, to say any more about the goodness or badness of the excuses put forward for the lateness of the amendments, and I have made a few comments about the strength of the amendments. I should just refer, to make good a submission I made earlier, in the authorities'

bundle, to the Goldsmith Williams case, if I can ask you to look at our authorities bundle. ... So in this case Ms Usman was the honest person, or possibly honest, and Mr Atikpakpa was the partner who was definitely dishonest. And the issue we are concerned with related to 42 Tulse Hill, a property which Mr Atikpakpa had stolen from his wife. At 4 it says:

"The judge held there was no evidence which showed that Ms Usman took any part in facilitating the transaction relating to 42 Tulse Hill, indeed no direct evidence that she knew it. Insurers were nevertheless entitled to repudiate liability. She had committed a fraudulent act in relation to 5 Montague Close."

That is the other property, so we are not concerned with that. But then at B, the top of column 2:

"As regards 42 Tulse Hill, by the time that Mr Atikpakpa stole the money loaned in respect of 42 Tulse Hill, Ms Usman knew that he was engaging in mortgage fraud. Specifically she knew of his application for a mortgage in respect of another property in Surrey, and she knew of his application for a mortgage in respect of 5 Montague Place. She knew he had made false representations in the mortgage application forms. That was a course of conduct which she condoned. Had she not condoned such conduct, Mr Atikpakpa would have been in no position to steal the money for 42 Tulse Hill."

So that is how, in my submission, it works, applying the earlier case of Zurich. This is the latest case on this issue. I mean, I can show your Lordship in the judgment a little more about that on p. 322, column 2, para.97. This is having considered Mr Justice Irwin's decision in a case called Zurich v Karim, which the defendant also relies on.

"As can be seen from these extracts from his judgment Irwin J decided that if an Insured condones a course of conduct which is dishonest or fraudulent and that course of conduct leads to or permits the specific acts or omissions upon which the claim is founded the insurer is entitled to repudiate liability." And at the end of the paragraph he says he agrees with that approach and should follow it, which he duly does at 99, in the way that the headnote told us.

THE DEPUTY JUDGE: Yes. The wording of the clause here is slightly different to the wording in Goldsmith and in Karim. I assume for present purposes the two things being to the same effect - is that right?

MR FLENLEY: Well, for today's purposes I am prepared to assume that they are sufficiently close, my Lord. They all derive-- they are all solicitors' policies primary (inaudible). They all derive from the SRA minimum terms.

THE DEPUTY JUDGE: Yes.

MR FLENLEY: And in those policies, as you no doubt know, the SRA minimum terms always take precedence, because if there is an inconsistency, it is always the wording of the minimum terms that are applied. But, my Lord, that shows the target my learned friend is, as it were, aiming at on condonation. He has got to show the course of conduct, dishonest conduct, condoned by Mr Prentice which led to or permitted the specific acts or omissions that caused my clients to lose money. So events in 2010, while no doubt colourful, seem an extremely long way away from that." [emphasis added]

49. This is not a case where the legal analysis which now is said to provide a complete answer to the condonation case was not considered. In the

passage quoted above it is clear that the claimants were of the view at that time (I infer having considered the matter) that:

i) there was no significant difference in the import of the wording between the wording in Karim (and the MTCs) and the wording in the Policy; and

ii) Axis had to demonstrate a course of conduct which led to or permitted the specific acts.

50. By contrast the claimants now submit that:

i) it is clear (such that the court should give summary judgment on the issue of construction now) that there is a significant and intentional difference between the wording in the MTCs and the wording of the Policy; and

ii) the court should find that as a matter of construction the wording is clear and unambiguous, and that “condone” means having actual knowledge of the acts of Mr Jones.

51. Whilst the claimants now submit that they had not thought of the point of construction previously, the submissions made by the claimants at the Amendment Hearing show that this was not a case where the point was “overlooked” but rather a case where their views have now changed. Further, the views of the claimants expressed on their then-analysis at the time of the Amendment Hearing tend to refute any conclusion that on the basis of the arguments now advanced, the claimants now have an "unanswerable" case in the sense contemplated by Brooke LJ.

52. A further consideration in the public interest is that to permit this Application would encourage parties to circumvent the appeal process in relation to the first decision and the constraints of any appeal on an interlocutory decision of this nature. It could also cause disruption to the trial process if it resulted in an appeal of the decision on the merits of this Application.

53. As well as the public interest in discouraging a “second bite at the cherry”, there is the private interest in the defendant not being vexed twice. The impact on the defendant includes both the costs which have been incurred following the amendment and, whilst it is not suggested for the

defendant that all the costs subsequently incurred would be wasted, there would be wasted costs. Further, there is the disruption caused to the defendant in its preparation for trial (as referred to above) in circumstances where the defendant was entitled to assume that it could proceed to prepare for trial on the basis that its case was as set out in the amended defence. In Koza Popplewell LJ stated that allowing a party to take points serially in subsequent applications would be to "generally permit abuse in the form of unfair harassment of the other party".

Conclusion

54. It could be said that this is not a case where a point which could have been taken was not taken in the sense of being "overlooked" but rather that the relevant issue, namely the construction of the relevant clause, and the relevant authorities had clearly been considered by the claimants and having considered the point, the claimants conceded that the amendments were arguable. Even if this were to be treated as a case where a "point" could have been taken and was not pursued, in my view this case falls squarely within the category of cases contemplated by Popplewell LJ in Koza as a case in respect of which there has been no significant or material change of circumstances, nor have the claimants become aware of facts which they did not know at the time of the first hearing.

55. In my view to permit the claimants to bring this Application obstructs the efficacy of the judicial process by undermining the finality of the interlocutory decision. It is no answer in my view to say that the issue of construction will have to be dealt with at trial or that a decision may assist settlement. To accept such a submission would be allow every "second bite of the cherry" irrespective of whether there has been any material change of circumstances or new fact arising and such an approach would be contrary to the Court of Appeal decision in Koza. The court has already considered the very issue of whether the amendments have a real prospect of success and the defendant is entitled to proceed now to trial on that case as amended.

56. For all these reasons in my view this Application is an abuse of process and must be refused. In the light of my findings it is unnecessary to consider the merits of the Application.