Neutral Citation Number: [2019] EWHC 32 (QB)

Case No: HQ18X02037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2019

Before :

MASTER COOK

- -

Between :

JUSTIN COHEN	**Claimant**
- and -	
(1) LORRELLS LLP (IN LIQUIDATION) **(2) ELDONS BERKELEY LIMITED**	**Defendants**

- -
- -

Simon Davenport QC and **Navjot Atwal** (instructed by **FWJ Legal Limited**) for the **Claimant**
Alison Padfield QC (instructed by **DAC Beachcroft LLP**) for the **Second Defendant**

Hearing date: 10th December 2018

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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MASTER COOK

MASTER COOK:

The Application

1. This is the second defendant's application for an order that the claimant's claim for a declaration that the second defendant is a "successor practice" of the first defendant within the meaning of Appendix 1 of the SRA Indemnity Insurance Rules 2013 and the SRA Minimum Terms and Conditions of Professional Indemnity Insurance [MTCs] be struck out.

2. The second defendant is represented by Ms Padfield QC and the claimant by Mr Simon Davenport QC. Both counsel have submitted skeleton arguments and I am grateful to them for their economical and focused submissions.

3. The application is supported by the witness statement of Mr Marcus Thomson dated 4 September 2018. In opposition to the application the claimant relies upon the witness statement of Mr Simon Loome dated 30 November 2018.

The facts

4. The facts can be simply stated. The first defendant is a firm of solicitors now in liquidation. The claimant has taken an assignment of two causes of action against the first defendant on behalf of Shoprite Limited and Brimstone Investments Limited.

5. The Shoprite Limited cause of action is a claim arising out of a secured loan made by Shoprite to Amanda Clutterbuck in or about June 2012. It is alleged that the first defendant provided negligent advice and services in respect of the loan and associated security. It is further alleged that the first defendant failed to account to Shoprite for loan monies and security discharged in satisfaction of the claim. The claim is alleged to be worth £1,483,628.55.

6. The Brimstone Investments Limited cause of action is a claim for damages representing the shortfall in amounts that the first defendant was liable to account and/or pay to Brimstone Limited from the end of 2012 onwards. The claim is alleged to be worth £411,991.95.

7. On the 31 May 2018 the claimant issued a claim form in which the said sums were claimed against the first defendant by way of damages and/or equitable compensation. A claim was also made against the second defendant for a declaration that it is the "successor practice" to the first defendant such that its professional indemnity insurers are liable under the MTCs to satisfy the Brimstone and Shoprite claims, see paragraph 178 of the particulars of claim. No other remedy or relief was sought against the second defendant.

8. Together the two claims are valued at just under £1.9 million plus continuing interest. By the time of the hearing before me judgment in default of defence had been entered by the court against the first defendant.

9. The first defendant went into voluntary liquidation in September 2015 with estimated net liabilities of £2.28 million. As stated in paragraph 5 of Mr Thomson's witness

statement the Liquidators' progress report dated 13 December 2017 indicated that the first defendant's professional indemnity insurers at the time of the liquidation, who under the SRA's MTCs are obliged (if there is no "successor practice" within the meaning of the MTCs) to provide run-off cover for six years, are themselves in insolvent liquidation.

The parties' submissions

10. Ms Padfield QC, who appears for the second defendant, submits that the claimant's only purpose in bringing these proceedings against the second defendant is to obtain a declaration which, he believes, will entitle him to an indemnity from the second defendant's insurers (AmTrust Europe Limited) in respect of his claims against the first defendant, she refers to paragraph 21 of Mr Loome's witness statement. Ms Padfield QC submits that this is simply incorrect and that in any event this is not a suitable case for the grant of declaratory relief. In the circumstances she submits that the second defendant should not be forced to defend these proceedings and the claim against it should be struck out.

11. It was common ground that solicitors are required by the SRA to have a minimum level of insurance on prescribed minimum terms and conditions. These are the MTCs, clause 4.12 of which provides that any policy of insurance is to be construed or rectified so as to comply with the requirements of the MTCs and that any provision which is inconsistent with the MTCs is to be severed or rectified to comply with them. In the circumstances it is not necessary to consider the individual policies of professional indemnity insurance issued to the first and second defendant.

12. I was taken to the following relevant provisions of the MTCs;

> **1.1 Civil liability**
>
> Subject to the limits in clause 2, the insurance must indemnify each *insured* against civil liability to the extent that it arises from *private legal practice* in connection with the *insured firm's practice*, provided that a *claim* in respect of such liability:
>
> (a) is first made against an *insured* during the *period of insurance*; or
>
> (b) is made against an *insured* during or after the *period of insurance* and arising from *circumstances* first notified to the *insurer* during the *period of insurance*.
>
> **1.4 Prior practice**
>
> The insurance must indemnify each *insured* against civil liability to the extent that it arises from *private legal practice* in connection with a *prior practice*, provided that a *claim* in respect of such liability is first made against an *insured*:

(a) during the *period of insurance*; or

(b) during or after the *period of insurance* and arising from *circumstances* first notified to the *insurer* during the *period of insurance*.

1.5 The insured - prior practice

For the purposes of the cover contemplated by clause 1.4, the *insured* must include:

(a) each *partnership, recognised body* or *licensed body* (in respect of its *regulated activities*) which, or *sole practitioner* who, carried on the *prior practice*;

5.4 Run-off cover

Subject to clause 5.8, the insurance must provide run-off cover:

(a) in the event of a *cessation* that occurs during or on expiration of the *policy period*;

(b) in the event of a *cessation* that occurs during the *extended indemnity period* or the *cessation period*; or

(c) from the expiration of the *cessation period*;

and for the purposes of this clause 5.4 and clause 5.8, an *insured firm's practice* shall (without limitation) be regarded as ceasing if (and with effect from the date upon which) the *insured firm* becomes a *non-SRA firm*.

5.5 Scope of run-off cover

The run-off cover referred to in clause 5.4 must:

(a) indemnify each *insured* in accordance with clauses 1.1 to 1.8;

(b) provide a minimum level of insurance cover in accordance with clauses 2.1 and 2.3;

(c) be subject to the exclusions and conditions of the insurance applicable in accordance with the *MTC*; and

(d) extend the *period of insurance* for an additional six years (ending on the sixth anniversary of the date upon which, but for this requirement, it would have ended, and for the avoidance of doubt, including the *extended indemnity period* and *cessation period*), save that in respect of run-off cover provided under clause 5.4(c), such run-off cover shall not operate to indemnify any *insured* for civil liability arising from acts or omissions of

such *insured* occurring after the expiration of the *cessation period*.

5.6 Succession

The insurance must provide that, if there is a *successor practice* to the ceased *practice*, the *insured firm* may elect before its *cessation*, whether it wishes the ceased *practice*:

(a) to be insured under the run-off cover referred to in clause 5.4(a); or

(b) provided that there is insurance complying with these *MTC* in relation to that *successor practice*, to be insured as a *prior practice* under such insurance.

If the *insured firm* fails to make an election and/or fails to pay any premium due under the terms of the *policy*, before its *cessation*, clause 5.6(b) above shall apply.

The insurance must also provide that where an *insured firm* makes an election pursuant to this clause 5.6, the *insurer* shall give notice to the *Society* in writing of the election not later than seven days following the receipt by the *insurer* of the *insured firm's* election and that election has become effective and the *insured firm* shall irrevocably consent to that notification.

13. Ms Padfield QC submitted that a correct understanding of the insurance position was essential to the consideration of the application. She starts from the proposition that the claimant's claim is for breach of duty against the first defendant and that there is no claim for breach of duty against the second defendant. The first defendant is in liquidation and its practice has ceased, in the circumstances clauses 5.4 and 5.5 of the MTCs provide that the insurance must provide run off cover.

14. Where, however, there is a "*successor practice*" to the ceased practice, the insured firm (ie. the first defendant) may elect before its cessation whether it wishes the ceased practice to be insured under the run-off cover or, provided that there is insurance complying with the MTCs in relation to the successor practice, *"to be insured as a prior practice under such insurance"* in accordance with the MTCs clause 5.6.

15. If the first defendant failed to make an election and/or failed to pay any premium due under the terms of its policy, it would be insured as a prior practice pursuant to clause 5.6 of the MTCs.

16. In the circumstances the relevant civil liability for policy purposes is that of the first defendant. Therefore, if the first defendant is entitled to run-off cover under its own policy, the relevant insuring clause is 1.1 of the MTCs. Alternatively, the insuring clause in relation to civil liability in connection with a "*prior practice*" is clause 1.4

of the MTCs and the first defendant would be "*insured*" under clause 1.4(a) by virtue of clause 1.5(a).

17. Ms Padfield QC makes the point that as the second defendant is not liable to the claimant, the second defendant's own insurance position under the MTCs is irrelevant, this she submits is of central importance to understanding the insurance issues and why the claim for declaratory relief against the second defendant should be struck out.

18. Ms Padfield QC refers to Mr Loome's assertion at paragraph 23 of his witness statement that if the second defendant is a "*successor practice*" to the first defendant, *"the second defendant is insured for the acts of its prior practice (ie, the first defendant)"* and that *"on this basis"* proceedings against the second defendant's insurer under the 1930 Act[1] are unnecessary. She submits that this demonstrates a fundamental misunderstanding on the part of the claimant as to this issue. She submits the relevant question is not whether the second defendant is entitled to an indemnity under the MTCs – because there is no relevant liability for which the second defendant could claim an indemnity – but whether the first defendant is entitled to an indemnity under clause 1.4 for its liability to the claimant, if any.

19. Ms Padfield QC therefore submits that the claim against the second defendant is premature, inappropriate and futile.

20. It is premature because the question of whether the first defendant is insured against its liability to the claimant does not fall to be determined until after the claimant has obtained judgment against the first defendant. Only at that point will the Claimant be able to stand in the first defendant's shoes and claim an indemnity under the 1930 Act, see *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, CA and *Bradley v Eagle Star Insurance Co Plc* [1989] 1 WLR 957, HL.

21. Even if the claimant has now obtained a default judgment it must still seek to obtain an indemnity from the first defendant's insurers. It is only if the first defendant's insurers refuse to pay the claimant's claim that the claimant is entitled to stand in the first defendant's shoes and make a claim for an indemnity under the policy that the successor practice issue arises.

22. The claim is inappropriate because of the insurance position explained above because the question is not whether the second defendant is a successor practice to the first defendant but whether the first defendant is a prior practice to the second defendant so that clause 1.4 of the MTCs applies. In the circumstances the second defendant should not be forced to participate in a claim by the claimant against the first defendant and its insurers.

23. The claim is futile because a declaration as between the claimant and the second defendant will not bind the second defendant's insurers if and when the claimant is entitled to stand in the shoes of the first defendant under the 1930 Act and claim an indemnity from the insurers. Ms Padfield QC relied upon principles derived from the judgment of Christopher Clarke J in *Omega Proteins Ltd v Aspen Insurance UK Ltd* [2010] EWHC 2280 (Comm) [2011] Lloyd's Rep IR 183, paras 49 and 68-71 and

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[1] The Third Parties (Rights Against Insurers) Act 1930.

confirmed by the Court of Appeal in the case of *AstraZenica Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660, [2014] Lloyd's Rep IR 509, paras 16 – 18, 21-23 84 and 85.

24. By parity of reasoning the insurer is not bound by findings in proceedings between the third party, in this case the claimant, and a different insured, in this case the second defendant, which is not liable to the claimant and which is not therefore entitled to an indemnity in respect of the claimant's claim.

25. Ms Padfield QC also submitted that the discretionary nature of the relief sought was an additional reason why the claim should be struck out. She relied particularly on the summary of applicable principles by Marcus Smith J in *The Bank of New York Mellon v Essar Steel India Ltd* [2018] EWHC 3177 (Ch). At paragraph 21;

> "The power to grant declaratory relief is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration."

And at paragraph 21 (1);

> "There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them."

26. Ms Padfield QC accepted that Marcus Smith J was prepared to accept that the claimant may have a present dispute over a future contingency but submitted that the factors identified by the judge did not apply to facts of this case. Firstly, because there was no "*real and present dispute"* but more importantly and secondly, that if and when any dispute arises, it will not arise between the claimant and the second defendant but between the claimant and one or both of the first defendant's possible insurers.

27. Mr Davenport QC fundamentally disagrees with Ms Padfield QC's analysis of the case. He submits that the application to strike out should be refused, that the claim for a declaration is properly made and there are reasonable grounds for seeking the proposed declaration in these proceedings. His starting point is that the application is being made under CPR 3.4. He referred me to the well-known principle summarised by Flaux J in *Fortress Value Recovery Fund 1 LLC and others v Blue Skye Special opportunities Fund L.P. and others* [2013] EWCA 14 (Comm) at para 38;

> "The application to strike out must be being made under CPR 3.4 on the basis that the particular paragraphs of the claimants' pleaded case disclose no reasonable or valid cause of action. It is well established that the court will not grant an application to strike out a claim unless it is certain that the claim is bound to fail: see *Hughes v Colin Richards & Co* [2004] EWCA Civ 266."

28. Mr Davenport QC submits that the claimant's case as set out in the particulars of claim is that the first defendant failed to obtain run off cover or pay any premiums due in respect of such cover. Further the first defendant failed to make an election under clause 5.6 of the MTCs to be covered under its successor practice's professional indemnity insurance, see para 110 of the particulars of claim.

29. Mr Davenport QC submits that for the reasons set out at paras 108 to 178 of the particulars of claim the second defendant is the successor practice to the first defendant. The thrust of this part of the claimant's case is set out at paragraph 145 of the particulars of claim;

> "145. The true and ultimate effect of the arrangements was the absorption of the First Defendant's business into the Second Defendant with a view to avoiding the successor practice rules (which if applicable would have left the Second Defendant with a large and unsustainable PII premium given the First Defendant's claims history). The Second Defendant was thereby used as a means to continue the First Defendant's business and incorporated it such that it is properly described as a successor practice."

30. Mr Davenport QC points out that the second defendant has denied in correspondence that it is a successor practice but has not responded to the detailed factual case pleaded. In the circumstances he submits that the second defendant's status as a successor practice is one of mixed law and fact and plainly gives rise to a triable issue.

31. Mr Davenport QC submitted that it was irrelevant that no free-standing claim for damages was made against the second defendant, a claim for a declaration is a discretionary remedy and can be properly made under CPR 40.20 whether or not any other remedy is claimed. In this case any declaration against the second defendant is likely to have an impact on its insurance arrangements and in the circumstances, it will be directly affected by any declaration that the court may ultimately make. He also pointed out that the second defendant would be in possession of all the relevant documentary evidence concerning its status as a successor practice.

32. Mr Davenport QC submitted that a proper understanding of clause 5.6 of the MTCs was critical to the application. He submitted that clause 5.6(b) was the relevant clause where there was a successor practice and the insured practice had not made an election to be covered by the run-off cover provided by clause 5.4(a) of the MTCs. The reference to "such insurance" in clause 5.6(b) can only be to the insurance policy of the of the successor practice which in this case is the second defendant. In the circumstances it would not be possible for the first defendant to be insured as a prior practice under its own policy and in accordance with clauses 1.4 and 1.5(a) of the MTCs in the manner suggested by Ms Padfield QC.

33. In the circumstances Mr Davenport QC maintained his submission that the application for a declaration serves a useful purpose and is properly made in these proceedings. In the alternative he submitted the claimant should be permitted to amend his claim to add the second defendant's insurer. In relation to this last point Ms Padfield QC pointed out that there is no application to amend and no draft pleading has been

proffered. She also contrasted the position in this case where there is an arguable failure to include a necessary party with the position in *Soo Kim v Young Geun Park and others* [2011] EWHC 1781 (QB) where the court upheld the general principle that a party should be given the opportunity to amend its pleading against an existing party before the court exercised its power to strike out.

Events after the hearing

34. At the conclusion of the hearing I informed counsel that I would produce a written judgment as there was insufficient time remaining for me to deliver an oral judgment before the end of term. On the 12th December 2018, without any warning, a file was delivered to my room containing a supplemental skeleton argument from Mr Davenport QC making reference to the case of *McManus & Others v European Risk Insurance Company* [2013] EWHC 18, which was said to be an important case concerning the operation of the successor practice rules as set out in the MTCs and two further articles referring to the operation of the successor practice rules. This prompted a further note prepared by Ms Padfield QC which arrived on 13 December 2018. Ms Padfield QC objected in the strongest terms to the submission of a further skeleton argument but responded in the alternative to the points made by Mr Davenport QC.

35. This is a wholly inappropriate way of proceeding. At the very least Mr Davenport QC should have raised these issues with Ms Padfield QC before submitting further material to the court. In any event the submission of this extra material has delayed my production of this judgment as I did not have time to read it before the Christmas break. As it transpires, I did not find any of the extra material of assistance to me.

Discussion and decision

36. It seems to me that the insurance issues in this case have generated more heat than light. On any view the relevant liability here is that of the first defendant in relation to the Brimstone and Shoprite causes of action. The claimant now has a judgment against the first defendant.

37. The claimant has pleaded no cause of action against the second defendant and seeks no remedy other than the proposed declaration.

38. It is common ground that the first defendant must have professional indemnity insurance. Any such insurance policy would be written on the "claims made" basis. On the facts of this case this will be provided by the first defendant's insurer in the event run off cover is in place in accordance with the clauses 5.4 and 5.5 of the MTCs. As the first defendant's insurer is in liquidation its liabilities may be met by the Financial Services Compensation Scheme, see paragraph 5 of Mr Thomson's witness statement and paragraph 27 of Mr Loome's witness statement.

39. In the event there is no run off cover in place in accordance with clauses 5.4 and 5.5 of the MTCs and in the event that the first defendant is a "prior practice" to the second defendant, in accordance with clause 1.5 of the MTCs, the second defendant's insurer will be the insurer of the first defendant. If this is the case, as Ms Padfield QC submits, it is possible for two entities to be insured under a single policy with one

policy holder and so the first defendant would be insured under the second defendant's policy of insurance.

40. The important point to grasp is that the insurance arrangements, whatever they may be, do not transfer the liability of the first defendant to the second defendant.

41. If matters are as Mr Davenport QC submits, then the first defendant would be insured under the second defendant's policy of insurance in respect of its liability to the claimant. In this case the claimant would look to AmTrust Europe to meet the claim.

42. In the circumstances I have some difficulty in understanding what purpose the second defendant's continued involvement in these proceedings serves. I accept Mr Davenport QC's submission that a declaration is a discretionary remedy. I also accept his submission that there need not be a present cause of action against the defendant. The court must however exercise its discretion in accordance with the over-riding objective to ensure that cases are dealt with justly and at proportionate cost.

43. In my judgment the critical factor here is that a declaration in the form currently sought will not bind AmTrust Europe the insurer who is potentially liable to pay the claim. In the circumstances there is considerable merit in Ms Padfield QC's submission that this is inappropriate and futile litigation.

44. There are now many cases where the courts have found that the benefit of the litigation does not justify the cost of the proceedings. This is a species of abuse of process, see *Jameel v Dow Jones and Co* [2005] EWCA Civ 75 and cases cited at paragraph 3.4.3.4 of the White Book. As was pointed out by Lord Phillips in the case of *Jameel* the role of the courts has changed in modern times;

> "54. An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

45. I was not impressed with the suggestion made by Mr Davenport QC that it would be open to AmTrust Europe to apply to join these proceedings. Nor was I impressed with his submission that the very existence of the declaration would cause AmTrust Europe to accept the claim.

46. It is the claimant who has chosen to bring these proceedings in their current form. In my judgment the claim for a declaration would only have utility if AmTrust Europe is joined to these proceedings by the claimant. To permit the claim for a declaration to proceed in its current form purely against the second defendant would clearly put the second defendant to a great deal of time and cost in circumstances where it has no direct liability to the claimant and the issue may well have to be litigated further between different parties at even greater cost and court time.

47. In the circumstances I am satisfied that the claim against the second defendant as currently pleaded should be struck out. However before taking that step I am also

satisfied that the claimant should be given the opportunity of reformulating its claim to include AmTrust Europe. If the successor practice issue is to persist it would be inappropriate and disproportionate to require the claimant to start from scratch. I also take into account that AmTrust Europe has been put on notice of this issue and their potential liability under the policy since May of last year. Further I do not accept the submission made by Ms Padfield QC that in the context of an application to strike out a pleading the proposed addition of a party should be viewed any differently to the proposed amendment of the case against an existing party, particularly given the very wide terms of CPR 19.2 (2) which provides;

> "The court may order a person to be added as a new party if—
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

48. In the circumstances I would propose to stay the claim for a limited period with a direction that unless the claimant applies to lift the stay together with an application to amend supported by a draft amended claim form and particulars of claim the claim against the second defendant will be struck out without further order. In the event an application to amend is made by the claimant the second defendant's continued involvement in these proceedings will be determined in light of the proposed amendment. I would ask that counsel discuss and prepare a suitable form of order prior to the handing down of this judgment.