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***Castles in the Air: Discovery Land Revisited***

INTRODUCTION

In *Axis v Discovery Land and ors* [2024] EWCA Civ 7, the Court of Appeal dismissed an appeal by Insurers against adverse findings on the application of the dishonesty exclusion and aggregation clause in a solicitors’ professional indemnity policy.

**This note reviews the decision.**

**THE DISHONEST SOLICITOR AND THE DISPUTE DIRECTOR**

We [reported](https://www.caytonslaw.com/wp-content/uploads/2024/02/2023.05.03-Discovery-Land.pdf) in May last year on the decision of the Commercial Court in *Discovery Land and ors v Axis Specialty* [2023] EWHC 779. The case arose from the dishonesty of a solicitor named Stephen Jones. Mr Jones owned and controlled various corporate entities which operated under the ‘Jirehouse’ brand. They were collectively referred to as ‘the Jirehouse Entities’. Vieoence Prentice was registered as a member of one of the entities and director of others. In practice, he had little or no involvement in management. He left that to Mr Jones.

Discovery Land LLC retained one of the Jirehouse Entities to act in the purchase of a castle in Scotland. It put it in funds for the purchase price of US$14m. Mr Jones helped himself to the money. He paid it away to one of his other companies. He then put the castle up as security for loan finance for his companies. The loan monies disappeared, as well. The Jirehouse Entities were intervened. Mr Jones was struck off the roll. He was found guilty of fraud in a criminal trial and sentenced to twelve years in prison.

**THE ATTEMPT TO DECLINE INDEMNITY**

The Claimants brought proceedings to recover the money. They got judgment against the Jirehouse Entities. These entities were by then insolvent. Axis, their professional indemnity insurer, declined the claim. It relied on the dishonesty exclusion in the policy. The wording of this departed from the Minimum Terms but the broad effect was the same[[1]](#footnote-1). It excluded “*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*”[[2]](#footnote-2). This was then subject to the proviso that dishonesty was not to *“be imputed to a body corporate unless it was committed or condoned by…all directors…or members*….”

Axis argued that there was no innocent principal. By analogy with the doctrine of sham partnership, it contended that Mr Prentice was not a ‘real’ member of the LLP or director of the companies. In any event, it maintained, he had ‘blind-eye’ knowledge of Mr Jones’s dishonesty and had condoned it. In the alternative, Axis argued that claims arising from the theft of the purchase monies and the fraudulent loans fell to be aggregated. It lost on all three grounds.

**THE JUDGMENT AND THE APPEAL**

It was predictable that the court would be satisfied that Mr Prentice was indeed a real director. The court left open the possibility that a directorship might be found to be a sham device in the appropriate case, but for reasons which we have explored [before](https://www.caytonslaw.com/wp-content/uploads/2022/10/2022.10.21.-Solicitors-practices.pdf) this is extremely doubtful. Tellingly, perhaps, the point was not taken further. The facts of this case were materially different from those in [*Bishop of Leeds v Dixon Coles & Gill*](https://www.caytonslaw.com/wp-content/uploads/2021/08/2021.08.12-Aggregation-of-Claims-Dishonest-Solicitors-Revisited.pdf) [2021] EWCA Civ 1211 but it would nevertheless have been surprising if the court had reached a different conclusion on aggregation.

The Judge was very critical of Mr Prentice. He found that he had lied in his evidence before the court, lied to Counsel at an indemnity conference and lied in a witness statement in a background matter. It was satisfied that he knew that Mr Jones was prepared to do things he should not have done. It concluded that he was not fit to be a solicitor, let alone a principal of a legal practice. Nevertheless, he did not accept that the threshold for blind-eye knowledge had been met. If Mr Prentice had failed to make enquiries, the Judge found, this was down to his incompetence and lack of professionalism rather than anything more sinister. It followed that there was no condonation.

Axis appealed the court’s findings on condonation and aggregation. The appeal was dismissed.

**CONDONATION**

The appeal on condonation involved a challenge to the Judge’s findings of fact. Axis argued that his conclusions on condonation were inconsistent with his findings about Mr Prentice’s honesty. This was an inevitably challenging case to mount. It faced a number of difficulties.

First, the appellate courts are reluctant to interfere with factual findings. The authorities variously indicate that they will only do so if the findings are “*plainly wrong,*” “*cannot reasonably be explained or justified*” or are “*rationally insupportable*”.

Secondly, the test for blind-eye dishonesty outlined in *Manifest Shipping v Uni-Polaris* [2003] 1 AC 469 is tightly drawn. It requires an individual to have a firmly grounded suspicion targeted on specific facts and to have made a deliberate decision to avoid confirming what the individual has good reason to believe. The fact that the individual might be an unreliable witness and may have in other ways acted dishonestly does not, without more, lead to the conclusion that they had blind-eye knowledge.

Thirdly, it would be alarming if it were intended to be suggested that, once an individual has been found to have a predisposition for dishonesty, it can be assumed that they are guilty of the specific dishonest conduct of which they are accused. The fact that a witness might have lied about some things does not necessarily mean that they have lied about everything. Even the most pathological liar sometimes tells the truth.

Andrews LJ (with whom the others agreed) concluded that Axis had failed by some margin to meet the threshold for an appeal against findings of fact. She observed that it was for the trial Judge to decide what weight to place on the fact a witness had lied. He was entitled to conclude that Mr Prentice was lying to distance himself from events and not to hide the extent of his knowledge. She accepted that a different Judge might have reached a less benign conclusion on the same facts but found that this did not make the decision irrational.

Of more interest, perhaps, is the Court of Appeal’s approach to the meaning of condonation. Andrews LJ found that ‘condone’ means “*to treat as acceptable conduct which is unlawful or morally blameworthy*”. Approval need not be overt. It can and commonly will be tacit. There needs to be a causal nexus between the conduct alleged to have been condoned and the claim.

She concluded that the use in the exclusion of the words “*in any way involving*” meant that it would be enough if Mr Prentice had knowledge of a dishonest act or omission which formed an essential part of the chain of events.

These words were a gloss on the Minimum Terms and ought properly to have been given the blue pencil treatment. *Zurich v Karim* [2006] 3355 and *Goldsmith Williams v Travelers* [2010] EWHC 26, in which the wording was more faithful to the Minimum Terms, would suggest that the outcome would not have differed if they were. But neither case considered authorities from the wider insurance field to the effect that *“arise from*” denotes proximate cause when used in an exclusion. It is not immediately obvious why solicitors’ professional indemnity policies should be treated differently.

Andrews LJ agreed with the Judge that the exclusion extended to a pattern of behaviour. But she doubted whether, as the Judge appeared to suggest, it would avail an insured to say that it only condoned short-term borrowing of client monies and not their outright theft. This conclusion might be more readily reached where the wording of the Minimum Terms is adopted without amendment and the exclusion to claims arising from “*dishonesty or a fraudulent act or omission*”.

**AGGREGATION**

Andrews LJ echoed Lord Toulson in *AIG v Woodman* [2017] UKSC 18 in observing that the exercise in determining whether claims are related for the purposes of aggregation is acutely fact-sensitive. She found that the straightforward theft of the purchase monies and the more convoluted series of events by which the fraudulent loans were procured were two very different things. On that basis, she had no difficulty in concluding that the Judge’s decision on aggregation was not only one that was open to him, but also that it was plainly the right answer.

**DISCUSSION**

The weight of authority is such that appellants hardly needed a reminder of the difficulties in challenging findings of fact. Nevertheless, respondents should not be complacent. The case of *Group Seven v Notable Services* [2019] EWCA Civ 614 (in which we were involved) has parallels at a high level with this one. At first instance, the Judge found that a key individual had lied to the court and had acted dishonestly in other respects but did not have blind-eye knowledge. The Court of Appeal, exceptionally, concluded that the finding could not stand.

It is helpful to have some guidance from the court of appeal on what does and does not amount to condonation, although it is unfortunate that the exclusion under consideration materially departed from the Minimum Terms. The causal connection required under the Minimum Terms is yet to be considered by the appellate courts.

Together with the judgments of the Supreme Court in *Woodman* and the Court of Appeal in *Dixon Coles & Gill,* this case might be seen as the final part of a triptych illustrating the current approach to questions of aggregation.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note.   
If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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1. The departure from the Minimum Terms has been missed in some commentaries [↑](#footnote-ref-1)
2. It is hard to see why the draftsman thought that there might be scope for a dishonest *error* or fraudulent acts or omissions which were not already caught by the reference to dishonest acts or omissions [↑](#footnote-ref-2)