Neutral Citation Number: [2021] EWHC 2146 (Comm)

Case No: CL-2020-000451

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

Peter MacDonald Eggers QC
(sitting as a Deputy Judge of the High Court)

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Between:

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

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William Flenley QC (instructed by **Davis Woolfe Limited**) for the **Claimants**
Helen Evans (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing dates: 28 May 2021
Further written submissions: 28 May 2021, 11 June 2021 and 16 June 2021

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Approved Judgment

I direct that 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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PETER MACDONALD EGGERS QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment will be 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 will be deemed to be 10:30 am on 30 July 2021. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk"

Peter MacDonald Eggers QC:

Introduction

1. On 16th April 2021, I conducted a case and costs management conference in this action. On that occasion, a number of matters, including disclosure, were addressed. The costs management hearing itself was adjourned, because decisions taken during the case management conference led to a change in the assumptions which underpinned the costs budgeting to be considered.

2. On 28th May 2021, I conducted the adjourned costs management conference. A number of issues arose during that hearing and the proposals for costs budgeting being put forward by the Defendant were complex and required further modification. I therefore directed that the parties provide further submissions in writing after the hearing and that I would deal with the costs management and budgeting issues by a written ruling thereafter. This is that ruling in respect of the issues which remain in dispute between the parties. It is issued following the parties' further written submissions, which closed with the Claimants' submissions in reply dated 16th June 2021.

3. I regret that this process has taken the path it has, but it has proved to be unavoidable. In this respect, I make no criticism of the parties, but it points to possible difficulties with costs budgeting as the same time as the case management conference, where decisions taken in case management can influence the outcome of a proposed costs budget. The obvious solution is for those preparing the proposed costs budgets to allow for an alteration in the assumptions underlying the proposed costs budget, insofar as that is possible.

4. The Defendant is an insurer which provided professional indemnity insurance, subject to a limit of £3,000,000 any one claim and specified excesses each and every claim, to Jirehouse, Jirehouse Trustees Ltd ("JTL") and Jirehouse Partners LLP (collectively "the Jirehouse Entities"). The professional indemnity insurance policy was written in accordance with the Solicitors Regulation Authority ("SRA") regulatory regime for compulsory primary layer insurance for solicitors in private practice in England and Wales.

5. At all material times, Mr Stephen David Jones was a director or member of the Jirehouse Entities. It is agreed between the parties to this action that the three claims which are the subject of this action arose out of the dishonesty of Mr Jones. Mr Jones is not a party to this action.

6. Mr Vieoence Prentice was registered at Companies House as a director or member of each of the Jirehouse Entities from 2nd June 2017 until his resignation on 15th March 2019.

7. The policy issued by the Defendant contained an exclusion (clause 2.8) which provided that the Defendant would 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, subject to certain provisos, namely that (a) the policy shall nonetheless cover the civil liability of any innocent insured, and (b) no dishonest or fraudulent act shall be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company or,

in the case of a Limited Liability Partnership, all members of that Limited Liability Partnership.

8. There is also an aggregation provision (clause 5.2) identifying what amounted to "*one claim*".

9. The Claimants claim declarations that they are entitled to indemnities under the policy pursuant to their rights under the Third Parties (Rights against Insurers) Act 2010.

10. It is common ground between the parties that, subject to the application of any of the exclusions of the policy, each of the Jirehouse Entities was entitled to be indemnified by the Defendant in respect of three claims made against the Jirehouse Entities, namely (1) the Surplus Funds Claim, (2) the Dragonfly Claim, and (3) the Mount Two Claim. These claims may be described as follows:

    (1) By a judgment dated 30th July 2019 in claim no. BL-2019-000541, judgment in default was granted against each of the Jirehouse Entities in respect of the following two claims:

        (a) The Surplus Funds Claim: judgment was entered for the First Claimant in the sum of £7,423,501.80 plus interest. This claim related to sums which had been paid by or on behalf of the Claimants to Jirehouse in April 2018 and November 2018. The Claimants alleged that, unknown to the Claimants, the funds were in fact dissipated by one of the Jirehouse Entities, on 6th December 2018, Mr Jones subsequently caused the First Claimant to send to another of the Jirehouse Entities the further sum of US$9.3 million, subject to an undertaking that the sum would be repaid on certain terms, and these funds were ultimately used to complete the purchase of property in Scotland known as Taymouth Castle, but in breach of undertaking, the Surplus Funds were not repaid to the First Claimant when they fell due or at all.

        (b) The Dragonfly Claim: judgment for the Third Claimant was entered for damages to be assessed but with an order that the Jirehouse Entities forthwith pay the Third Claimant £5,294.818.70 on account of damages, together with interest. This was in respect of a claim arising from the unauthorised creation between 21st January 2019 and 12st February 2019 of a secured loan facility in favour of Dragonfly Sarl which was secured over Taymouth Castle.

    (2) The Mount Two Claim: by a judgment dated 26th July 2019 in claim number BL-2019-000683, judgment in default was granted against one of the Jirehouse Entities in favour of the First Claimant for the sum of £18,813.30 plus interest. This was a claim which had originally been brought by Mount Two Limited, the seller of Taymouth Castle. The claim related to the dissipation of a retention of £1.43 million which one of the Jirehouse Entities had agreed to hold on the seller's behalf but in fact dissipated. As it happened, Mr Jones used part of the Dragonfly loan monies to restore the retention sum. Subsequently, Mount Two Limited assigned its claim to the First Claimant, which was duly substituted as the Claimant in the Mount Two Claim.

11. The principal issue between the parties in this action under the professional indemnity policy is whether the Defendant has no liability to the Jirehouse Entities and/or the Claimants as a consequence of Mr Jones's dishonesty. The Defendant contends that the exclusion in clause 2.8 applies to exclude cover for the Claimants' claim, unless at the time of Mr Jones's conduct there was another member or director of those entities who did not commit or condone Mr Jones's dishonesty, and that in this case there was no such other member or director. The Defendant has reserved its right to allege that Mr Prentice condoned Mr Jones' dishonesty pending outstanding requests for documents within the control of the SRA, but does not currently advance that allegation. The Defendant's case is that the documents purporting to evidence Mr Prentice as a director or member of the Jirehouse Entities are a sham, and that Mr Prentice was not so appointed, but in fact remained merely an employee of the Jirehouse Entities and that Mr Prentice did not fulfil the role of a "*director*" and "*member*" within the meaning of clause 2.8 of the policy.

12. In support of this case, the Defendant relies on Mr Prentice's conduct in another transaction involving Rheno Property Holdings Ltd ("Rheno"), where Mr Jones had misappropriated client funds (referred to as the "Good Faith Deposit") within a day of its receipt in or around June 2016 and subsequently moved a sum of £400,000 in and out of one of the Jirehouse Entities' bank account in February 2017 when he was asked for evidence that the sum was still being held. The Defendant contends that Mr Jones had involved Mr Prentice in writing a letter to Rheno's agent in June 2017 stating that it had been "*necessary for us to review the records and this took some time*" and that the Good Faith Deposit was still held by the Jirehouse Entities, and that if Mr Prentice had taken any steps to check the client account record and file, he would have realised that the Good Faith Deposit had been dissipated.

13. Therefore, the Defendant contends that it is not obliged to indemnify the Jirehouse Entities in respect of all three matters which are the subject of this action and that the Claimants are not entitled to the declarations they seek.

14. Alternatively, the Defendant contends that if it is not entitled to rely on the exclusion in clause 2.8 of the policy, the Surplus Funds claim, the Dragonfly claim and the Mount Two claim all fall to be treated as "*one claim*" for the purpose of clause 5.2 of the policy, with one limit of indemnity of £3 million, because they are claims which arise from one matter or transaction or from one series of related acts or omissions or from similar acts and omissions in a series of related matters or transactions.

15. The Claimants' case is that the exclusion in clause 2.8 does not apply, because the documents showing Mr Prentice's appointment as a director and member of the Jirehouse Entities were not a sham, and the words "*directors*" and "*members*" in clause 2.8 are not to be interpreted as requiring factual fulfilment of these roles and/or a substantial fulfilment of them. The Claimants also contend that the three claims which are the subject of this action do not fall to be treated as "*one claim*" for the purpose of clause 5.2 of the policy, because the Surplus Funds Claim, the Dragonfly Claim and the Mount Two Claim amount to three separate claims under clause 5.2, because they arise from three separate transactions and separate and distinct breaches of duties owed to different parties, by different entities, and at different times.

Costs budgeting issues

16. For the purposes of making a costs management order under CPR rule 3.15, the Court is concerned to record (a) whether and the extent to which the parties are agreed as to incurred costs, i.e. the costs incurred up to the date of the costs management conference, (b) whether and the extent to which the parties are agreed as to budgeted costs, i.e. costs to be incurred after the date of the costs management conference, and (c) insofar as the parties are not agreed as to budgeted costs, the Court's approval, subject to any appropriate revisions. The Court's approval is given with a view to furthering the overriding objective (CPR rule 15.12(2)), which in this context puts particular emphasis on the desirability of saving expense, adopting a proportionate response having regard to the value of the claim, the financial resources of each party, and the complexity of the issues, and with an eye on ensuring the fair conduct of the action.

17. In the context of the overriding objective, Mr William Flenley QC on behalf of the Claimants referred me to a passage in the White Book, at paragraph 44.3.3, where reference is made to the decision of Leggatt, J in *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm), where the learned judge said at para. 13:

> "*In a case where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants*."

18. Of course, costs must be assessed in the manner that Leggatt, J indicated in this judgment. I have only one reservation. I am not certain why the "*touchstone*" of reasonable or proportionate costs must be the lowest amount which a party could reasonably have been expected to spend. Certainly in the context of costs management, the Court should allow some flexibility to the parties to ensure that their conduct of the action is not unnecessarily and potentially unfairly hampered by an unrealistically low

assessment or by only the lowest assessment of what would constitute reasonable and proportionate expenditure. Expenditure which is within a reasonable and proportionate range is still reasonable and proportionate even if it is not at the lower end.

19. In this judgment, I am not undertaking an assessment of costs, and certainly not a detailed assessment (CPR PD 3E, para. 12), but deciding whether to approve a costs budget and in what amount.

20. In exercising its costs management jurisdiction, the Court's role is not to approve the parties' incurred costs (CPR rule 3.17(3)(a)), but the Court may record its comments on incurred costs and take those costs into account when considering the reasonableness and proportionality of all budgeted costs (CPR rule 3.17(3)(b)).

21. In the present case, the Claimants have taken issue with the proposed costs to be incurred by the Defendant overall and in respect of individual phases of the action and also submitted that the Court should exercise its power under CPR rule 3.17(3)(b) having regard to the incurred costs.

22. The Defendant had taken issue with some items of the Claimant's proposed budget, but these matters have now been agreed between the parties.

23. This judgment will address only those matters which remain in dispute between the parties, which focus on the Defendant's costs budget, not that of the Claimants. If a party's estimate for a particular phase is agreed, I do not address those costs in this ruling.

24. I will address these issues as follows:

    (1) The costs incurred in respect of disclosure.

    (2) Whether the Court should exercise its power under CPR rule 3.17(3)(b) in respect of incurred disclosure costs.

    (3) The costs to be incurred in respect of each phase of the action as from disclosure (as all of the costs of the previous phases have been incurred).

    (4) The costs incurred and to be incurred overall.

25. In considering these issues, I have regard to the Defendant's revised costs budget as at 29th April 2021 submitted on 10th June 2021, although the Claimant has asked the Court to consider the changes made to the Defendant's previous budgets. I also have regard to the Claimant's budget as at 28th May 2021 submitted on 11th June 2021. There is therefore a difference of one month between the dates as at which the parties' budgets have been prepared, but I do not consider that this is significant for the purposes of the costs budgeting exercise which the Court is undertaking. Further, it is plain that the action has progressed since the end of April 2021 (as far as the Defendant's costs budget is concerned) and that what were previously costs to be incurred are now costs incurred. Nevertheless, the Defendant's costs budget is considered by the Court as at 29th April 2021 and not any later date.

The Defendant's Incurred Costs of Disclosure

26. Disclosure is the most contentious item between the parties as to the costs budgeting exercise.

27. The Defendant has "*incurred*" £245,850.99 by way of disbursements and £54,181 by way of time costs to date.

28. The Defendant's total of £624,781.99 in respect of incurred and estimated costs of disclosure stands considerably higher than the Claimants' total of incurred and estimated costs of £89,230.

29. There is, says the Defendant, a reason for this disparity. In May 2019, the SRA had intervened into the practices of Mr Jones at each of the Jirehouse Entities which are in liquidation. As a result, access to the Jirehouse Entities' server was controlled by the SRA. This is, says the Defendant, a time-consuming and expensive exercise, requiring the Defendant's solicitors to undertake three particular searches of documents on that server, processing information on that server, the need to approve and agree the appropriate approach with the Jirehouse Entities' liquidators and the SRA, and the requirement to use an independent counsel team to review the documents so that privileged material would not be provided to the Defendant.

30. This exercise is explained in detail in paragraphs 34-47 of the witness statement dated 9th April 2021 made by Ms Zoe Burge of CMS Cameron McKenna Nabarro Olswang LLP ("CMS"), the Defendant's solicitors. Ms Burge corrected and updated this witness statement by her second witness statement dated 16th April 2021 and her third statement dated 23rd April 2021. At paragraphs 34-47 of her first witness statement, Ms Burge stated:

    (1) On 18th September 2020, CMS met IT specialists, Lighthouse Global ("Lighthouse"), who informed CMS that prior to any searches of the Jirehouse server being performed, the data held by the SRA would need to be processed, an exercise that would involve significant further time and additional costs.

    (2) The Jirehouse servers would not be in a readily searchable format because all documents would be held on proprietary systems and would need to be processed and formatted using specialist forensic software before keyword searches could be applied.

    (3) Lighthouse's final estimate for the data processing exercise was £200,000 (plus VAT), representing almost 75% of the total costs estimate of £269,400 (plus VAT).

    (4) Given the size of the estimate, CMS contacted another IT specialist on 22nd September 2020, who provided a higher quotation of £669,845 (plus VAT).

    (5) On 25th September 2020, the Defendant authorised the instruction of Lighthouse to process the Jirehouse servers and undertake the requested searches.

(6) On 9th October 2020, Devonshires, the SRA's Intervention Agent in respect of the Jirehouse Entities, confirmed that Lighthouse could attend its offices that day to collect the copy of the Jirehouse servers, which Lighthouse did.

(7) The process of searching, reviewing and obtaining relevant documents from the Jirehouse servers also involved the meeting of demanding requirements imposed by the SRA, which has taken far longer than CMS or the Defendant expected:

(a) For each search of the Jirehouse server, the Defendant was required to draft and negotiate the terms of instructions sent to Lighthouse, who holds the processed server on behalf of the SRA.

(b) The scope of the searches required some negotiation with Devonshires/SRA.

(c) The processing of Jirehouse servers was completed on 7th January 2021.

(d) As the Jirehouse servers have been reconstituted and made searchable, searches were undertaken relatively quickly once the instructions to Lighthouse (including the search terms and date range) were agreed with the SRA, but the next stage of the process proved far more challenging than expected.

(e) The Defendant had to assemble and fund a team of 4 independent counsel to review the documents that were responsive to the search terms. Instructions for the independent counsel team also had to be prepared and negotiated with the SRA and Devonshires.

(f) Independent counsel were required to assess the relevance of documents identified as responsive to the searches performed and then determine whether the documents would be provided to the Defendant or whether the SRA wished to make a claim for privilege or confidentiality in respect of the documents (and/or whether the documents should be redacted to permit provision to the Defendant).

(8) The three searches referred to were for documents relating to:

(a) The Rheno transaction, in part in order to analyse Mr Prentice's involvement with and knowledge of that transaction. This search commenced in November 2020, but given the large number of documents resulting from the search (approximately 117,200 documents), and given that a large proportion of these documents (80%) were not relevant, this search was paused in December 2020 while the scope of search terms was narrowed and resumed in January 2021 (resulting in 2,415 documents). Documents from this search were produced in November 2020 (156 documents from a set of 6017 documents that had been reviewed), and on 25th March 2021 and 31st March 2021, after a review by independent counsel took place. As to the latter documents produced, on 9th March 2021, CMS were informed that approximately 1,687 of the responsive documents had been assessed as

relevant but were being withheld from production on the grounds of privilege or confidentiality and that approximately 1,000 privileged or confidential documents could be redacted to permit provision to the Defendant, subject to the SRA's consent; on 25th March 2021, independent counsel authorised the provision to CMS of 136 redacted documents; on 31st March 2021, independent counsel authorised the provision to CMS of a final tranche of 123 redacted documents.

(b) Mr Prentice's status in the Jirehouse Entities. On 19th March 2021, CMS issued instructions to Lighthouse (agreed by the SRA) for this search. This search generated approximately 141,000 documents. So, the search terms had to be refined.

(c) Mr Prentice's knowledge of the Taymouth Castle transaction. On 19th March 2021, CMS issued instructions to Lighthouse (agreed by the SRA) for this search. This generated about 4,250 documents for review and on 1st April 2021 the independent counsel team was instructed to review these documents, the instructions having been agreed the instructions with the SRA and Devonshires.

31. Further information about this exercise was provided by CMS in their letter dated 21st May 2021. The Claimants, not surprisingly, have offered no evidence in response although they did raise questions about the Defendant's evidence.

32. Ms Helen Evans, who appeared on behalf of the Defendant in respect of costs budgeting, submitted that:

(1) It is not possible at this stage to quantify the size of disclosure, not least because there are ongoing reviews of the material from the Jirehouse server. Mr Jones provided approximately 10,000 electronic pages of what appears to be an edited version of the Taymouth Castle transaction file (via the SRA).

(2) The Defendant's budget extended to disclosure of documents relating to the Rheno transaction, Mr Prentice's status and the Taymouth Castle transaction so far as relevant to the case currently pleaded.

(3) Although the above searches have now taken place on the server, Lighthouse's hosting and search costs, together with the fees of independent counsel actually reviewing the documents described above had not been billed as at the date of the revised budget and are included in budgeted costs in the budget before the Court on 28th May 2021 (see CMS's letter dated 21st May 2021).

(4) The bulk of the incurred disclosure costs relate to Lighthouse's costs of processing the Jirehouse server (approximately £170,000), Lighthouse's hosting and search costs relating to the Rheno transaction (approximately £14,900), independent counsel fees for work done by the date of the budget (approximately £46,800) and the costs of the SRA and Devonshires (approximately £5,800).

(5) The Defendant's approach in relation to the Jirehouse server disclosure costs was to include all billed costs under the "*incurred*" heading and all unbilled

costs under the "*estimated*" heading. The Defendant submitted that there were good practical reasons for this approach, not least because at the time of preparing the budget on 29th April 2021, CMS were not in a position to quantify the work which had been undertaken but not yet billed.

(6) The bulk of the budgeted costs of disclosure in the budget before the Court on 28th May 2021 relate to Lighthouse's hosting/search/project management costs (approximately £125,000) and the costs of independent counsel reviewing the documents as required by the SRA (approximately £100,000) and the costs of the SRA and Devonshires (approximately £20,000).

(7) The budget before the Court on 28th May 2021 was subsequently revised. As explained in CMS's letter dated 11th June 2021, the estimate for future costs includes:

(a) Lighthouse's fees until trial are estimated to be £95,000, comprising monthly hosting charges of around £3,000 for 14 months, additional search and project management fees of around £40,000, and provision for fees incurred since service of the Defendant's revised cost budget dated 29th April 2021. Access to the Jirehouse servers (subject to the SRA's consent) and access to the electronic documents disclosed from the servers up to and including trial is necessary in order to deal with any queries about those documents and to enable any additional discrete searches connected to the documents to be performed. The servers and the electronic documents must be hosted by an independent IT consultant as per the SRA's requirements.

(b) An estimate of £10,000 for the SRA's and Devonshires' fees to cover confidentiality and privilege issues and searches and document review.

(c) An estimate of £75,000 for independent counsel for completing the review and status searches, the review of documents responsive to revised and additional searches and the redaction of confidential or privileged documents arising from those searches.

(8) Adopting the approach in the revised budget, the incurred server disclosure costs were £237,469.49 and the estimated server disclosure costs are £180,000. If however the "*work done but not yet billed*" server disclosure costs are to be treated as "*incurred*" costs, the estimated disbursements in the revised budget as at 29th April 2021 were £245,114.56 and the estimated server disclosure costs are £172,354.93; and the "*incurred*" disbursements for disclosure to 31st May 2021 would total £262,009.90 and estimated disbursements for disclosure would be £155,459.59.

33. Mr William Flenley QC on behalf of the Claimants contended that:

(1) Given that so much has been spent by the Defendant on disclosure to date, there should be little further to spend on the disclosure exercise.

(2) The effect of Ms Burge's evidence is that so far as searches of the servers are concerned, CMS have carried out all searches which are necessary and so it follows that estimated costs should not include sums for searches of servers.

(3) In their letter dated 21st May 2021, CMS set out the Defendant's then estimates for future costs of disclosure as follows:

(a) £125,000 for Lighthouse, in relation to hosting and project management fees for 12 months: this is not understood, because it appears that the servers are readily searchable and the necessary searches have already been done, and if not, as disclosure is ordered to take place by 30th July 2021, it is not clear why 12 months of hosting and project management are required.

(b) £20,000 for the SRA and Devonshires in relation to the searches relating to Mr Prentice's status and Taymouth Castle: it is not clear why the SRA or Devonshires will in the future charge in relation to searches which according to paragraph 45 of Ms Burge's first witness statement had been started on 19th March 2021.

(c) £100,000 plus VAT for independent counsel, which is said to comprise £25,000 per search: this is not understood, because there are only two searches relating to Mr Prentice's status and Taymouth Castle and because, according to paragraph 46 of Ms Burge's first witness statement, instructions had been issued to counsel to review 4,250 documents on 1st April 2021.

(4) The fees of the Defendant's own leading and junior counsel in respect of disclosure are estimated to be £80,000, but no explanation is given for this figure.

(5) The Defendant has almost entirely failed to explain its claim for the estimated future costs in relation to disclosure.

(6) As can be seen from the table at para 10 of Practice Direction 3E - Costs Management, however, the disclosure phase of a costs budget refers, and refers only, to the following activities: "*Obtaining documents from client and advising on disclosure obligations; Reviewing documents for disclosure, preparing disclosure report or questionnaire response and list; Inspection; Reviewing opponent's list and documents, undertaking any appropriate investigations; Correspondence between parties about the scope of disclosure and questions arising; Consulting counsel, so far as appropriate, in relation to disclosure.*"

(7) Costs budgeting must assume that the parties will comply with the Court's directions and disclosure must be given on 30th July 2021. The Defendant has provided no explanation as to why correspondence between the parties about disclosure will continue for a further 12 months after 30th July 2021. Hence the budget should allow for, say, 3 months, rather than 14 months, of hosting from 28th April 2021.

(8) There is no explanation of what the future search and project management fees relate to.

(9) The estimate includes fees for "*confidentiality/privilege issues*" and "*revised/additional searches (aggregation/excess)*", but no explanation is given as to what those issues or searches might be or why they might be necessary.

(10) The charge for independent counsel is high, given the work that has already been done. Similarly, the reasons for the high estimated fees for the Defendant's own leading and junior counsel remain unclear.

(11) There is a dispute between the parties as the scope of disclosure, but that dispute is irrelevant to the Defendant's costs budget. The Defendant's budget does not include costs for disclosure relating to the Rheno transaction.

34. The Defendant's incurred costs in respect of disclosure are high, perhaps very high. However, the explanation provided by Defendant is one I find credible and reasonable. In circumstances where a third party claimant is seeking to claim relief against a liability insurer pursuant to the Third Parties (Rights against Insurers) Act 2010, relying on the wrongful conduct of the insured, an insurer who must defend the claim often has little choice but to seek to access the documentary archives held by those representing the interests of the insolvent insured. I consider that it is both legitimate and reasonable for the Defendant to wish to access such documents. Otherwise, the Defendant becomes solely reliant on the disclosure provided by the Claimants.

35. If the only manner of the Defendant accessing those archives involves the processing of the Jirehouse servers, the administration of searches agreed with the SRA, the review by independent counsel, and the production of documents to the insurer, at which point the usual review processes commence, I consider that the Defendant's decision to adopt this approach is of itself both reasonable and justified. The Defendant has apparently taken steps to contain the costs, but the extent of the costs being incurred could not be reasonably predicted at the outset of this process. In circumstances where the issues in this action revolve around the status of Mr Prentice in his position within the Jirehouse Entities and given that the value of the claim is £6,000,000, in my judgment, the Defendant's decision to incur costs in respect of these documents was reasonable, based on the limited information available to me. Certainly, I do not consider that this approach is unreasonable. That is not to say that if or when such costs are assessed, the Court might not then reach a different view, but for the purposes of costs budgeting, I do not consider that the Court should criticise the Defendant incurring these costs in respect of disclosure.

36. I know that the Defendant's incurred and estimated costs of disclosure have been modified since the time of the case management hearing on 16th April 2021. However, I do not consider that the modification and further modification of such calculations by themselves render those calculations unreliable, especially where the costs are high, as here, and the circumstances giving rise to such costs are by their nature complex.

37. There is an issue about whether the "*work done but not yet billed*" server disclosure costs should be treated as "*incurred costs*" rather than "*budgeted costs*". In the result, I agree with the Defendant that this issue made little practical difference to the outcome. This translates to a difference of only £7,645.07 as at 29th April 2021 (which is the date

on which I am making the costs management order in respect of the Defendant's costs) or a difference of £24,540.41 as at 31st May 2021. Yet there is a difference. In my judgment, "*incurred costs*" should be treated as including the "*work done but not yet billed*" server disclosure costs, because the purpose of the costs budget is to allow the Court to set a budget by which the parties, going forward, can prepare the case for trial and take decisions in this respect with the Court-approved budget in mind. It is difficult to see how costs which relate to work already done and for which a party is responsible should not be treated as incurred costs, even if the costs are not yet quantified. In that event, the party concerned should estimate what those incurred costs are, even if that cannot be done with precision. With this in mind, I make the costs management order on this basis.

CPR rule 3.17(3)(b)

38. CPR rule 3.17(3)(b) provides that "*the court - (a) may not approve costs incurred up to and including the date of any costs management hearing; but (b) may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of all budgeted costs*".

39. The Claimants submitted that the Court should exercise its power under this rule insofar as the Defendant's incurred disclosure costs are concerned.

40. I was referred by the parties to three earlier decisions of the Court in connection with the treatment of incurred costs as part of the costs budgeting exercise. In *Yeo v Times Newspapers Ltd* (No 2) [2015] EWHC 209 (QB); [2015] 1 WLR 3031, Warby J said at para. 60-61:

> "*(ii) Incurred costs*
>
> *60. These are not subject to the approval process. This means that under the default procedure substantial costs may already have been incurred, without any budgetary control, by the time a decision is taken at a CMC. The parties' costs figures in this case illustrate the point. The total incurred by the time of my budgeting decision was over £200,000 (£110,000 on the claimant's side and £94,000 on the defendant's). In a case that goes to trial the successful party's costs incurred before approval of a budget will normally need detailed assessment, in the absence of agreement.*
>
> *61. However, if by the time the costs management process takes place substantial costs have been incurred, one thing the court may do is to "record its comments on those costs": see PD 3E, paragraph 7.4. What the court will do is to "take those costs into account when considering the reasonableness and proportionality of all subsequent costs": ibid. The court may reduce a budget for reasons which apply equally to incurred costs, or for reasons which have a bearing on what should be recoverable in that respect, for instance, that so much had been spent before the action began that the budgeted cost of preparing witness statements is excessive. If so, it is likely to help the*

> *parties reach agreement without detailed assessment later on if these reasons are briefly recorded at the time the budget is approved. I make some comments of this kind below.*"

41. In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC); [2015] 2 Costs LR 363, Coulson, J said at para. 83-84:

> "*83. Towards the end of the hearing on 13 February 2015, I made plain to the parties that I considered the claimant's costs budget to be unreliable (Section 4 above); that the claimant's costs budget was disproportionate (Section 5 above); and that the claimant's costs budget was unreasonable (Section 6 above). Although I did not in the hearing do what I have now done, and identify general figures which I consider to be reasonable under each head, I did indicate that an overall figure of about £4.5 million was likely to be the upper limit of what I considered to be reasonable. In view of the huge disparity between this figure and the claimant's budget costs, and the difficulties which the level of costs already incurred had created, I asked the parties to identify what options were open to me.*
>
> *84. Essentially, four options were identified. Option 1A was to order the claimant to prepare a new budget. Option 1B was to decline to approve the claimant's costs budget, a course I was obliged to take in Willis v MRJ Rundell and Associates Ltd and Another [2013] EWHC 2923 (TCC). Option 2 was to endeavour to set costs budget figures on a phase by phase basis, looking primarily at the estimated rather than actual costs. And Option 3 was simply to refuse to allow anything more in the costs budget beyond that which had already been spent, so that the claimant could not recover anything more than the costs already incurred* …"

42. In *Richard v The British Broadcasting Corporation* [2017] EWHC 1666 (Ch), Chief Master Marsh said at para. 6:

> "*This leads me to conclude that a degree of caution is appropriate when the court considers whether to make a comment about incurred costs. It is asked to do so in the context of the overall costs management exercise and the restraints that are clearly stated in PD3E para.7.3. The exercise of producing budgets and their review is, necessarily, an exercise based on limited information, even in relation to incurred costs; the amount of information that is to be included in the budget is very limited indeed.*"

43. Mr Flenley QC on behalf of the Claimants submitted that if the Court concludes that the Defendant has spent too much on disclosure in incurred costs in the present case then it should carry out an exercise similar to that undertaken by Coulson J, in relation to disclosure, in *CIP v Galliford*, that is the Court should identify the total sum which

it is reasonable and proportionate to spend on disclosure in this case, based on the information currently available; the Court should then deduct from that sum the total sum which the Defendant says it has already spent, which at the relevant time was approximately £389,000 (although the Defendant points out that its incurred costs were in fact £300,031.99); the sum allowed for future costs should be the difference between those two figures; if the difference is nil, in other words if the Court concludes that the total sum which it would be reasonable and proportionate for the defendant to spend on disclosure in this case is below £389,000, then the Court should award nil for the disclosure phase in the costs management order. However, if that course is not adopted by the Court, the Claimants submitted that the Court should nevertheless reject the option of deciding not to make a costs management order in respect of disclosure, because as Coulson, J said at para. 88, "… *the [Defendant]'s legal team may take the view that, without an approved costs budget, they can spend what they like and take their chances on assessment of the costs incurred*."

44. Ms Evans on behalf of the Defendant submitted that:

(1) Adopting the approach of Chief Master Marsh in *Richard v BBC*, the Court should adopt a cautious approach to exercising its powers under CPR rule 3.17(3)(b), especially when the Court is not in a position to judge the reasonableness of the Defendant's disclosure costs.

(2) There is nothing unreasonable or disproportionate about the Defendant's disclosure costs. The Defendant has been required to follow unusual and expensive procedures to gain access to Jirehouse documents on its server. The Court is not in a position to conclude, in the absence of knowing what those searches have yielded, that there is anything inappropriate about the incurred costs.

(3) The budgeted costs for disclosure are also higher than they might be in other cases because of the server disclosure costs. The budgeted costs should be considered on their own merits and not as part of an exercise ascribing an overall figure for incurred/budgeted costs as suggested by the Claimants. To decide an overall figure would have the effect of assessing the budgeted costs when the Court is not in a position to do so.

(4) The decision in *CIP v Galliford* is distinguishable in that Coulson, J decided that the claimant's budget was not only unreasonable and disproportionate, but also that it was unreliable; the claimant's incurred costs had increased from just under £1.6 million in the case management information sheet to £4.2 million in the budget; the key defendant's incurred costs were £1.5 million; the claimant's aggregate budgeted and incurred costs were nearly £9 million. Coulson, J decided that the case was straightforward and referred to the possibility that the claim's purported value of £18 million had been exaggerated (para. 17). The features that led Coulson, J to impose an aggregate incurred/budgeted figure do not apply to the present case. In this case, for reasons set out above, it would be inappropriate for the Court to comment on, or seek to constrain, the incurred disclosure costs.

45. In reply, the Claimants submitted that the decision in *Richard v BBC* is concerned with the Court recording comments on incurred costs and does not consider the decision in *CIP v Galliford*. The Claimants accepted that the Court must exercise care at the costs budgeting stage, but submitted that, particularly in the context of the very large sums both said to have been incurred, and estimated to be incurred, in relation to disclosure in the present case, it is appropriate and right that the Court should exercise some control over costs at the budgeting stage. Further, while the circumstances of the present case are not as extreme as those in *CIP v Galliford*, the Defendant's costs budgets have so far been voluntarily reduced by just under £500,000, or 25%, since their original budget which is a large sum in the context of a short trial with limited issues such as this.

46. The emphasis of costs budgeting rests on the future costs which the parties are to incur. This is for good reason in that it allows the parties to make their decisions in respect of the conduct of the action in light of the costs budget approved by the Court. It is unhelpful for the Court to comment on incurred costs where it is not undertaking a formal assessment of costs, with the benefit of the information and evidence which would be available for that exercise. Therefore, as the parties accept, the Court should comment on the parties' incurred costs with some circumspection (*Richard v BBC*). However, there will be occasions where, even on the limited information and evidence before it, the Court is not satisfied with the level of a party's incurred costs, or the party's explanation for those costs, even at the costs budgeting stage. This was the position in *CIP v Galliford*. In that event, CPR rule 3.17(3)(b) allows the Court to express and records its comments on those incurred costs and to allow its views on such incurred costs to influence the budgeting of costs to be incurred. This may allow the Court to employ various measures to deal with the costs budget, including those options identified in *CIP v Galliford*; there may well be other courses open to the Court in these circumstances.

47. In the present case, as explained above, I am not in a position to express any criticism about the Defendant's incurred costs. Based on the information available to me, I have found the Defendant's explanation for its incurred costs in respect of disclosure to be credible and reasonable. As regards the other elements of the Defendant's incurred costs, I have little information and evidence available to me and I am disinclined to rush to any decision which is critical of the Defendant in respect of those incurred costs. Of course, if or when the Defendant's costs are to be considered in the context of assessment, the Court will be free to assess costs in accordance with the usual principles.

48. In these circumstances, I propose not to make any comments in respect of the Defendant's incurred costs pursuant to CPR rule 3.17(3)(b).

Costs to be incurred

Disclosure

49. The Defendant estimates that a further £260,000 of disbursements and £64,750 of time costs are to be incurred in the future, giving a total of incurred and estimated costs of £624,781.99 for disclosure.

50. As to the estimated costs of disclosure in the future, the Claimants make a legitimate point that disclosure was expected to be exchanged in short order, by 30th July 2021 (although I have been informed that this date has been extended by agreement to 10th September 2021). That said, the disclosure exercise extends beyond the exchange of disclosure and includes dealing with additional disclosure requests and undertaking additional investigations. That process need not take place during all of the time available up to the trial. In my judgment, that facility should extend up to 7 months after the exchange of disclosure, not beyond. If it is so limited, any difficulties encountered by the Defendant to deal with later disclosure requests may not be readily answered by the Claimants and that is a matter which should be taken into account at that time.

51. In those circumstances, I will allow £40,000 in respect of the Defendant's time costs and £110,000 in respect of disbursements other than in respect of the Defendant's own counsel fees. In respect of counsel's fees, I consider that these costs should also be reduced, given that there is no real explanation provided by the Defendant for such a high figure. I therefore reduce this sum from £80,000 to £40,000.

Costs of the Pre-Trial Review

52. The Defendant has put forward an estimate of £36,220 for the Pre-Trial Review, comprising £25,600 disbursements (the vast majority of which represents counsels' fees) and £10,620 time costs. By comparison, the Claimants' budgeted figure is £27,625 of which £16,250 represent counsels' fees. The Claimants object to the Defendant's estimate as being neither reasonable nor proportionate.

53. I consider that the Defendant's estimate is reasonable and not especially high. In the circumstances, I approve that estimate.

Costs of Trial Preparation

54. The matter has been fixed for trial with an estimated trial length of 6 days (excluding reading time).

55. The Defendant's estimate of costs of trial preparation are £230,000 for counsels' fees, £600 other disbursements, and £46,300 time costs. By comparison, the Claimants' estimated trial preparations costs are £112,500 counsels' fees, £3,000 other disbursements, and £41,375 time costs. The Claimants' estimate has been agreed.

56. The Claimants objected to the Defendant's estimate on the ground that it is not reasonable and proportionate. The Defendant responds by stating that this is a complex case, both as a matter of fact and law, and that the value of the claim justifies the expense.

57. In this respect, I agree with the Claimants that the costs of trial preparation insofar as they comprise counsels' fees estimated by the Defendant are excessively high and should be reduced from £230,000 to £150,000. I approve the other elements of the Defendant's estimated costs.

Costs of the Trial

58. The Defendant's estimated cost of the trial are £72,500 counsels' fees, £2,000 other disbursements, and £26,200 time costs. By comparison, the Claimants' estimated costs are £42,000 counsels' fees, £8,000 other disbursements and £33,375 time costs.

59. The Claimants argued that the Defendant's estimate should be reduced to the same level as their own estimate.

60. I do not consider that the Defendant's estimate is disproportionate or unreasonable. These costs estimates are approved.

Contingent Costs A

61. The Defendant has included an estimate for a contingent application for specific disclosure and for permission to adduce third party documents in the total sum of £79,660 (comprising counsels' fees of £60,000, other disbursements of £510, and time costs of £19,150).

62. The Claimants suggested that these costs should be dealt with and disposed of as part of the application if and when it is made, because it is impossible to assess whether the costs asserted are reasonable without knowing what the applications entail. I have some sympathy for this view, although I do not think that by itself is a sufficient ground to refuse to make a costs management order in respect of this contingent application.

63. Furthermore, the Defendant has explained the assumptions underlying the application, namely that it relates to specific disclosure of documents from third parties, in particular Mr Prentice, and permission to rely on third party documents such as those under control of the SRA, supported by witness evidence.

64. I approve the costs of this contingency in the reduced sum of £55,660 (the reduction being in respect of counsels' fees from £60,000 to £36,000), because the application is likely not to be of more than one day's duration.

Costs overall

65. The value of the claim is just under £6,000,000.

66. There is a vast difference between the Claimants' incurred and estimated costs (£520,961) and those of the Defendant, after the reductions in the costs to be incurred addressed above (£1,221,683.71).

67. The Claimants rely on that difference as a self-evident indication that the Defendant's overall costs incurred and to be incurred are disproportionately high.

68. The Defendant contends that its costs are much higher than the Claimants' costs, largely because it has had to engage an independent IT consultant to process and search the SRA's image of Jirehouse's server and to engage a team of independent counsel to deal review documents for privilege/confidentiality (at the SRA's insistence). As explained above, given the explanation given by the Defendant in respect of the costs of the disclosure exercise based on the material before me, I do not consider that its incurred

costs are unreasonable. However, if one subtracts the total disclosure costs (£624,781.99), the Defendant's total costs are still substantially in excess of the Claimants' costs. There are in addition incurred costs prior to the commencement of the action (£90,112.62) and in respect of statements of case (£140,768.60) and the case management conference (£45,925.50). These additional costs may be accounted for at least in part by the case being advanced by the Defendant that Mr Prentice's role in the Jirehouse Entities is a sham, which may be the product of substantial investigations on the part of the Defendant.

69. I also have in mind the possibility that the Claimants may well have under-estimated the costs of the action and the fact the value of the claim is such that the Defendant's costs could not be said to be self-evidently disproportionate.

70. In the circumstances, I am not in a position to judge whether the Defendant's costs are unreasonable based on the information available to me.

Conclusion

71. For the reasons explained above, I make no criticism of the Defendant's incurred costs in respect of disclosure and I decline to make any comment in respect of the Defendant's incurred costs under CPR rule 3.17(3)(b).

72. As to the Defendant's costs to be incurred, I approve the Defendant's costs budget in the following amounts:

(1) Disclosure: I approve the Defendant's costs budget as follows:

(a) £40,000 in respect of the Defendant's time costs, reduced from £64,750.

(b) £40,000 in respect of the Defendant's counsel fees, reduced from £80,000.

(c) £110,000 in respect of other disbursements, reduced from £180,000.

(2) Pre-Trial Review: I approve £36,220 in accordance with the Defendant's proposed budget.

(3) Trial Preparation: I approve the Defendant's costs budget as follows:

(a) £46,300 in respect of time costs.

(b) £150,000 in respect of counsels' fees, reduced from £230,000.

(c) £600 in respect of other disbursements.

(4) Trial: I approve £100,700 in accordance with the Defendant's proposed budget.

(5) Contingent Costs A: I approve the Defendant's costs budget as follows:

(a) £19,150 in respect of time costs.

(b) £36,000 in respect of counsels' fees, reduced from £60,000.

(c) £510 in respect of other disbursements.

73. The other elements of the parties' proposed costs budgets have been agreed, including all of the Claimants' proposed costs budget.

74. I am grateful to both counsel for their helpful submissions.