Liberty Managing Agency Ltd & Others V Chedid & Salibi **[2026] EWHC 2354 (Comm)**

Some Issues relating to D&O Policies, explained by Jacobs J

By Simon Howarth KC

In this decision, handed down on 11th September 2026, Jacobs J provided a succinct but illuminating analysis of the operation of D&O policies where indemnity is sought in relation to the costs of defending criminal proceedings, incurred by the insured.

He also made some more general remarks relating to the insurer's remedy of avoidance in this context, set against the general principles which apply when a party to a contract seeks to avoid it.

Facts

The facts of the matter were relatively commonplace, in the context of D&O insurance. The Claimants insured a second excess layer in the programme of insurance instituted by a company, Petrofac Ltd. The Defendants were former officers of Petrofac and therefore insured persons.

The Defendants are[1] accused of offences under the Bribery Act 2010. Such offences are generally complex and require a lengthy criminal trial: and so it is in this instance. Their trial is set to commence at the beginning of November 2026 and will likely not conclude before mid-February 2027. Jacobs J noted the involvement of "substantial legal teams" for the defence. The primary and first excess layers of insurance each provided £15M of indemnity, but those limits were imminently expected to be exhausted.

The Claimant insurers sought to avoid their policy, in August 2026. The basis of the avoidance lay in allegations of fraudulent misrepresentation and fraudulent non-disclosure, reliant in large part on the Crown's case in the criminal proceedings. Necessarily that case had not been proved (and remains to be dealt with in the Crown Court) and nor had any admissions been made.

The Defendants cannot afford to fund their own defence if cover is not available. This is the usual factual position in such circumstances. On the other hand, of course, the Claimant insurers are concerned about laying out substantial sums in defence costs in favour of persons who (if the criminal proceedings are concluded against them) will have been shown to have committed serious offences of dishonesty. The broad question in the case was whether the Claimant had agreed to policy terms which obliged it to do so. The Claimant insurers were presumably concerned that if they were, as a result of the criminal proceedings, later able to establish a right to avoid (and to recoup their outlay) this would be of little or no practical benefit to them.

Issues

Jacobs J was determining preliminary issues (as a matter of some urgency, given the commencement date for the criminal trial). He was asked to determine:

[1] The trial is fixed for November 2026 and nothing in this Note should be taken to express any view as to the likely result of those proceedings. Statements as to the facts surrounding the criminal proceedings, so far as relevant to the decision on the policy points, are taken from the judgment as handed down. Those facts have self evidently not been proven.

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(i) Whether the fact that alleged fraudulent misrepresentation and/or fraudulent non-disclosure could be deployed for this purpose absent a final decision of the criminal courts or a formal admission of such behaviour;

(ii) Whether the defence costs were uninsurable as a matter of public policy; and, depending on the answers to (i) and (ii) above,

(iii) whether the Claimant was obliged to pay the defence costs within the time period specified in the policy pending the determination of the criminal proceedings.

Issue (i)

This note does not discuss the detailed provisions of the policy, nor all of the arguments of construction that were advanced (although these are fully considered by the judge[2]). Instead, I concentrate on more general points about D&O cover which emerge from his discussion.

First, Jacobs J held at [24] (approving a passage in Colinvaux & Merkin at para 14.86) that it is typical for D&O policies to exclude cover for deliberately dishonest or deliberately fraudulent acts: but also typical for the exclusion to operate only where there is a final adjudication to this effect. He decided that the "final adjudication" wording meant that the Claimant was obliged to indemnify the Defendants in relation to costs, prior to such final adjudication being made. In other words, the Claimant had to pay the costs as they were incurred.

Second, Jacobs J discussed some commercial consequences arising from the rival arguments. He pointed out that it was very much in the interests of the Defendants to have their costs paid, pending "an objective resolution" of the allegations against them [26]. He pointed out that otherwise "the insurer's unilateral assessment of the factual position would leave [the insured] deprived of the costs of defending proceedings, perhaps (as here) at a critical time in the run up to trial".

Relying on the Australian case of **Wilkie v Gordian Runoff Ltd** [2005] HCA 17[3], he noted that, if the insured lacked the means to have professional representation at the trial, absent the provision of cover for defence costs, this would increase the chance of a conviction. Thus, the insured would be subject to the increased risk of a serious penalty, whilst conversely the insurer would have its hand strengthened in terms of showing that there had been a "final adjudication" of the allegations in a manner which supported reliance on the exclusionary provisions (see [28]).

He also pointed out that to construe the policy wording as providing cover unless and until the criminal proceedings were determined against the insured was commercially attractive in "a competitive market" and it was not therefore "difficult to see" why insurers might be willing to provide that protection [26].

He concluded, on the wording in issue before him, that insurers would not be entitled to avoid <u>until</u> there had been a final decision establishing fraudulent conduct. He held [31] that:

> "*The requirement that fraudulent conduct "is established by a final decision" is a temporal requirement. It identifies establishment as the key point in time when there can be an avoidance…*"

[2] Reference should be made to the judgment for the full policy terms and arguments about construction in this particular case.

[3] Especially per Callinan J at [36-42].

Issue (ii)

On the issue of public policy, the Claimant started with a well-known principle summarised in MacGillivray (16th Ed para 17-062):

> "… *the law will not enforce a term which purports to protect the insured from the consequences of their own fraudulent statements. This is because no-one should be allowed to benefit from their own wilful wrongdoing.*"[4]

The Claimant then argued that "since the authorities make clear that "fraud unravels all", as a matter of principle the Insureds' argument that the effect of clause 8.2 in the Policy was to delay the point at which avoidance was possible, until the moment of a final adjudication, could not be right.

The Insureds countered this argument in a number of ways. First, it was said that it was necessary to distinguish between proven fraud (to which the maxim "fraud unravels all" is directed), and cases where fraud is alleged but has not (yet) been proved. It was argued that there was "no public policy which precludes contractual parties from reaching an agreement as to how allegations of fraud, in other words unproven fraud, should affect their contractual relationship". Second, the Insureds accepted that if the Claimant ultimately proved the existence of fraud, then it would be entitled to avoid, with retrospective effect.

Jacobs J accepted these submissions. He held (at [41]) that the relevant clauses in the Policy operated to "regulate the position between allegation and proof" as between the contracting parties, and that this was not objectionable.

Moreover, more generally he pointed out that there is nothing against public policy for insurers to agree to indemnify against the costs of meeting criminal allegations. This is widespread in D&O policies and (as the Second Defendant submitted) also consistent with the terms of the Minimum Terms applicable to solicitors' insurance (see [45]). Finally, Jacobs J pointed out, on the authority of **Coulson v News Group** [2012] EWCA Civ 1547, that the cases on the doctrine of illegality are not in point where an indemnity is offered not in respect of damages awarded for fraud, but against the costs of defending oneself against such proceedings.

For these reasons he rejected the Claimant's argument on issue (ii).

Issue (iii)

As followed, in effect, from his decisions on issues (i) and (ii), and as was contemplated by the formulation of issue (iii) he held that the Claimant insurers remained (as at the date of the judgment and pre-resolution of the criminal proceedings) obliged to advance defence costs.

Avoidance of Insurance Contract more generally

At [14], Jacobs J discussed **Abram Steamship Co v Westville Shipping Co** [1923] AC 773, per Lord Atkinson at 781. Lord Atkinson there said that if a party to a contract expressed, unequivocally by word or deed, that he did not wish to be bound by a contract owing to (inter alia) fraud, his election terminated the contract and compelled the restoration of the status quo ante – subject to that party proving his position

[4] Note, of course, that there are similar principles to the effect that an insured cannot by his own intentional act bring about the event upon which the insurance money is payable, and then seek to recover (MacGillivray para 14-30); nor can the insured recover an indemnity for loss caused by his own deliberate crime (ibid para 14-029).

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to be correct, if sued thereafter. But Lord Atkinson was clear that if that position were justified it would be effective to rescind from the date of communication of the election.

Thus, the right is a "self-help" remedy: see per Jacobs J at [16]. The insurer may, even if proven to be wrong and subject to issues as to damages for breach of the insurance contract, "have had the practical benefit of what the court ultimately holds to be his wrongful avoidance". It is submitted that this is a pithy and helpful summary of the law.

But this is subject to the wording of the policy. In the view of the Judge, on the facts, the policy wording in this case was sufficient to make it clear that the self-help remedy was excluded, because the "establishment" of the necessary allegations had to occur before the Claimant could seek to avoid the policy.

Conclusions

The judgment lucidly explains why, in the context of D&O insurance against defence costs, the initial reaction of an insurance lawyer to the effect that indemnity is not available against loss caused by one's own wrongdoing is not correct (at least on this common wording).

It confirms that, if the wording is appropriate, there is nothing contrary to public policy in such insurance being made available.

Finally, it explains why the usual "self-help" remedy of an insurer (to avoid and leave it to the insured to show that the avoidance was not proper) is not available in this particular context.

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