



Neutral Citation Number: [2020] EWHC 2591 (Ch)

Case No: HC-2017-001598

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building,
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 02/10/2020

Before :

THE HON. MR JUSTICE FANCOURT

Between :

(1) MARK BYERS
(2) HUGH DICKSON
(AS JOINT OFFICIAL LIQUIDATORS OF
SAAD INVESTMENTS COMPANY
LIMITED)
(3) SAAD INVESTMENT COMPANY
LIMITED (IN LIQUIDATION)

Claimants

- and -

SAMBA FINANCIAL GROUP

Defendant

Stephen Smith QC, Adam Cloherty and Timothy Sherwin (instructed by **Morrison & Foerster (UK) LLP**) for the **Claimants**
Andrew Onslow QC, Alan Roxburgh, Edward Harrison and Sarah Tulip (instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing dates: WRITTEN SUBMISSIONS ONLY

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FANCOURT

MR JUSTICE FANCOURT :

1. On 2 September 2020, the Defendant bank (“Samba”) applied for an order that the Claimants disclose and provide inspection of the expert reports of Professor Chibli Mallat in the Cayman Islands proceedings between Ahmad Hamad Al Gosaibi and Brothers (“AHAB”) and Saad Investments Company Limited (in liquidation) (“SICL”) and others, cause no. FSD 0054 of 2009 (“the Cayman proceedings”).
2. Standard disclosure in this action was given by the Claimants on 4 October 2019. The trial is due to start on 5 October 2020. Given the shortness of time, the parties agreed that the application should be determined on paper. Each side provided evidence in support of or against the application and detailed written submissions.
3. Professor Mallat is the Claimants’ expert witness on Saudi Arabian law. He was also called as an expert witness in that capacity by the liquidators of SICL in the Cayman proceedings. The Claimants do not dispute that they have the relevant expert reports in their possession but deny that disclosure is warranted.
4. As a result of previous orders made by me in this action, the trial is limited to certain identified issues. The expert Saudi Arabian law evidence is relevant to only one issue, namely:

“If Saudi Arabian law is the governing law of the September Transfer, whether its effect is to extinguish [SICL’s] rights in the Disputed Securities... even if [Samba] had knowledge of [SICL’s] interest.”

As explained in my judgment of 23 July 2020, the existence of SICL’s property rights under the Cayman Islands trusts of shares including the Disputed Securities cannot be challenged by Samba at trial, but the issue of Saudi Arabian law is one of priority between the pre-existing rights of SICL and the rights of Samba as purchaser of the Disputed Securities with knowledge of those rights.

5. It is common ground that Saudi Arabian law does not recognise or apply foreign law when addressing such a question. The issue is therefore whether under Saudi Arabian law the rights or interest that SICL had would be recognised and take priority over the interest of a purchaser with knowledge of them.
6. The claim pursued by the Claimants is a personal claim for compensation under the Cayman Islands/English law of knowing receipt, not a proprietary claim to the Disputed Securities. But the claim arises from the prior proprietary interest of SICL in the Disputed Securities. In the Cayman proceedings, on the other hand, AHAB’s claims against the defendants (including SICL) included proprietary claims to the proceeds of the fraud (or their traceable proceeds) and personal claims for restitution, damages and compensation based on a conspiracy with Mr Al-Sanea, knowing assistance in the fraud on AHAB and knowing receipt of the proceeds of the fraud.

7. The particular issue of priorities that must be decided at trial did not arise in the Cayman proceedings. Nevertheless, it is evident that there is significant overlap in the subject matter of the expert evidence on Saudi Arabian law, covering such issues as whether there is a distinction between proprietary and personal claims, the extent to which Saudi Arabian law recognises property rights or interests, and the “unifying theory of liability” based on harm, wrongful conduct and causation.
8. Although Samba cannot dispute the lawfulness of the Cayman Islands trusts, it is entitled to assert that Saudi Arabian law does not recognise or give effect to such rights or interests and/or would treat the transferor of the Disputed Securities, Mr Al-Sanea, as the owner of them. I therefore accept that material contained in the expert reports in the Cayman proceedings (“the Cayman reports”) is likely to be “relevant”, in a broad sense, to the sole issue of Saudi Arabian law at trial. However, the Cayman reports will not have addressed the particular question of Saudi Arabian law for which permission to adduce expert evidence is given in these proceedings.
9. Samba submits that the Claimants should therefore have given disclosure of the expert reports at an earlier date and should now be ordered to do so. It relies on paragraph 17 of CPR 51UPD, which is in the following terms, so far as relevant:

“17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to –

 - (1) serve a further, or revised, Disclosure Certificate;
 - (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
 - (3) provide a further or improved Extended Disclosure List of Documents;
 - (4) produce documents; or
 - (5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate...”
10. CPR 51UPD came into effect on 1 January 2019, after HHJ Klein had given directions at the first case management conference that included an order for standard disclosure under CPR rule 31.5(7)(e). CPR 51UPD nevertheless applies and, pursuant to transitional provisions, the order for standard disclosure must be treated for the purposes of 51UPD as if it were an order for Extended Disclosure. The triable issue of Saudi Arabian law is an Issue for Disclosure under 51UPD.

11. An order for standard disclosure requires a party to disclose only (a) the documents on which he relies; (b) the documents which adversely affect his own case; adversely affect another party's case; or support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction (CPR rule 31.6). It does not require a party to disclose documents that are only relevant in a broad sense.
12. Samba argues that Professor Mallat's Cayman reports "must contain material that illuminates [his] views on issues of Saudi Arabian law that also arise in the current proceedings". Although it seeks to draw inferences from the contents of the judgment of the Grand Court of the Cayman Islands (Smellie CJ) in the AHAB case, Samba has no evidence of any inconsistent statement made by Professor Mallat in those reports. Indeed, at paragraph 17 of his witness statement dated 2 September 2020 in support of the application, Mr Daniel Smith says:

"It also appears from the above quoted passages [from the judgment of Smellie CJ] that Prof Mallat may have expressed different views on some of these issues in the Cayman reports. Samba is unable to verify whether or not this is the case, because it does not have the Cayman reports in its control."

Samba argues that, given that the Cayman reports address issues that are relevant to the issue of Saudi Arabian law to be decided at trial, they will either adversely affect the Claimants' case and thereby support Samba's case, or adversely affect Samba's case, and that they must do one or the other. On that basis, it is argued that the Claimants should have disclosed the reports previously and the court should now order compliance under paragraph 17 of 51UPD.

13. I am unable to accept this argument. In the absence of evidence of a material inconsistent statement - which could be relied on by Samba should Professor Mallat not accept its truth - there is no reason to suppose that the Cayman reports contain material that will assist one party or the other in establishing its case on the relevant priorities issue of Saudi Arabian law. It is not suggested by Samba that Professor Mallat's expert reports in this case exclude material evidence that will not otherwise be before the court. To the extent that the content of the Cayman reports and the expert reports in this action overlap, there is no proper basis in evidence for a conclusion that there is a difference in Professor Mallat's opinion on a material issue that will make a difference to any party's case.
14. As the Claimants point out, the expert reports and joint statement in this action run to some 300 pages, supported by nearly 3,500 pages of exhibits. There are significant disagreements between the opinions of Professor Mallat and Mr Haberbeck that are addressed in detail in these reports and in the joint statement. Both expert witnesses will be cross-examined at trial. In my judgment, previous expert reports that are prepared in the context of different claims and which address some of the same general material but not the same specific legal issues will not adversely affect one or other party's case or support another party's case, within the meaning of CPR rule 31.6, in the absence of a material inconsistency of opinion.
15. It is well-established that documents that only relate to the credibility of a witness and not to substantial issues in a case are not disclosable: Favor Easy Management Ltd v Wu [2010] EWCA Civ 1630; [2011] 1 WLR 1803 at [16]-[19]. In my judgment, the

Claimants are right to suggest that Samba wishes to have sight of the Cayman reports in the hope of finding something that is either inconsistent with the opinions expressed by Professor Mallat in his expert reports or at least has different emphasis, which can form the basis of their cross-examination. While an inconsistent statement could be relied upon by Samba as evidence in support of its case, other differences of expression or emphasis, or omissions, would go only to credit. The effect of disclosure would be likely to create a distraction from focus on the distinct issue of Saudi Arabian law to be decided at trial. It might also give rise to further inquiry into the oral evidence given by Professor Mallat at the Cayman trial. General principles of Saudi Arabian law that have some bearing on the answer to the central issue are fully covered by both expert witnesses and in those circumstances, absent evidence of a material inconsistency, expert witnesses' previous proofs of evidence in other claims will not normally fall within the scope of standard disclosure.

16. Samba sought to rely on an ex tempore judgment of Peter Smith J in L'Oreal S.A. v Bellure NV [2006] EWHC 1503 (Ch), in which he refused to order disclosure of skeleton arguments, statements of case and witness statements used by the claimants in other proceedings but did order disclosure of a previous expert report of a survey expert witness. There were two different features in that case. First, the applicant had evidence of a prior inconsistency of opinion expressed by the witness about the value of survey material; and second, the applicant was not calling expert survey evidence itself, such that the full opinions of the respondent's expert witness were of rather greater significance for the fairness of the trial. The judge considered that it was inevitable that the expert's previous and somewhat different opinions would be put to him in cross-examination, even if disclosure were refused, and that it was therefore more convenient and appropriate for the trial judge to be able to see the relevant document. I do not consider that that particular exercise of case management discretion in the different circumstances of that case provides any compelling precedent that should be followed in the different circumstances of this case.
17. Samba's alternative argument, assuming that para 17 of CPR 51UPD does not apply, is that disclosure should be ordered under para 18, which is in the following terms:
 - “18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.
 - 18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate...”
18. This provision is similar in effect to rule 31.12 in that it provides for specific disclosure but, like its equivalent in the Rules of the Supreme Court 1965, it can be invoked only where a variation of the order for disclosure is necessary for the just disposal of the proceedings. The variation must also be reasonable and proportionate.
19. While accepting that disclosure of at most two or three expert reports that the Claimants have in their possession is not likely to be unreasonable or disproportionate, if otherwise appropriate, I do not accept that disclosure is necessary for the just disposal of these

proceedings, absent evidence of some material inconsistency. For the reasons that I have given, if there were a material inconsistency, the document or documents in question would have been disclosable under the existing order for standard disclosure, as being likely adversely to affect the Claimants' case or support Samba's case. But there is no sufficient evidence of such an inconsistent statement. That being so, disclosure is not necessary for the fair disposal of the claim merely because the Cayman reports address some of the same general principles of Saudi Arabian law that are covered in the detailed expert evidence in these proceedings. There seems to me to be a real risk that their production will become a distraction from the principal differences between Professor Mallat and Mr Haberbeck on the priorities issue in this action.

20. Samba is of course entitled to question Professor Mallat on the evidence that he gave to the Cayman Islands Grand Court, by reference to extracts from the judgment or otherwise, provided that the issues addressed are relevant to the issues in these proceedings or (subject to recognised limitations) the credit of Professor Mallat as an expert on Saudi Arabian law. I am satisfied that, on the basis of what the judgment of Smellie CJ contains and the evidence of Mr Smith, it is not necessary for the just disposal of the issue for Samba to have the Cayman reports produced and it is therefore inappropriate to exercise the power to vary the order for Extended Disclosure to that end.