



Neutral Citation Number: [2020] EWHC 2077 (Comm)

Case No: CL-2017-000323

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 July 2020

Before :

Mr Justice Foxton

Between :

Serious Fraud Office & Anor
- and -
LCL & Ors

Claimant

Defendant

Mr Tim Akouh and Mr Rick Hoyle (instructed by **Harcus Parker LLP**) for the **seventh respondent**
Sebastian Kokelaar (instructed by **Richard Slade and Company**) for the **eighth and ninth respondents**
James Pickering QC and Samuel Hodge (instructed by **Spring Law**) for the **12th, 13th and 14th Respondents**
Mr Ulrich Pelz in person
Rupert Hamilton (instructed by **HFW**) for the **21st to 25th Respondents**
Kennedy Talbot QC for **The Serious Fraud Office**
Tony Beswetherick (instructed by **Stephenson Harwood LLP**) for the **Second Applicants**
Mr David Caplan (instructed by **Charles Russell Speechlys Bircham LLP**) for the **18th Defendant**
Mr Rupert Bowers QC (instructed by **Keystone Law**) for **Litigation Capital Ltd**
Mr David Rosen (solicitor-advocate of **David Rosen & Co**) for **Ms Sinead Irving**
Sean Upson (solicitor-advocate) for **Stewarts**
Dr Gerald Martin Smith in person

Hearing dates: **27th and 28th July 2020**

RULING

Mr Justice Foxton
(10.30 am)

Tuesday, 28 July 2020

Ruling by MR JUSTICE FOXTON

1. I am now going to issue my ruling following on from the argument yesterday as to whether the so-called individual underlying asset claims (“IUA Claims”) should be determined as part of the Directed Trial.
2. I am not going to rehearse the background to the application at any length, I have set out the lengthy background, both to the action and to the application, in prior judgments which are reported at [2020] EWHC 788 (Comm) and [2020] EWHC 1280 (Comm). I adopt the definitions used in those judgments.
3. But by way of very brief introduction, on 25th July of this year the Settlement Parties finally served their consolidated pleading, which had the effect of resolving their claims against each other and allowing them, going forward, to be represented before the court principally by a single team with the potential saving for time and costs at the trial.
4. Having anticipated such a development, the Settlement Parties obtained from me in May an order that required anyone claiming proprietary interests in certain individual underlying assets (the “IUAs”) to articulate those claims. They now, at this CMC, take the next step of applying to me for an order directing that the IUA Claims be heard as part of the Directed Trial in January.
5. So far as the other parties are concerned, their positions are as follows:
 - a. LCL support the application.
 - b. In the form in which it was finally put forward yesterday, which involved the significant revision, HPII is neutral on the application.
 - c. Phoenix and Minardi oppose the application on the basis that it cuts across the logic of Mr Justice Popplewell's original management scheme and because it is said there simply will not be enough time, either in advance or possibly at the January hearing, to deal with the additional issues.
 - d. Mr Ulrich Pelz also opposes the inclusion of the IUA Claims, saying it will add to the complexity and cost of the January trial, increase the number of participants and delay the resolution of the Directed Trial. Mr Pelz also raises a separate issue, which I will come back to, which is that it has always been the collective understanding of the parties, going back to the hearings before Mr Justice Popplewell in 2018, that issues arising from the so-called Qatar project were not to be part of the first phase trial in this litigation. It has become apparent following the service of Mr Pelz's claimed submissions in relation to the IUAs yesterday that there are a number of IUAs in relation to which those issues might be relevant and that this may also be true in relation to one of the so-called Jersey properties, which is already part of the Directed Trial. I will return to the particular position of Mr Pelz in due course.
 - e. Ms Sinead Irving opposes the inclusion of the IUAs in the Directed Trial on the basis that, as someone who says they have not been closely involved in the underlying events and disputes, should not have to participate in the trial of any issues which do not directly concern her. Mr Rosen, on her behalf, has submitted that there should be, in effect, a three-phase trial process with Ms Irving only participating if and to the extent necessary at the end.
 - f. Finally Mr Sodzawiczny is neutral on the application.
6. Having considered all the arguments, I have decided that the appropriate course is to order the inclusion of the IUA Claims in the Directed Trial on the basis of the final form application put forward by Mr Akkouch yesterday. The effect of that decision is that in addition to the

matters already to be determined in January 2021, the proprietary claims to the IUAs will also be included. That will not include, however, the issue of whether HP11 is able to trace into the Isle of Man settlement and the Arena and non-Arena companies, nor will it involve any issue of whether Mr Pelz is able to trace into those assets, or indeed into the payment made in 2015 to Ocean on the basis of the so-called Qatar settlement agreement.

7. I have reached that conclusion for the following reasons.
8. I do not accept the submission that the targeted inclusion of these specific IUAs sought now cuts across the logic of Mr Justice Popplewell's original order. In any event, Mr Justice Popplewell's order reflected a number of pragmatic, as well as principled, considerations. In my judgment of 20 May I said at paragraphs 45(iii) to 46:

"There was no developed proposal for the inclusion of specific underlying assets within the directed trial at the April 2018 CMC. Instead, a rather general proposal was put forward in the course of argument. By contrast, the Settlement Parties' application identifies specific underlying assets and the rationale for selecting them. It is clear that Mr Justice Popplewell's reasons for refusing that application were essentially pragmatic, as can be seen from the fact that the Jersey properties were included within the Directed Trial, even though they are underlying assets. It will be for the judge at the July CMC to determine whether those pragmatic considerations still hold good, or whether circumstances have changed sufficiently to make another order appropriate."

Similarly, although Mr Justice Popplewell generally excluded upstream issues from the Directed Trial, he did include those issues so far as Mr Sodzawiczny's claim is concerned.
9. It has fallen to me at this July CMC to determine whether those pragmatic considerations still hold sway. It is now clear, in a way it could not possibly have been to Mr Justice Popplewell, that there is a very substantial overlap between the factual issues which arise in determining the claims to the Relevant Assets and the Jersey properties, which already formed part of the Directed Trial, and those which arise in relation to the IUA Claims.
10. First, the basis upon which the various parties claim an entitlement to trace involves a very substantial overlap between the issues which are currently part of the Directed Trial and the IUA Claims. The consequence of that is a very key element of the IUA Claims is already in play.
11. Further, issues relating to LCL - its role, the arrangements it made in relation to the Ruhan litigation, whether people invested in LCL and with what expectations or whether people assisted in the Ruhan litigation - play a central role both in relation to claims already in play, and in relation to the claims of various parties to the IUAs. The reality is that a determination of the issues concerning LCL within the Directed Trial is inevitably going to have a very significant impact on the claims of a number of parties to the IUAs. One benefit of including those parties and their claims within the Directed Trial is that they will now have an opportunity to address the court on matters which are relevant to their particular claims.
12. Indeed, it seems to me that evidence relating to the IUAs may well have been evidence that LCL would wish to have deployed at the Directed Trial in any event, in order to provide the court with evidence as to the nature of the services it was providing and the source of funds it was using.
13. Second, I am satisfied that there will be time to address the issues raised by the IUA Claims before and at the Directed Trial.
14. It is apparent from the various claims submissions that have been served in relation to the IUAs that there is no significant dispute as to the source of assets used to acquire the IUAs. On the contrary, there is, as one would expect, very substantial agreement between the parties on a matter which essentially involves factual issues concerning tracing payments, although I accept the legal characterisation of those issues is a very significant matter for argument.

15. Further, with the exception of LCL and those claiming through LCL, the inclusion of the IUA Claims will not involve significant additional factual witness evidence, and in any event the evidence for LCL or those claiming through LCL is, as I have said, likely to have been highly relevant to the issues already forming part of the Directed Trial.
16. Further, the case is one which appears to turn largely on legal submissions and documentary analysis, and by the standards of 10-week cases in this court, not to a significant extent on factual evidence.
17. I should make it clear now that the court will not welcome lengthy factual witness statements from individuals with no first-hand knowledge of the events, who are simply commenting upon the documents disclosed to them in the course of trial and exhibited by them. Nor will the court be permitting lengthy cross-examination of individuals with no first-hand relevant evidence to give.
18. As matters stand, there is no contested expert evidence at the Directed Trial. Further, I accept that there will be some significant saving from the fact that the Settlement Parties will no longer be litigating their claims *inter se* and will be advancing their claims principally through one legal team. Taking all those matters into account, there are good grounds to believe that the 10-week period set aside for the Directed Trial is generous.. Indeed, Phoenix and Minardi, who oppose the inclusion of the IUA Claims in the Directed Trial, accept that the 10-week period is generous and suggest that it might be shortened by two weeks. Finally, as the trial judge, it seems to me there may well be scope for reducing the pre-reading time from two weeks to one week, which would increase the time available for the hearing to nine weeks, but that can be reviewed at a later stage at the PTR.
19. So far as Ms Sinead Irving is concerned, her position in relation to the two IUAs in which she claims an interest essentially adopts LCL's statement of case, and she claims to derive an entitlement through LCL. She is able to rely on LCL's legal team to a significant extent to advance those claims, and careful timetabling of the action and sticking to the timetable will ensure that she only has to participate or attend when witnesses are giving evidence or matters are taking place which directly concern her. In those circumstances I do not believe she would be any worse off if the IUA Claims form part of the Directed Trial than she would have been in not attending parts of Directed Trial which did not concern her, or parts of a phase 2 trial concerned with assets in which she claimed no interest.
20. Finally, including these IUAs within the directed trial will assist in the goal, which will serve the interests of all parties, of bringing this long-standing litigation closer to ultimate finality. It is important that a whole year has been lost, something which Mr Justice Popplewell could not possibly have anticipated back in 2018, and that is a matter which bears on the appropriate phasing and staging of the litigation at this stage.
21. For those reasons, I am satisfied that the claims to the IUAs should be dealt with as part of the Directed Trial, subject to the carving out of the upstream issues so far as HPII and Mr Pelz are concerned.
22. I wish to say a little bit more about the position of Mr Pelz. He has not asserted a claim to the assets which are currently in dispute in January 2021 but has brought forward a claim to the IUAs. It is apparent from the claims submissions he served that he does not substantially challenge the tracing exercise performed from the Isle of Man settlement, Arena companies and non-Arena companies onwards, or indeed the payments from Ocean onwards. And, as I have indicated, the upstream tracing issues, so far as he is concerned, will not be decided in January.
23. However, it is apparent from his claims submissions, served yesterday, that he does claim an interest in one of the Jersey properties, Antoinette Gardens.

24. That gives rise to a particular issue, the background to which is as follows. Mr Justice Popplewell's order of 25 April 2018 provided that the Directed Trial would include issues of the ownership of the Jersey properties, and it provided that any party who wished to assert a claim to those properties had to notify it by 1 June 2018, failing which they would be debarred from asserting such a claim but with liberty to apply.
25. It is common ground Mr Pelz did not bring a claim within the relevant time limit, but the circumstances in which he did not do so included the fact that there appears to have been a shared assumption at the hearings before Mr Justice Popplewell that he did not have a claim to bring in relation to an asset at issue in the Directed Trial.
26. At a CMC on 22 June 2017, Mr Justice Popplewell said to Mr Pelz:
"As I understand your claims, and I'll be corrected by others who have also looked at it carefully, I understand your claims to be claims to the underlying assets, rather than any claims to the pool of the assets that we've put into the first stage."
27. Again, on 28 April 2018, Mr Justice Popplewell said in respect of Mr Pelz:
"Again, I would invite anyone to say if they think I've got this wrong. If I order the directed issues to be decided in the way they are, then if you [*and that was a reference to Mr Pelz*] don't participate, the court will reach a decision which may have an effect on your claim in the end but you don't have a direct proprietary claim in any of the assets which they are going to be a final determination of. Therefore, you can wait and see what the court decides, and that will then assist you."
28. On the material now available to me, it does appear that it could have been ascertained by other parties at that stage that Mr Pelz's claims relating to the so-called Qatar settlement payments did involve money which had, indeed, found its way into Antoinette Gardens, but no one, including Mr Pelz, had made that connection at that stage. Indeed, it appears that Mr Pelz did not make it for some time afterwards because he did not review documents provided to him by way of disclosure which may have revealed that connection, not least because he was suffering from poor health in 2018 and 2019.
29. If it had been appreciated in April 2018 that the claim that Mr Pelz was advancing in relation to the Qatar settlement payments was a claim to monies which had found their way through to Antoinette Gardens, I think it very unlikely that Mr Justice Popplewell would have included those upstream issues within the Directed Trial. I think it is far more likely that Antoinette Gardens would have been excluded from the Directed Trial, or at least excluded so far as the upstream issues are concerned.
30. In those circumstances, it is necessary for Mr Pelz to issue an application seeking an extension of time to notify a proprietary claim to Antoinette Gardens beyond that provided by Mr Justice Popplewell. That application will need to be supported by evidence from Mr Pelz, explaining why he did not previously notify such a claim, and why he should be given an extension of time, and it would be helpful if Mr Pelz was able to exhibit evidence of his poor health.
31. But if such an application is made, I would urge the Settlement Parties in particular to give very serious consideration to it in circumstances in which there will be other IUAs in the Directed Trial for which they have accepted that Mr Pelz's upstream claims will not be determined in January, such that those issues will have to be considered anyway. I would also ask them to have in mind the circumstances in which those exchanges came to be made in 2017 and 2018, when all parties appear to have been working on the assumption that Mr Pelz could safely proceed on the basis that the claims he was advancing did not relate to matters in issue in the January 2021 trial.
32. Of course, if an application to grant Mr Pelz an extension of time in relation to his Antoinette Gardens claim cannot be agreed, then it will come to me and I will have to determine it.

33. There is one final matter which I should mention, which is this: the issues that I have been deciding are those matters that will fall to be determined as trial issues in the January trial, ie those issues that will be subject to disclosure, witness statements as appropriate, and where the court will make final findings on the balance of probability.
34. Nothing I have said can or does take away the right of any party who thinks it is able to defeat some part of another party's case without a trial, by obtaining summary judgment, from making that application.
35. Of course, one consequence of making such an application is that the applicant faces the burden of the higher summary judgment test, which allows for the fact that the court is being asked to find there is no realistic arguable defence or claim, even at a stage when disclosure has not been granted and the witness evidence has not been heard.
36. Mr Akkouch for the Settlement Parties has made it clear that his clients are contemplating, at least, such an application in relation to the HPII upstream tracing issues and in relation to Mr Pelz's upstream tracing issues. As I have made clear, it is his clients' entitlement to bring that application. I am sure they fully understand the difficult burden that summary judgment will involve, but that is a different question from the issues I have been asked to rule on today, which deal with matters which are part of the trial process.
37. So for those reasons, those are my rulings on yesterday's application.