



Neutral Citation Number: [2019] EWHC 3690 (Ch)

Case No: HC-2013-000606 and 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: 20 December 2019

Before :

THE HON. MR. JUSTICE FANCOURT

Between :

(1) MARK BYERS
(2) HUGH DICKSON
(as Joint Official Liquidators of
Saad Investment Company Limited)
(3) SAAD INVESTMENT COMPANY
LIMITED (in liquidation)

Claimants

- and -

SAMBA FINANCIAL GROUP

Defendant

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

Hearing dates: 20th December 2019

Approved Judgment

Mr Justice Fancourt:

1. This is an application by the defendant issued on 13 December 2019, for an extension of the date by which the defendant was required to give standard disclosure. The date set by Judge Klein, as varied by me at a previous hearing, was 13 December 2019, and the defendant seeks to extend that date to 10 January 2020.
2. The claim is a claim by liquidators of a Cayman Islands limited company, Saad Investments Company Limited, for equitable relief on the basis that the defendant bank received a transfer of shares in 2009 in breach of a trust of the shares and that the defendant knew or was on notice of the breach of trust. The claimants claim that the shares were held on trust by the transferor, Mr Al-Sanea, for SICL.
3. For the present purposes of the disclosure obligations, the important factual issue in the case is the question of the extent of the knowledge of anyone on behalf of the defendant bank of the existence of sale agreements and declarations of trust by Mr Al-Sanea in favour of SICL, as alleged by the claimants, or circumstances in which Mr Al-Sanea held the shares in question and his relationship with SICL.
4. From that brief recital of the issue, it is evident, and the parties accept, that disclosure of the defendant's documents is of central importance to a fair and effective trial of this action.
5. On 20 November 2018, Judge Klein made the order for disclosure that originally was to be completed by the defendant 27 September 2019. The trial date is 5 October 2020. On 27 September 2019 (ie the last day for completing disclosure), the defendant applied to extend time to 6 January 2020. My disapproval of the conduct of the defendant in that regard is a matter of record in my judgment of 22 October 2019. On that day I nevertheless granted an extension of time to 13 December 2019, on terms. In my judgment on that occasion, I said as follows:

"The defendant must not be under any illusion about the importance of compliance with that order, both in terms of time and substance. The court will be likely to exercise its more rigorous case management powers in the event of further serious non-compliance. Any application to extend time further, if justified, will have to be made promptly and on the basis of full evidence explaining the need for an extension. This evidence must, in those circumstances, include the communications between the defendant and SAMA relating to the defendant's ability to give disclosure in these proceedings if the reason for any further application is connected in any way with the stance taken by SAMA."
6. Those requirements were incorporated into the terms of the order of 22 October 2019.
7. On 13 December 2019, the last day for compliance with the disclosure obligations as varied, the defendant applied for a further extension of time to 10 January 2020. It relies on a letter from SAMA dated 11 December 2019, which has not been produced in evidence, but which the defendant says requires the English court's request for disclosure of the defendant's documents to be made through the diplomatic channels of the Government of the Kingdom of

Saudi Arabia. That, the defendant says, amounts to a refusal of permission by SAMA to allow it to give disclosure.

8. The defendant was previously in default of its duties under the rules and the court's order, both in failing to comply with the order for disclosure and in failing to make a prompt application for relief. Once again, the defendant is in default, both as to its failure to comply with the court's order and in failing to make a prompt application to the court following receipt of a letter from SAMA dated 5 November 2019. A translation of that letter includes the following paragraph:

"I would like to inform you that SAMA affirms that it does not approve the disclosure of the relevant correspondences between Samba and SAMA, as it is confidential and private to both parties. It is prohibited to provide such correspondences to any third party based on the local regulations in Saudi Arabia. SAMA approves to submit this letter to the concerned court if necessary required."

9. Remarkably, given the terms of my judgment and my order of 22 October 2019, that letter or that translation and the letter were not disclosed to the claimants, and no application was made to the court to revisit the terms of the order that had been made requiring the defendant to produce its correspondence with SAMA in the event of a further application to the court relating to the disclosure obligations. Instead, the defendant served the claimants with the draft application further to extend time and the letter of 5 November from SAMA only on 13 December, after working hours.
10. Once again, it seems to me that the defendant has presented the court with a *fait accompli*, having made its application in breach of the terms of the previous order. The defendant now belatedly seeks a variation of those terms.
11. This conduct is, I regret to say, all of a piece with the defendant's previous conduct on 27 September 2019. At the previous hearing, I said that I was giving the defendant the benefit of any doubt in granting a generous extension of time. As on that occasion, I do not accept that the defendant had no option but to seek further relief at the very last minute. The defendant should have applied back to the court after receiving the 5 November 2019 letter, given the real likelihood, or at least strong possibility, that it would need to make a further application in connection with performance of its disclosure obligations. It should also, in my judgment, have engaged fully with SAMA, both before and after sending a list of documents to SAMA on 24 November 2019, and not just sit back and wait to see if SAMA did anything by 13 December 2019.
12. The evidence in support of the defendant's current application is sketchy and incomplete. It is in the shape of a fourth witness statement of Mr Al-Missaind, the general legal counsel of the defendant bank in Riyadh. He refers to the 5 November 2019 letter from SAMA but says nothing about the defendant's contact with SAMA before and after that letter, in particular the content of the letter to which SAMA was apparently responding on 5 November. He says that on 24 November 2019, a partial disclosure list was sent to SAMA with a request for review and approval of disclosure. The list was incomplete because the defendant had not finished the process of sifting and reviewing its documents. Mr Al-Missaind says that SAMA queried why the list was incomplete and that he explained the position and stated that there

was a deadline of 13 December 2019. There is no evidence about any further contact with SAMA before receipt of the letter of 11 December on 12 December 2019; no evidence of the defendant chasing or reminding SAMA of the urgency of the matter, and no evidence about whether a further list of documents was sent to SAMA for approval, and, if so, when. Although Mr Al-Missaind refers to the content of the letter from SAMA of 11 December 2019, he does not disclose it or purport to quote from it verbatim. Nothing is said by Mr Al-Missaind about any conversation with SAMA before or after receipt of that letter. What Mr Al-Missaind does say is that the defendant now wishes to make urgent representations to SAMA at a senior level to seek to change its mind. But nothing is said about who is going to approach whom at SAMA, or when. Mr Onslow QC, who appeared on behalf of the defendant, was unable at the hearing yesterday to provide any update on progress.

13. There is, in my judgment, no evidence to support a conclusion that there is a realistic prospect of SAMA changing its decision by 10 January 2020 or at all. There is no indication of how the defendant is intending to approach the matter, or when, and I infer that nothing has been done to date in that regard. What the defendant's evidence really amounts to is this: "Give us a further four weeks' extension and let's see what happens".
14. In pursuing the application, no attempt was made by the defendant to engage with the issue of prejudice to the claimants or the effect of my previous judgment, which had refused an extension to 6 January 2020 on the grounds of likely prejudice to the claimants. To put that prejudice into context, the defendant's evidence in support of its previous application for an extension of time said that there would be between 450,000 and 500,000 documents of the defendant to review. The likelihood, therefore, is that the disclosed documents in this case from the defendant will run into six figures.
15. The original directions of Judge Klein allowed a period in excess of four months between disclosure and exchange of witness statements. Witness statements are due to be exchanged on 31 January 2020. Expert evidence is due to be exchanged on 13 March 2020. Further steps are then timetabled up to June 2020, with a six-week trial due to start on 5 October 2020. The content of the trial and the amount of work required to be done to prepare for it thoroughly is extremely heavy.
16. It also became apparent from a second application issued by the defendant on 13 December 2019 that, in relation to other significant parts of the defendant's disclosure, disclosure cannot be completed until 17 January, or in one case 20 January, in any event. The number of documents in these categories are themselves expected to run into four figures.
17. Notwithstanding all that I have said, I must consider whether it is just to grant a final extension of time to the defendant to give it a final opportunity to comply. I accept the submission of Mr Onslow that this is not a relief from sanctions case, and that the application is to be dealt with in accordance with the overriding objective of dealing with cases justly; and that, in general terms, that objective is furthered by parties agreeing or the court ordering "reasonable extensions of time which neither imperil hearing dates nor otherwise disrupt the proceedings": see Hallam Estates Ltd v Baker [2014] EWCA Civ 661.
18. But to what end would a further extension be granted? The defendants accept in their evidence that the matter is out of their hands and depends on SAMA. One therefore comes

back to the point that there is no satisfactory evidence to establish a real prospect of a change of mind by SAMA. SAMA must have known via the defendant that the defendant was in serious default and that a longer extension beyond 13 December 2019 had been refused by me. There is no reason to think that it would view a final order for disclosure by early January differently.

19. In my judgment, the further extension sought is not, in the circumstances, reasonable, and it will clearly disrupt the orderly conduct of these proceedings. It is inconceivable that witness statements could be exchanged by the end of January 2020 if disclosure is not completed until 10 January. Even with substantial teams of lawyers available as a resource, a detailed review of the defendant's disclosure will take weeks or possibly even months.
20. Mr Onslow submitted that the circumstances have changed since the last application was heard in view of SAMA's letter of 11 December 2019, and that in view of the difficulty that has created, the extension sought is now a reasonable one. I do not accept that. The original extension of time was calculated to allow time for the defendant to seek SAMA's approval. It was always recognised that SAMA might not give approval. SAMA has not said that it has had insufficient time to make a decision. That, perhaps, would amount to a change of circumstances that could justify a short extension of time. But SAMA has, apparently, made its decision, and the only question, therefore, is whether there is a realistic prospect that it may change its mind. As I have said, there is no sufficient evidence of such a prospect, nor indeed any evidence of what the defendant intends to do to seek to achieve such a change of mind.
21. I have considered whether at this stage to make an unless order requiring disclosure by 3 or 10 January 2020, failing which the defendant will be debarred. But the making of such an order raises tricky questions about the proper extent of the sanction, i.e. whether the defendant should be debarred on all issues or only on some that are sensitive to disclosure, and whether it is appropriate to apply such a sanction at all where compliance with the disclosure order could result in criminal proceedings against the defendant in Saudi Arabia. Further, the defendant has applied in any event to vary the order for disclosure.
22. These matters are all raised by the parties' applications of 13 and 16 December and require a much longer hearing. They cannot be heard before 14 January 2020 at the earliest. A delay until then before making an unless order is unacceptable in case management terms, for reasons that I have given both in this judgment and previously.
23. Accordingly, in the exercise of my discretion, I decline to grant any extension of time. I do so on the basis that no proper case for an extension of time has been made out; that the extension of time is not reasonable in all the circumstances; and that such an extension is liable to interfere with the orderly preparation for trial.
24. I do make it clear, however, that I have not reached that conclusion on the basis that the defendant is in breach of my previous order by failing to disclose the SAMA correspondence. That breach may be excusable, if the translation of SAMA's 5 November 2019 letter is taken at face value. However, the defendant's failure to disclose that letter and apply promptly to the court to vary the previous order is not excusable. Its failure to do so promptly makes the opaqueness of Mr Al-Missaind's evidence of the defendant's dealings with SAMA even more

blameworthy. In my judgment, the defendant is at least to some extent seeking to hide behind SAMA's inscrutable regulation and is not being completely frank with the court about what is passing between it and SAMA.

25. The effect of my refusal to grant an extension of time today is that the defendant will nevertheless have a short opportunity before the remainder of the applications are heard in January to seek to remedy matters. If it transpires in January that disclosure is belatedly but fully given, the claimants' strikeout application, or any application of the defendant for relief, will be able to focus intently on the nature and extent of prejudice actually caused to the claimants by the delay in disclosure, and on whether a fair trial nevertheless remains achievable. If, on the other hand, disclosure has not been given by that hearing, the issues will be whether retrospectively the orders for disclosure should be varied, and, if not, and possibly in any event, whether all or part of the defendant's defence should be struck out.
26. I will therefore adjourn the remainder of the defendant's first application of 13 December and the claimants' application of 16 December to be heard not before 14 January 2020, on a date to be fixed for the convenience of the parties.