Neutral Citation Number: [2020] EWHC 1006 (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: 24 April 2020

Before :

The Hon. Mr Justice Fancourt

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Between :

(1) Mark Byers **(2) Hugh Dickson (as Joint Official Liquidators of Saad Investments Company Limited)** **(3) Saad Investments Company Limited (In Liquidation)**	**Claimants**
- and –	
Samba Financial Group	**Defendant**

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

Hearing dates: 24th April 2020

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Approved Judgment

MR. JUSTICE FANCOURT:

1. I handed down judgment on 8 April 2020 on numerous applications that were heard by me between 25 and 27 February 2020. In that judgment, I struck out the Defence and debarred the Defendant ("the Bank") from defending the claim save for five identified issues ("the Live Issues") which will proceed to a trial in October 2020. The Bank is entitled to defend any of the Live Issues. There are two matters arising from my judgment that divide the parties. One of those is costs, and this judgment does not address that matter.

2. The other matter is the consequences of the debarring order, in particular what (if anything) the Claimants will have to prove at trial in relation to any disputed issues in the claim other than the Live Issues.

3. The Claimants' case is that the effect of my judgment is that they should be permitted in effect to sign judgment on this claim, not now but at trial, subject only to the outcome of the trial of the Live Issues. The Bank's case is that, despite the judgment that strikes out its Defence and debars it from defending all other issues, the Claimants nevertheless must prove their case on those issues at trial by adducing relevant evidence. Although Mr Roxburgh, who appeared for the Bank today, did not say so in term, it was implicit that what was meant was that the Claimants must prove their case on a balance of probabilities. In aid of that, as he said, the Claimants might invite the Court to draw inferences against the Bank.

4. The default of the Bank that led me to strike out its Defence and debar it from defending, save in relation to the Live Issues, was its almost complete failure to give standard disclosure. As a result of its not giving standard disclosure, I concluded that there could not be a fair trial of very many factual issues in the claim. That is why I refused to revoke the order for standard disclosure and why the Defendant could not be allowed to continue to defend those issues.

5. The Claimants are obviously prejudiced in seeking to prove some or all of such issues without the benefit of the Bank's disclosure. In relation to some of the factual issues, the position might be that they are potentially prejudiced, rather than certainly prejudiced, since the content of what would have been the Bank's disclosure and any further disclosure sought from it subsequently is unknown. But the Claimants are prejudiced nonetheless in not having the full factual picture placed before the court.

6. If the Claimants still had to prove the issues that the Bank has been debarred from defending on a balance of probabilities, then it seems to me that the Bank would be in scarcely a worse position as a result of the strikeout (save that it will not have the opportunity to articulate in argument why the Claimants have failed to prove their case but will expect the court to examine that). The reason, which has been identified by Judge Klein and me from an early stage in case management, is that the Bank's documents are likely to be central to resolving questions such as the extent of its knowledge of SICL's

interest in the Relevant Securities. The prejudice that the Claimants have suffered as a result of the Bank's culpable failure to disclose documents would continue.

7. In relation to some of the issues, such as that about the Bank's knowledge of SICL's interest, that prejudice might be terminal so far as the Claimants' claim is concerned.

8. This is not a case in which the claim manifestly succeeds subject only to a question of whether a discrete defence, such as a change of position defence in an unjust enrichment claim, is established by the defendant. It is a case in which proof of ingredients of the claim is the central factual dispute between the parties and the Bank's undisclosed documents are material or likely to be material to proving those aspects of the claim.

9. It would therefore, in my judgment, be inappropriate in this type of case for the court simply to say that the Bank's defence is struck out and so the onus now rests on the Claimants to prove their claim. To require the Claimants, without disclosure of all relevant documents, to prove various issues in this claim, including the governing law of the Six Transactions, whether the Bank was sufficiently aware of SICL's equitable interest, and to what extent the shares in which SICL had an interest were assigned by Mr Al-Sanea to the Bank, would be to continue the injustice that flows from the absence of the Bank's disclosure. It would allow the Bank to benefit from its serious and culpable breaches of the court's orders, as I found them to be.

10. The Claimants' claim is for the payment to them by the Bank of an amount of money, to be determined by the court. Had I made an order that unless the Bank complied with the previous disclosure orders by a specified date its Defence should be entirely struck out and it be debarred from defending, the effect of the Bank's default would have been that, under Rule 3.5(2) of the Civil Procedure Rules, the Claimants could then have obtained judgment on liability simply by filing a request for judgment without making an application to the court. The court would then in due course need to determine the amount of the judgment.

11. Where, however, as was the case here, the striking out order was made without the need to make an unless order – an unless order not being needed or appropriate here to impress on the Bank the consequences of non-compliance – the court has power under Rule 3.4(3) and under para 4 of Practice Direction A to Part 3 to make any consequential order that it considers appropriate, including entering judgment.

12. In my judgment, paragraph 4.2 of the Practice Direction cannot be interpreted, as Mr Roxburgh suggested, as requiring a party to prove its case with evidence at a trial in all cases. The paragraph is concerned to confer on the court the power to enter judgment, which power the court will exercise (or not exercise) in a matter that is appropriate on the facts of the particular case.

13. Accordingly, in this case, had I made an unqualified debarring order and not allowed the Bank to defend certain issues, I consider that it would have been appropriate to enter judgment for the Claimants on their claim, by analogy with what the position would have been under Rule 3.5(2) had I first made an unless order.

14. Equally, it seems to me that the fact that I have exempted from the strike out and debarring the Live Issues, which may enable the Bank to establish a defence to the claim, does not

mean that any greater burden should be imposed on the Claimants to prove the other issues that the Bank has been debarred from defending than would have been the case if I had not exempted specific issues from the effect of the debarring order.

15. My reserved judgment, at paragraphs 119 and 128 in particular, makes it clear that I intended that the consequence of the debarring order would be that the Claimants did not have to prove their claim by evidence in relation to those issues from which the defendant was debarred.

16. Paragraph 131 of my judgment does not say otherwise. It says that the Claimants' case on issues other than the Live Issues will not be allowed to be challenged by the Bank, either on the basis of the factual case of the claimants or as regards the legal conclusions that should be drawn from it. It does not imply that the Claimants were required to adduce evidence to prove their case, although I accept that my use of the word "evidence" in that paragraph, rather than the word "case" which would have been more appropriate, may inadvertently have created ambiguity.

17. Mr Roxburgh, on behalf of the Bank, submits that the Court has no power to enter judgment where the case does not fall within Rule 3.5(2) and that a claimant is otherwise required to prove its case at a trial. He relies on two cases in particular, Thevarajah v Riordan [2015] EWCA Civ 41 and Times Travel (UK) Ltd v Pakistan International Airlines [2019] EWHC 3732 (Ch). He relies on the Thevarajah case for the proposition that in any case where a defence has been struck out, if Rule 3.5 does not apply, a trial is required to take place at which the claimant must prove his claim, not simply the entry of judgment on the basis of the pleaded case.

18. I consider, however, that the analysis of the Court of Appeal in that case was firmly premised on the fact that the claim there was for discretionary equitable relief, not merely a money claim. A claimant cannot simply sign judgment for such relief and on an application for judgment, or at the trial, the appropriateness of granting relief has to be evaluated by the judge before judgment can be entered. There happened to be a trial date already fixed, which was shortly after the strike out took effect. The Court of Appeal in that case did not say that the claimant had to prove his case on the basis of evidence, on a balance of probabilities.

19. The Times Travel case is also relied upon for the proposition that a claim must be proved notwithstanding a striking out. But that was a case where a judgment had already been entered for the taking of an account and an inquiry into the amount of commission that was due. The defendant then became debarred from defending the account and inquiry proceedings, and the question was what, if any, part the defendant could play at the account and inquiry hearing.

20. The deputy judge held that it could play no part, but he said in the course of his judgment at [55] sub-paragraph 5:

> "Where a debarring order does have the effect of preventing a defendant from participating in the trial, the position does not then go by default. At the trial the claimant must still demonstrate to the

> satisfaction of the court that the claimant is entitled to the relief sought in the relevant proceedings."

21. However, the context in which that statement was made was, first, that as recorded in para [23] of the judgment, it was conceded by the claimant's counsel that the claimants must still prove their claims in the account proceedings to the satisfaction of the court. Second, the account proceedings were, by their nature, a type of claim in which the court has to be satisfied of the appropriate money amount arising from the taking of the account before a quantum can be entered as a judgment.

22. The view that the deputy judge formed in that case was wholly understandable in that context, but the case is not authority for any wider proposition. Similarly, in this case, I have permitted the Bank to defend certain quantum issues, so there is no inconsistency in respect of such issues between what the deputy judge said in the Times Travel case and what I have ordered in this case as regards determining the quantum of the claim.

23. Otherwise, however, this case is of a wholly different type. It is liability that the claimants are seeking to prove. None of the authorities that have been referred to establish that a claimant in this type of case must be required to prove the very thing for which the defendant's disclosure was necessary if they were to have a fair chance of being able to do so at trial. It seems to me that that would be wholly unjust and inappropriate where the Bank's breach has prevented a fair trial on most issues.

24. The position of these Claimants is particularly acute because they are office holders; they have no first-hand evidence to give, and they do not, for reasons that I have previously explained, have access to many of SICL's own documents.

25. I do accept that there are cases where a claimant should nevertheless satisfy the court of his entitlement, but that will not be so in a case like this, where the defence has been struck out because the defendant's conduct has prejudicially affected the claimant's ability to prove its case and has prevented a fair trial of many issues in the claim.

26. Accordingly, in my judgment, although no judgment is sought to be entered at this stage in view of the Live Issues that have to be tried, subject only to the outcome of the Live Issues the Claimants will in principle be entitled to enter judgment on their claim for the amount that is determined at trial. Obviously, the judgment will go in the opposite direction in the event that the Bank succeeds at trial in establishing a defence on the basis of any of the Live Issues.

27. My decision means that the parties only have to prepare for a trial of the Live Issues, and the Claimants do not have to adduce evidence in support of their case on any other issue. It was necessary to determine it at this stage so that the Claimants would know what evidence they have to prepare for the trial.

28. One particular consequence of my ruling is that the court will therefore not decide at trial, on the basis of evidence, what is the governing law of the claim brought by the claimants.

29. The dispute between the parties is whether the governing law is Cayman Islands or English law, on the one hand, or Saudi Arabian law on the other hand. Since the Claimants' primary case is that Cayman Islands law or English law (it matters not which) governs that issue, it seems to me that unless and until the claimants amend their claim to plead as their primary case that the claim is governed by Saudi Arabian law, the claim must be treated as governed by Cayman Islands or English law.

30. That means that the relevant issue to be tried, as things stand, is whether the claim as pleaded must fail on the basis that Cayman Islands law or English law is the governing law of the claimants' claim (the fourth of the Live Issues) and not whether the claim as pleaded must fail on the basis that Saudi Arabian law is the governing law of the claimants' claim (the third of the Live Issues).

31. The claimants clearly cannot seek to have two bites at the cherry because there cannot be parallel claims in this action. As a matter of English law, the governing law is either Cayman Islands or English law or it is Saudi Arabian law, and the claimants' case is that it is Cayman Islands or English law. Their Saudi Arabian law claim is only advanced against the contingency that the Court might accept the Bank's case that that law governs their claim.

32. The effect of the order that I will make is that at trial the conclusion is that Cayman Islands law or English law is the governing law of the claim and the Live Issues will be tried at that basis. That position will only change in the event that the claimants either abandon their primary case or amend their claim in order to claim that Saudi Arabian law is the governing law. It seems to me there is no difference in substance between those two alternatives, though Mr Roxburgh may well be right that an amendment to the Amended Particulars of Claim would be required.

33. That is the end of my judgment on that issue.