Neutral Citation Number: **[2020] EWHC 788 (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: **24 February 2020**

Before :

Mr Justice Foxton

- -

Between :

The Serious Fraud Office & Anor.	**Claimant**
- and -	
Litigation Capital Limited & Ors	**Defendant**

- -
- -

Nathan Pillow QC, Tim Akouh and Richard Hoyle (instructed by **Harcus Parker LLP**) for **Harbour Litigation**
Kennedy Talbot QC and **James Maher** (instructed by **Stephenson Harwood LLP**) for **The Serious Fraud Office**
Blair Leahy (instructed by **Holman Fenwick & Willan LLP**) for **The Joint Liquidators**
Richard Fisher (instructed by **Addleshaw Goddard LLP**) for **The Viscount of Jersey**
Sean Upson for **Stewarts LLP**
James Pickering and Samuel Hodge (instructed by **Spring Law**) for **OMH Companies**
Sebastian Kokelaar (instructed by **Richard Slade & Company**) for **Phoenix Group Foundation** and **Minardi Investments Limited**

Hearing dates: **24th February 2020**

- -

RULING

Mr Justice Foxton **Monday, 24 February 2020**

(**2.42** pm)

Ruling by **MR JUSTICE FOXTON**

1. This is the hearing of the latest case management conference in a case involving competing claims to interests in a variety of assets. Those assets are linked in various ways to the business of a private limited company registered in Jersey called Orb; the involvement in that business of Dr Martin Smith; the involvement of Mr Andrew Ruhan in transactions relating to those assets, and a wide range of subsequent litigation that has arisen from those matters.
2. That brief description does not begin to do justice to the labyrinthine complexity of this dispute but it will have to do for now. Further, in a case in which there are, for understandable reasons, strong feeling on the different sides of the dispute, there is much to be said for a neutral summary of the case at this stage.
3. The large number of transactions in issue that has made this a very complex case which has required careful case management. Mr Justice Popplewell gave directions for the determination of issues relating to certain of those assets called "the relevant assets" at a trial which was originally fixed for January 2020. The parties have referred to that trial as "the Directed Trial".
4. In September 2019, after negotiations which I am told lasted some 22 months, some of the parties involved in this dispute reached a partial settlement, albeit a settlement whose final status was subject to the sanction of the supervising courts of those parties represented by officers or administrators. The effect of that settlement, if crystallised, would to be resolve the disputes between those parties inter se and to allow the case for all of them to be presented as a coherent whole by one legal team, albeit it might involve alternative cases, those parties no doubt advancing a primary case and, if that case does not succeed, turning to an alternative case and so on.
5. The parties who have agreed to that settlement are the Serious Fraud Office, the Enforcement Receivers, Harbour, Stewarts, the Joint Liquidators in the BVI, and the Viscount of Jersey. I am going to refer to those parties as "the Settlement Parties". If and when the settlement does become

final, I understand that it is Harbour who will assume the principal burden of advancing the Settlement Parties' case.

6. On 20 September 2019 the Settlement Parties applied to Mrs Justice Moulder to vacate the Directed Trial. They did so on the basis that the settlement, if sanctioned, would have a significant impact on the shape of the litigation but that it would not be possible to obtain that sanction in time for the trial to begin and proceed in an orderly manner in its existing slot. That application was opposed by certain of the parties (LCL, Dr Smith and HPII), but Mrs Justice Moulder was persuaded to make the order for the reasons that she set out in her approved ruling.
7. The order she made provided for a stay of the existing directions, for a further CMC to take place on 24/25 February 2020, and for the Settlement Parties to file a consolidated pleading setting out their combined and integrated case on 27 January 2020.
8. This is the hearing of the further CMC that Mrs Justice Moulder ordered, but the consolidated pleading has not been served. The reason for that is that it has not been possible to obtain the sanction of the various supervising courts which those parties represented by officers wish to obtain.
9. The current position is as follows.
10. The Royal Court of Jersey has granted its sanction on 27 January 2020 on the application of the Viscount, but I understand the reasons for that decision have yet to be handed down.
11. The sanctions hearing in the BVI has yet to take place. The hearing had been fixed for three hours on 14 January 2020, but the need to expand the time estimate for that hearing and issues of lawyers' availability have led to the hearing being put back until 15 June 2020, when it is listed for three days.
12. The plan was always for the Isle of Man sanctions hearing to take place shortly after the BVI hearing, and it has currently been listed in early July 2020. On the basis of what I am told by Ms Leahy, who appears for the Joint Liquidators, the issues in that sanctions hearing are likely to be of a rather less contentious scope than those which will feature in the BVI hearing.

13. Against that background, the Settlement Parties have applied to me for an order extending the time for compliance with Mrs Justice Moulder's order for the service of the consolidated pleading to 13 July 2020; for a further case management conference to take place with an estimate of 1 to 2 days between 20 and 31 July; and for liberty to the Settlement Parties to apply for a further extension of time for service of the consolidated pleading if the settlement agreement has not come into effect by 3 July 2020.

14. The application is opposed by Mr Kokelaar, who appears for Phoenix and Minardi. It is also resisted in writing by a number of parties who have not instructed advocates for the hearing. I also received submissions from the OMH parties, who profess themselves largely neutral as to how matters should now proceed, albeit a historian of the 18th Century might regard that as a position of armed neutrality.

15. There was some debate in the skeletons as to what the proper approach of the court should be to this application and whether it should be determined by the application of the overriding objective or within the relief from sanctions framework. That point has not been developed orally. I am satisfied on the basis of Court of Appeal decision in Hallam Estates Limited v Baker [2014] EWCA Civ 1633 at [26] to [28], and the authorities cited in that case, that it is the overriding objective that applies in circumstances in which there has been an "in time" application for the extension of time as is the position here.

16. Some time was spent at the hearing addressing the issue of whether the Settlement Parties had committed themselves before Mrs Justice Moulder to serving a consolidated pleading by the time of this CMC, whether or not sanctions had been obtained. I do not regard that question as crucial to the issue before me, which requires me to decide how best to manage the case in the circumstances now prevailing, but I should say something about it briefly.

17. It was clearly the position of the Settlement Parties at the hearing before Mrs Justice Moulder that they did not want finally to commit themselves to amend their case before the settlement received

sanction. That is why Mr Zoubir's witness statement, for example, referred to the impossible position the Settlement Parties would be, in absent an adjournment, in not knowing whether they were allies or adversaries until the settlement was sanctioned.

18. Similarly, Mr Akkouh's skeleton argument for Harbour for that hearing, stated at paragraph 27: "Once the settlement agreement has received sanction there is a strong case for the consolidation of the Settlement Parties' pleadings". But it is fair to say that the issue was not as consistently framed throughout the transcript, in the nature of the ebb and flow which naturally happens at hearings of this nature.

19. Mr Slade, for Phoenix and Minardi, had clearly understood Mr Akkouh to be submitting that there would be no consolidated pleading before sanction, because Mr Slade in his submissions said that he had considered asking court to make an order requiring the consolidated pleading to be served regardless of whether sanction had been received but decided that it would not be appropriate. He said:

"Until those sanctions applications have been determined, I can see Mr Akkouh's difficulty in filing a single consolidated pleading, and so I don't urge upon your Ladyship that you should make a decision about that today."

20. In post-judgment submissions, however, Mr Akkouh does appear to have contemplated that the Court could require the consolidated pleading to be produced before or after sanction had been obtained, with arguments in favour of each approach. He also appeared to contemplate that it might be possible to produce the consolidated pleading in December and that the Court might want to move matters along by requiring earlier service, and he referred at the end of his submissions, in a compendious phrase, to the service of consolidated pleadings “in advance of the CMC/sanction”.

21. Having considered the materials. I have concluded that this was one of those issues on which no clear position emerged before Mrs Justice Moulder and to a degree it may have been lost in the fog of war. In terms of the final order, for so long as the BVI sanctions hearing was taking place on 14

January 2020 there was at least a possibility that the position would become clear before the consolidated amended pleading had to be served. For those reasons, I do not regard anything that was said about this issue before Mrs Justice Moulder as determinative of the approach I should take.

22. I have concluded I should extend the period of time for service of the consolidated pleading and that I should fix the further case management conference which I am asked to fix.

23. In my view, the considerations which led Mrs Justice Moulder to make the order she did have not materially altered since that date. I am not going to repeat the reasons she gave in her ruling but I agree with her, for the reasons that she gave, that the overriding objective is better served in this highly complicated case by allowing a fair opportunity for the settlement to be sanctioned and for the costs savings and efficiencies which would be realised by the Settlement Parties not taking on each other as well as the non-settlement parties to be achieved.

24. Second, I am satisfied that the Settlement Parties are not at fault in failing to obtain a hearing of the sanctions application in the BVI earlier than will now prove to be the case. I have referred to the difficulties in listing that application. I am not going to seek to assign blame or responsibility for those. The fact of the matter is that they have left everyone in a position where that hearing will now not take place until June 2020.

25. Thirdly, on the material before me, notwithstanding the submissions of the OMH parties, I am satisfied the extension sought <u>at this stage</u>, and I emphasise those words, will not threaten the trial date. There is no suggestion that any additional disclosure is required by any party for the directed trial apart from one discrete matter the Joint Liquidators have to concern themselves with, and which I have urged be brought on for determination as soon as possible.

26. The directions which will apply in relation to preparation for the January 2021 trial will involve a very similar timetable to that which would have applied had the adjournment application before Mrs Justice Moulder not succeeded, with the trial proceeding in January 2020.

27. Mr Pillow QC for the Settlement Parties has confirmed that if the settlement agreement is sanctioned that may lead to a reduction of issues for the trial in January, and certainly the removal from the trial of the disputes between the Settlement Parties inter se, but that it will not involve the introduction of new issues. If that is the case, I do not accept Mr Kokelaar's or indeed the OMH's submissions that there will be the need for a further round of pleadings responding to the consolidated pleading. But even if there would be benefit in some round of further pleadings, the service of those pleadings would not be on the critical path to preparation for the trial, because the issues will not be changing and will, if anything, have narrowed. Further; given the assurance I have been given that that the consolidated pleading will not be adding issues, the consolidated pleading will not enlarge the scope of factual evidence which the parties will need to serve to be ready for the January 2021 trial in any event.

28. Finally, Phoenix and Minardi submitted that they might wish to deploy the Settlement Parties' consolidated pleading at the sanctions hearing in the BVI. However, I do not think that that is a proper reason for me to order the service of a consolidated pleading in these proceedings now. To the extent that parties believe that further material should be available before the BVI judge, that is an issue for them to raise with the BVI court.

29. I explored with Mr Pillow QC whether it would be possible to obtain some form of non-binding draft of the consolidated pleading in advance of the July CMC. He identified a number of reasons why he said that was not possible. While I suspect that some of those reasons may be overstated, given the clear assurances the court has received that the consolidated pleading will involve a reduction of rather than an addition to the issues, I do not believe it is necessary to order the production of any form of draft pleading at this stage. But I am sure the Settlement Parties fully understand the difficulties which would be likely to emerge if, when a consolidated pleading was served, it did more than simply abandon some claims against the non-settlement parties or disputes

between the Settlement Parties inter se, and did seek to introduce new factual issues for possible determination at the January trial.

30. In an effort to ensure that any such departures from the existing issues are readily identifiable, I do believe it would be helpful if the consolidated pleading, when served, included, at least in the first instance, paragraph references to where the allegation in question had previously appeared in one of the existing statements of case.

31. There are two further matters I should mention.

32. First, obviously if costs are incurred by non-settling parties now in preparing to meet issues that are then not pursued once the consolidated pleading is served, it will be open to them to raise costs arguments at the relevant time, which it will be for the judge hearing the application at the July CMC or otherwise to determine.

33. Second, if the settlement is not sanctioned or if for any other reason the case continues on its current course, the Settlement Parties should be on notice that any attempt to adjourn the trial in order to give them more time to prepare their cases inter se is one that may well meet with an unsympathetic response. It will be clear to all parties that it will take a very compelling set of circumstances for this trial to be adjourned again and I am heartened by the fact that everyone here today assures me that they are determined to keep that hearing.

34. In those circumstances, I will say nothing about what the position would be if by July there has been no final determination of the sanctions application in the BVI. That is a bridge that can be crossed if we ever come to it. Plainly, the submissions Mr Pillow QC has been able to make today would be much more difficult submissions to advance if put forward in July of this year.