



Neutral Citation Number: [2020] EWHC 2380 (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: 23/07/2020

Before :

THE HON. MR JUSTICE FANCOURT

Between :

(1) MARK BYERS

Claimants

(2) HUGH DICKSON

**(AS JOINT OFFICIAL LIQUIDATORS OF
SAAD INVESTMENTS COMPANY LIMITED)
SAAD INVESTMENTS COMPANY LIMITED (IN
LIQUIDATION)**

- and -

Defendant

SAMBA FINANCIAL GROUP

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 date: 23 July 2020

Approved Judgment

MR JUSTICE FANCOURT :

1. This is an application by the Claimants, heard at the pre-trial review, for permission to amend the particulars of claim. The application notice is dated 10 July 2020.
2. The pre-trial review is concerned with a forthcoming trial due to start on 5 October 2020) in relation to which I made an order on 24 April 2020. The effect of that order was that the Defence of the defendant Bank was substantially struck out, subject only to its entitlement to defend certain identified issues. The issue that is relevant for current purposes is:

"The value of the disputed securities at the date of the September Transfer and at the date of trial."

3. The prayer to the particulars of claim as it stands reads as follows:

"1. An account of all trust property of SICL received by Samba together with an order that an amount equivalent to it, or the proceeds of any sale thereof, alternatively an amount of such greater value as the shares transferred may be worth as at the date of judgment herein, be paid to the JOLs.

2. An account of all profits, dividends and other income earned on these shares together with an order that an amount equivalent to such profits, dividends and other income be paid to the JOLs."

4. What is claimed in paragraph 1 from an alleged constructive trustee is therefore equitable compensation in lieu of an account of and restitution of trust property; and what is claimed in paragraph 2 is an account of any profits earned by the constructive trustee from holding the trust property in the meantime.
5. The amendment that is proposed to paragraph 1 of the prayer and which is opposed by the Defendant, is to add in a further alternative as the basis for the account of trust property as follows: "alternatively an amount equivalent to the value of the shares as at 31 January 2020."
6. Thus, instead of the simple alternatives of the value of the shares at the date of the breach of trust or at the date of judgment, the Claimants seek the opportunity to argue for a further alternative, namely the value of the shares as at 31 January 2020.
7. Why 31 January 2020? The answer to that is that that is the date at which, for convenience, the expert share valuers have valued the disputed securities, necessarily so since the first expert report was only produced in February 2020 and the responsive report has then adopted at the same date. That date, as I understand it, was used simply for convenience, for the purposes of exposition of the arguments and opinions relevant to the question of share valuation, though it was never at that stage understood that a relevant valuation date would

be 31 January 2020.

8. As it happens, with the benefit of hindsight but unforeseeable at the time, 31 January 2020 was broadly the high point of the value of the disputed securities before the significant reduction in share values resulting from the impact of the worldwide Covid-19 pandemic. The current position is that the value of the Disputed Securities is significantly depressed, in historic terms.
9. The objection on behalf of the Defendant is therefore not on the basis that further evidence would be required about values on 31 January 2020, but instead on the basis that an arbitrary earlier valuation date is unarguable as a matter of law, and that in any event were 31 January 2020 to be contended for as the right valuation date, the court would need to have before it evidence explaining why that particular date (rather than any other date and rather than the date of judgment) should as a matter of the court's equitable discretion be selected. Allowing the amendment would therefore give rise to the need for further evidence to be prepared ahead of trial.
10. The legal basis for the Claimants' argument that they should be entitled to amend to argue for that date is twofold. First, the Claimants argue that the Defendant in some way has caused a delay in either a trial taking place or a judgment being entered for the Claimants, which trial or judgment – but for their misconduct earlier in the trial – would otherwise have happened or might well have happened before 31 January 2020. Secondly, and in any event, that the Court has a broad equitable discretion as to the appropriate valuation date.
11. The basis of the latter argument is a paragraph in a decision of Asplin J, a case called Global Energy Horizons Corporation v Gray [2015] EWHC 2232 (Ch), which was concerned with an account of a profit made by a fiduciary in breach of fiduciary duty. In the course of discussing the right approach to the assessment of the amount of the profit, Asplin J said as follows, in paragraph 143:

"In my judgment, although Lord Neuberger in FHR was primarily concerned with questions arising from bribes and secret commissions, his conclusions in relation to the applicable equitable rule are clear. The principal has both a proprietary and a personal remedy. Furthermore, it seems to me that it is clear from all of the authorities to which I have been referred, each of which turns upon its own facts, that the court is concerned to do justice in these circumstances and as a result in some cases has concluded that it is necessary to attribute value to shares or an opportunity other than their value at the date of judgment. The court is not limited to being able to grant relief by way of restitution or to take the value of an asset at the date of judgment if on the facts of the case such a value would not reflect the value of the opportunity diverted which the defaulting fiduciary should have had in his possession."

12. As to the two arguments advanced by Mr Smith QC on behalf of the Claimants, I have no hesitation in rejecting the first. The reality of this case is that if one were to assume that the 'misconduct' of the Defendant had not taken place there would have been ordinary progress

to a trial at the very same date that the trial in fact is going to take place, 5 October 2020. If it is said that the Defendant was wrong not to have put up its hand at an earlier stage and accepted that it would not give disclosure of documents, then nevertheless, on the basis of my judgment in April 2020, it cannot be said that the Defendant would not have been given permission to defend some issues and that the Claimants could have entered judgment sooner. The Defendant would have been given permission to defend the very same issues that in the event I did give permission to defend, since it was clear to me that these would not depend on undisclosed documents and that a fair trial of them could take place.

13. It is therefore in my judgment unsustainable to argue that the Defendant's fault has deprived the Claimants of the opportunity to enter judgment before 31 January 2020.
14. As to the second argument, in my judgment there is no support in any of the authorities to which I have been referred for the proposition that the Court can and should take an earlier valuation date when valuing property as part of an account of or equitable compensation for trust property simply on the basis that the property in question has fallen in value over the period leading up to the judgment date.
15. In other types of claim with which Asplin J was concerned in the Global Energy case, namely stripping out profits made in breach of fiduciary duty, there may be a real question as to whether the profit made by a fiduciary should be assessed at an earlier date. Equally, if it is pleaded and contended that the trustee should have realised the property at an earlier stage, or alternatively that the beneficiary if it had had restitution by then would have sold the property at an earlier stage, there may be a proper basis for selecting an earlier valuation date. But neither of those is the case here.
16. If it were the case that the court has and should exercise in favour of a claimant a broad discretion to take an earlier valuation date simply because of a fall in the value of property that has nothing to do with the conduct of the defendant or what the claimant would have done with the property, then I would have expected there to have been cases addressing and establishing such a principle in the aftermath of the credit crunch in 2008 and the following years. However, there is no authority that Mr Smith has been able to point to other than Asplin J's decision, which was not dealing with the case of an account of trust property.
17. 31 January 2020 is purely adventitious as a possible valuation date and in my judgment there is no arguably proper legal foundation for the court selecting that date rather than any other date: it just happens to be the date on which the first valuer carried out his initial valuation.
18. As I have said, such a date might have been justified if the Claimants had pleaded that they would have sold by then or were deprived of the opportunity to do so, but that is not the pleaded case.
19. I also accept the submission made on behalf of the Defendant by Mr Onslow that pleading 31 January 2020 would raise questions for trial as to why that particular date rather than any other date, and in particular rather than the judgment date, should be selected by the court in its equitable discretion as the appropriate valuation date. If the answer to that is simply, as Mr Smith said, that it is guaranteed to be pre- any Covid effect, then that begs a number of

questions about the value that the shares in fact have on the judgment date and the extent to which that value is affected, if at all, by the pandemic at that time; and if so whether that makes the judgment date an inappropriate date as a matter of the court's discretion.

20. It does therefore give rise to issues on which there would need to be evidence to assist the court. I consider that it is too late in the preparation for this trial to raise such issues. The attempt by the Claimants to amend their claim will have the consequence – if permitted – of requiring the court to change the list of issues that have been directed to be tried. While that is not an impossible conclusion it is one that at this late stage the court should take some persuasion to reach.
21. For the reasons that I have given, I do not consider that the alternative valuation date is reasonably arguable by the Defendant. Because of the late stage of the application and the consequences that it would have for the preparation of evidence for trial, I would not have given permission in any event.
22. I therefore reject the application for permission to amend to the extent that it was opposed by the Defendant.