IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Neutral Citation number [2022] EWHC 1041 (Ch)

Case No: BL-2020-001003

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Tuesday, 12th April 2022

Before:
THE HONOURABLE MR JUSTICE TROWER

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

and

LONDON PROPERTY INVESTMENTS & ORS

MR M FELL QC appeared on behalf of the Claimant
MS A GREENLEY (instructed by RICHARDS SOLICITORS LLP) appeared on behalf of the Defendant

APPROVED JUDGMENT

MR JUSTICE TROWER:

1. There are two substantial applications with which I have to deal at this pre-trial review.

2. The first is the proposal by the claimant, the Financial Conduct Authority, that the trial presently fixed for hearing in a 10-day window opening on 3 May be limited to the determination of issues of liability and certain of the remedies sought. That is those remedies relating to declarations, injunctions, and remedial orders regarding restrictions. It is proposed that issues relating to the quantum of any order for restitution and any remedial orders relating to sale and rent-back agreements should be dealt with at a subsequent hearing.

3. The second is the defendant's application made by application notice dated 31 March for an order that notwithstanding that the defendants have been debarred from defending this claim, permission be granted to them to cross-examine the claimant's witnesses, to be heard on the evidence and to make submissions in relation to liability and quantum at trial.

4. The proceedings in which the application for the relief sought is made are proceedings by the FCA for relief under The Financial Services and Markets Act 2000, arising out of what are alleged to be contraventions of the general prohibition under section 19 of that Act.

5. The general prohibition prohibits the carrying on of a regulated activity in the United Kingdom by any person unless they are an authorised person or an exempt person. The nature of the activity is the provision of services to financially distressed individuals whose homes are at risk of being repossessed by mortgage lenders.

6. The first defendant facilitated the entry by individuals into loan agreements with third party lenders secured on the properties in question by a legal charge. The second defendant's business was the entering into of property transactions under which financially distressed individuals transferred ownership of their homes to the second defendant pursuant to a sale and lease back agreement.

7. The FCA alleges that the secured loans entered into by the first defendant are regulated mortgage contracts. It alleges that the making of arrangements by the first defendant and the giving of advice in relation to these regulated mortgage contracts constitute contraventions of the general prohibition. It also alleges that the service agreements under which fees are paid to the first defendant are unenforceable against the borrowers who are entitled to recover any money or other property paid or transferred to them under those agreements.

8. The FCA alleges that the property transactions are sale and rent-back agreements; it alleges that by entering into the sale and rent-back agreements the second defendant contravened the general prohibition and those agreements are thereby rendered unenforceable as against the sellers who are entitled to recover any money or other property paid or transferred under them and/or the associated service agreements. There are also claims arising out of what is alleged to be a contravention of the financial promotion restrictions under section 21 of the Act.

9. The third and fourth defendants are father and son. They are said to be concerned in the business of the first and second defendants. None of the defendants are authorised or exempt persons.

10. The relief sought includes declarations relating to the alleged contraventions and injunctions under section 380 of the Act, restraining continued or repeated contraventions, requiring one of the defendants to apply for restrictions it has registered against the property concerned to be removed and requiring another of the defendants to transfer any unencumbered properties back to the sellers and return any net proceeds of sale. It also includes an order for the supply of accounts for the purpose of enabling profits accrued to the defendants and losses suffered by the borrowers to be established, together with restitutionary relief and interest.

11. The procedural history, which bears on the proposal to split the trial and has led to the defendants being debarred from defending the proceedings, can be relatively shortly stated.

12. The FCA issued proceedings and obtained an injunction and freezing order against the defendants without notice on 9 July 2020. On 18 September 2020, the defendants filed their defence. In it they denied that any of the activities carried on by the first and second defendants were in breach of the general prohibition and they said that the loan agreements entered into by the first defendant were not regulated mortgage contracts and the sale and lease-back agreements entered into by the second defendant were not regulated sales and rent-back agreements.

13. On 20 May 2021, the defendant responded to a request for further information, scheduling the properties in relation to which consumers entered into agreements for the provision of mortgage finance and those in relation to which sale and rent-backs were agreed. That schedule contained an extensive amount of information in relation to the consumers who are affected by the matters of which complaint is made in these proceedings.

14. At the first CCMC held on 14 July 2021, Deputy Master Bowles gave directions for a trial of the claims to take place between 1 April 2022 and 30 June 2022. He also gave a number of other directions, including a direction for Model D disclosure to be given by the defendants. The deputy master also gave detailed directions in relation to section two of the defendants' disclosure review document and directed that disclosure was to be given by 31 October.

15. The issues that had arisen in relation to section two of the defendants' DRD were agreed at the beginning of October. The deadline for disclosure was then extended by consent to 8 November. That deadline expired without the defendants providing that disclosure.

16. The FCA then applied for an unless order in relation to the defendants' disclosure, an application that came on for hearing before Master Pester on 9 December. He determined that the defendants were in breach of the disclosure order made by Deputy Master Bowles, but he extended time to 14 January. Master Pester did not make the unless order sought.

17. Disclosure was not provided by the defendants by 14 January. The FCA therefore renewed their application for an unless order, an application that came on before Deputy Master Nurse on 24 January. He extended time for the provision of the documents to be disclosed to 31 January and extended time for service of an extended disclosure list and disclosure certificate to 4 February. Deputy Master Nurse also made an unless order that unless the defendants fully complied with the original disclosure order made by Deputy Master Bowles and did so by the dates and in the manner specified in his order, the defence was to struck out and the defendants would be debarred from defending the claim.

18. On 31 January 2022, the defendants filed an application for a further extension of time. On 23 February Deputy Master Nurse extended time again for provision of the documents to be disclosed to 1 March and for service of an extended disclosure list and disclosure certificate to 4 March. The deputy master also made a further unless order that, in the absence of full compliance with the order, the defendants' defence would be struck out and the defendants would be debarred from defending the claim. This is the unless order that has featured in the argument on this PTR.

19. On 1 March 2022, the defendants applied for a yet further extension of time for the provision of disclosure and the hearing of that application was listed for 16 March. On 4 March the deadline for provision of the list and the certificate expired; it was not complied with, but a document purporting to be a list of documents was filed 11 days later on 15 March.

20. It is obvious that this list did not comply with the obligation to list documents, it simply listed 18 separate emails dated, I think, between 18 January 2022 and 15 March, which enclosed a large number of files relating to numerous individual clients. The evidence is that even this disclosure was deficient because many documents were mis-filed in the wrong folders, although it is fair to record that at the application before me Ms Greenley says that I cannot be satisfied that the extent of the deficiencies in the disclosure were as explained in the evidence put in on behalf of the FCA.

21. When the application for an extension of time came before Deputy Master Nurse on 16 March, the defendants, by their counsel Ms Greenley, made an oral application for a relief from sanctions. The Deputy Master then gave directions for a further hearing of that application to be held on 23 March with a time estimate of three hours.

22. On 23 March, the same day as the application came on for hearing before Deputy Master Nurse; the defendant filed a supplemental list of documents. This list listed 47 further files but did not identify the documents to be found within them. It seems to me that apart from its own internal deficiencies, it served to confirm that the disclosure certificate dated 15 March was inaccurate.

23. Two days later, on 25 March, Deputy Master Nurse delivered a judgment applying the *Denton* test and dismissing the application for relief from sanctions. He had before him a witness statement from Mr Alasdair Begbie, the solicitor for the defendants, which disclosed, in my view, the frankly chaotic form in which disclosure has been given in these proceedings.

24. The consequence of Deputy Master Nurse's refusal of relief from sanctions was that the defendants' defence had been struck out with effect from noon on 4 March and the defendants were debarred from defending the claim in accordance with the 23 February order. By paragraph three of his order of 25 March, Deputy Master Nurse ordered that any application by the defendants for such further directions to which they may be entitled consistent with the sanction imposed by paragraph two of the order of 23 February, i.e. the debarring order, to participate in the trial of this claim be filed and served by 4pm on 31 March 2022 to be heard at the pre-trial review.

25. Against that background I turn first to the application for what I shall summarise as a split trial. I have given careful consideration to the evidence adduced as to the difficulties with which the FCA have been faced as a result of the inadequacies in disclosure and its lateness.

26. I am satisfied that the FCA has been prejudiced in their case preparation by the manner in which the defendants have purported to comply with their disclosure obligations. In many respects these are the same considerations which Deputy Master Nurse took into account when considering the defendants' application for relief from sanctions in the judgment he delivered on 25 March.

27. Documentation has not been properly listed and has been provided both late and in a form described in the FCA's evidence as a drip feed. Irrespective of whether or not, as Ms Greenley submitted, the FCA has in some respects had to row back from some of the original complaints that it made, the consequence of that is that the FCA has been given what amounts to reduced time to analyse disclosure documents. It has lost the opportunity to use disclosure lists as an analytical tool and it has been left with a reduced time to contact witnesses following review of disclosure documents and a reduced time to prepare the reporting witness statement.

28. A combination of these factors arising out of both the failure to complete the task of disclosure and the lateness of much of what has been disclosed means that the claimant's ability to prepare for trial has been compromised through what I am satisfied is the fault of the defendants. This has had a particular impact on those parts of the claim relating to quantum. I am satisfied that it will not prove possible for that part of the claim to be determined at a trial commencing at the beginning of May.

29. As the FCA explained in its evidence, this puts it in an invidious position. It is in the public interest as well as in the private interests of the individual consumers affected by the conduct of the defendants' businesses (and also in the interests of the defendants themselves) for these proceedings to be determined as soon as possible. To that extent there is a strong imperative for the matter, or as much of the matter as is practicable, to be tried in the window, which the Court has already allotted. This means that even if the Court had considered it appropriate to accede to an adjournment of the whole trial at the defendants' cost, there are powerful reasons, which weigh in the balance against the granting of such an application.

30. Mr Fell has satisfied me that a trial on liability can still be heard in May. He submitted that this points to maintaining a shorter listing for that purpose, leaving all questions as to the nature and extent of any restitutionary relief to be determined at a later hearing. He suggested that if the FCA is successful on liability the Court at the end of the trial of those issues should be invited to give directions for an enquiry to enable the determination of the profits and losses by reference to which restitution orders can be made. The enquiry would also have to deal with any claim for remedial relief in relation to the sale and rent-back agreements, which would need to be considered at the same time as the restitution order. If this course were to be adopted, it would mean that the amount of compensation and other remedial relief amounts to be paid in accordance with paragraphs seven to 12 of the prayer, would (if liability is established) be deferred to a future date.

31. At the hearing, Ms Greenley confirmed that her clients' attitude to this proposal was broadly neutral, although she did make submissions as to how she said that her clients ought to be permitted to participate in the trial as to quantum in due course were I to accede to the application made or the proposal made by Mr Fell.

32. In my judgment, Mr Fell's proposal is the right way forward. It will enable the trial time estimate to be reduced but will ensure that as much as practicable is determined, notwithstanding the defendants' defaults in their conduct of the proceedings. I am satisfied that it will still be possible for that part of the case to be dealt with justly and at proportionate cost. To split the trial in that way will therefore be in accordance with the overriding objective.

33. I now turn to the participation application. So far as this is concerned, Ms Greenley explained that the defendants recognise that a consequence of the debarring order is that they can no longer advance a positive case in their defence. She said, however, that in this particular case it would be in the interests of justice to allow the defendants to participate in a limited manner. She argued that the making of a debarring order did not mean that the defendant could not participate to the extent considered just in all the circumstances.

34. She pointed out, and made powerful submissions to this effect, that this was a serious case of considerable importance to both consumers and the defendants and she submitted, in particular, that declaratory and restitutionary relief was sought, which made it inherently unsuitable for the kind of case in which a default judgment, or something akin to a default judgment, was going to be obtained.

35. She reminded me that the Court would have to be satisfied at trial that the FCA had made out its case and to that extent there was common ground between the parties. Mr Fell both accepted that this is what the FCA would have to prove and he also addressed, towards the end of his submissions, the question of how it was that he, acting on behalf of the FCA, would regard it as incumbent upon him to draw to the attention of the Court any weaknesses in the case, which may be advanced.

36. At the forefront of her submissions, Ms Greenley relied on a decision of Mr Rosen QC in *Kliers v Schmerler & Anor* [2018] EWHC 1350 (Ch), and in particular the passage at paragraphs 26 to 28, which I shall recite:

> "26 Taking all the cases cited on board, the present Deputy Judge, [and I interpose that by that he is referring to himself] considers that at trial the Court has some residual discretion to hear a debarred defendant and whether a debarred party, in this case, Mordecai, might nonetheless be allowed to cross-examine and to make final submissions.
> 27 It seems to me that these rights, whilst manifestly important in our system of justice, are not absolutely lost or retained when a defendant is debarred from defending, unless the Court makes this explicit. Absent a previous order to that effect, the trial Judge can decide under his or her case management powers, but still of course having regard to the overriding objectives, to do what is just and expedient as regard the need and justification for cross-examination and further submissions in the particular case.
> 28 In some types of dispute - I have in mind for example wills and probate disputes, where the Court's function is not merely adversarial, but also has an historical basis in inquisitorial proceedings - that might be appropriate. However, the present case is extremely adversarial and the effect of the Court's previous orders should not be minimised. I also bear in mind the overriding objectives by way of fairness and justice between the parties, having regard to

the resources of the Court and the interests of the public at large, including other litigants".

37. In particular, Ms Greenley submitted that it would be in furtherance of the overriding objective to allow the defendants to test the claimant's case in cross-examination and to make submissions accordingly without straying into advancing a positive case. She said that her clients were not yet in a position to identify the precise areas of the reporting officer's statement on which they would focus and ultimately the reason for that is that the reporting officer's statement has not yet been served. However, they anticipated seeking to test the claimant's evidence in respect of the nature and extent of their involvement in the procurement of the secured loans and the relevant property transactions.

38. These submissions give rise to the need to give some consideration to the effect of a debarring order of the type made in the present case. The law was summarised by Mr Edwin Johnson QC, as he then was, in *Times Travel v Pakistan International Airline Group* [2019] EWHC 3732 (Ch) at paragraph 55 in a passage that was cited with approval by the Court of Appeal in *Hirachand v Hirachand* [2021] EWCA Civ 1498, in which King LJ, at paragraph 37 of her judgment, described what Mr Johnson had to say as summarising the proper approach. It has also subsequently been applied by Steyn J in *Kim v Lee* [2021] EWHC 231 QB at 25.

39. In *Times Travel v Pakistan International Airline Group*, the defendant was debarred from defending account proceedings and Mr Johnson QC said as follows:

> (1) If there is a debarring order in place, its effect depends in the first instance upon its terms. One must consider the terms of the debarring order in order to determine what it debars the relevant party from doing. And as I have already indicated there is no ambiguity in that respect in the present case. The December 2018 order, as accepted, debars the defendant from defending the account proceedings.
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> (2) Where an order debars a defendant from defending a particular proceedings, this should mean what it says: At the trial of the relevant proceedings the defendant should not be permitted to participate in the normal way. That is to say by doing such things as adducing evidence, cross-examining witnesses on the other side, or making submissions.
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> (3) The case law does appear to demonstrate the existence of a residual discretion or trial management power to permit a debarred defendant to take some part in the trial of the relevant proceedings. It seems to me that this discretion is a narrow one. In particular circumstances I can see that the exercise of this discretion might include the permitting of some limited submissions or the permitting of some cross-examination. More generally, it strikes me that a debarred defendant should normally be able to address the court on the form of order to be made after the substantive decision on the trial has been made, and in relation to the pointing out of any errors in the relevant judgment. It also strikes me, but I say this on a strictly provisional basis because it is not a matter I am deciding at this stage, that it does strike me that the debarred defendant ought to be able to address the court on the question of the costs of the relevant proceedings. But I repeat that that is not a question which I am deciding in this judgment.
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> (4) The overriding principle however is that debarring orders should mean what they say. The debarred defendant should not normally be permitted to participate in the relevant trial in a way which undermines the debarring order, and permits the defendant to escape the effect of the debarring order. A debarring order is an

> important sanction available to the court in the exercise of its case management powers, and an important method of ensuring that the court's case management orders are respected. As such, defendants should not normally be allowed to escape from the consequences of a debarring order when the trial of the relevant proceedings takes place.
> (5) Where a debarring order does have the effect of preventing a defendant from participating in a 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.
> (6) The striking out of the defence does not mean that the court cannot have any regard to that defence. It can still be considered by the court for the purposes of understanding the statements of case in the relevant proceedings as a whole. To adopt the phrase adopted by Tomlinson LJ in the second decision of the Court of Appeal in Thevarajah , "The relevant defence may have left a lasting legacy on the statements of case as a whole". It also appears, by reference to what Sales J is recorded as saying in the second decision in Thevarajah , that looking at the defence for the purposes of understanding the claim can also, in an appropriate case, extend to hearing from counsel for the debarred defendant in order for counsel for the debarred defendant to provide assistance for the benefit of the court in understanding the nature and extent of the relevant claim.

40. The conclusion that a debarring order should mean what it says is well established. As Soole J said, in *Michael v Phillips* [2017] EWHC 1084 (QB), a case that was referred to by Mr Johnson in his analysis of the previous authorities:

> "Challenges to the cogency of factual and expert witnesses by cross-examination and submission are a major participation in the trial and would be contrary to what the Court has decided should not happen. There would be great difficulties for the trial Judge in determining where the boundaries between such questions and submissions and putting an alternative case".

41. As Mr Johnson QC explained in sub-paragraph three of paragraph 55, the kinds of permissible participation when a debarring order has been made are narrow. In my view, the discretion to which he was referring relates to the ability of the defendant to participate for a purpose other than defending the claim. This is consistent with what King LJ said in *Hirachand v Hirachand* at paragraph 37, where she emphasised the overriding principle that that parties should not be allowed to escape from the consequences of a debarring order when the trial of the relevant proceedings takes place.

42. In particular, I do not think that where a debarring order has been made in the form it was in the present case, the discretion to participate should extend to enabling a debarred defendant to challenge the claimant's evidence by cross-examination on the basis that the cross-examination was focussed on the cogency of its witness's evidence as opposed to the advancing of a positive case. It seems to me that cross-examination for that purpose is as much a part of defending the claim, which Mr Johnson QC and the Court of Appeal have both said should not be permitted once the debarring order has been made, as is cross-examination in support of a positive case. Allowing it would, in my judgment, risk cutting across the debarring order that has been made and would amount to a collateral attack on an earlier order that has been made and not set aside.

43. In *Michael v Phillips*, Soole J also considered that policing the distinction between cross-examination to advance a positive case and cross-examination to challenge the cogency of the claimant's case would be very difficult in many cases and I agree with him. In particular, I agree with him that it would be difficult in the present case.

44. I should add, however, that this will not always be the case and there may be some cases in which the distinction between cross-examination for the purpose of testing the evidence and cross-examination for the purpose of advancing a positive case is a meaningful one. Indeed, the distinction was recently considered by Foxton J in *MMD Ltd v Wang Kai Lang* [2021] EWHC 3264 (Comm), in which he permitted just such a level of participation by a litigant in person who had failed to comply with an unless order.

45. But it is important to understand the context in which Foxton J permitted the defendant to cross-examine the factual witnesses called by the claimant and to make submissions on the documents, being the essence of the relief sought by the defendants in the present case. In particular, there are two critical differences from the present case.

46. The first difference is that it is apparent from paragraphs 9 and 13 of Foxton J's judgment that in the particular circumstances of that case the claimant did not resist permission being granted to the defendant to cross-examine its witnesses for a limited purpose. As Foxton J explained in paragraph 12 of his judgment, the case was one in which the claimant wished to obtain judgment on the merits rather than asking the Court to enter judgment by reason of the absence of a defence. The grant to the defendant of a right to participate was to that extent an advantage which the claimant was content for the defendant to have.

47. The second difference is that it appears that the nature of the unless order was rather different from the one in the present case. It made provision for the defence to be struck out, but did not provide that the defendant was debarred from defending the claim. It is not difficult to see why in those circumstances the Judge was persuaded that the defendant should be permitted to participate to the extent of challenging the claimant's assertion that it had proved its case. The claimant wanted a judgment that gave it more than simply an order made in default of defence and the form of unless order that had not been complied with permitted the Judge to take that approach, notwithstanding the fact that relief from sanctions had not been granted and was not being sought.

48. Despite her able submissions, I am not persuaded by Ms Greenley that where a clear and unambiguous debarring order has been made the Court has an untrammelled discretion to permit cross-examination or submissions advanced as a defence to the proceedings. I have been shown no case in which such permission has been granted where a full debarring order has been made, whether to enable a positive defence to be advanced or to enable the defendant to criticise the cogency of the claimant's case.

49. When it is said in the authorities that some form of limited discretion to cross-examine and make submissions exists, it seems to me that the Court is concerned with those aspects of the case, which are dealing with framing the issues before the Court and identifying the matters to be decided. These are the types of order that were identified in Sales J's order in *Thevarajah v Riordan* [2014] EWCA Civ 14, in which he ordered that, "At the final hearing the defendant shall not be permitted to participate in any matters of liability pleaded in the claimant's particulars of claim, save for assisting the Court in understanding the claimant's

case, if necessary". He also went on to order that, "They should have no right to take any steps to challenge any parts of the claimant's claim as pleaded in their particulars of claim or evidence adduced in support thereof".

50. In my judgment, where the debarring order is explicit and unambiguous in its terms, relief of the type sought on the participation application made by the defendants in the present case would be to side-step an order of the Court that has already been made and which prevents any form of participation that constitutes a defence of the claim.

51. I should say that I agree that this restriction does not extend to the making of submissions by or on behalf of the debarred defendants so as to enable the Court, for its benefit, not for the benefit of the defendants, to understand the nature and extent of the claim. That is also a circumstance in which in some cases it is conceivable that a limited form of cross-examination might be permissible.

52. However, it is important to stress that the reason for this is that such participation is not in substance part of the defence. It is a question of assisting the Court to understand the nature of the claim that is in fact being made and it is also why one form of particular participation is permitted in the cases, namely submissions to the Court on the form of order to be made after the substantive decision has been reached, together with the pointing out of any errors in the relevant judgment.

53. In the present case there is no doubt as to the terms of the order that was made. It does two things on a failure to comply with the disclosure orders in accordance with their terms. The first is that it operates to strike out the defence. The second is that it operates to debar the defendants from defending the claim. In my view, it is explicit and unambiguous in its terms and prevents anything that amounts to a defence to the claim. Relief from sanctions has been refused. It follows that the order should be enforced accordingly.

54. I should also add that, even if I were to have a discretion of the type described by Ms Greenley, to permit the participation in the form that I described at the beginning of this judgment and which is contained in the terms of the application notice, I think it most improbable that I would have exercised it in her client's favour. In order to enable the Court to exercise a discretion of the type sought by Ms Greenley's client, the Court would have to adopt an approach that was not dissimilar to the kind of approach that one would expect the Court to adopt on a renewed application for relief from sanctions. I do not agree that in the circumstances of a case such as the present, relief would be likely to be granted, largely for the reasons given by the deputy master.

55. The consequence of my decision to split the trial in the way proposed by Mr Fell and to refuse the defendants' participation application is that the time estimate for trial requires reconsideration. I have seen a revised draft timetable proposed by the claimant and I will now consider with counsel whether there are any further revisions that are needed to that, together with the other matters that arise on this PTR.

56. Therefore, the result is that the proposal to split the trial is acceded to and the proposal to participate in the form sought in the application notice is refused.

57. I was also addressed by Ms Greenley during the course of the hearing on the question of

whether I should determine now in a final form, Ms Greenley's application to participate at the hearing in respect of the quantum part of the trial, were I to accede to the application to split the trial. She submitted that it was appropriate for me to reach a conclusion now as to the appropriate way forward.

58. I do not agree. It seems to me that the appropriate thing to do is to adjourn that part of the participation application for determination by the trial Judge so that he can determine it as part of his consideration as to the nature of the enquiry that he is going to order if, but only if, liability is established as a result of part one of the trial.

End of Judgment

Transcript from a recording by Ubiqus
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