

Neutral Citation Number: [2019] EWHC 1617 (Ch)

Claim No. BL-2017-000561

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Before:

Miss Joanna Smith QC sitting as a Deputy Judge of the High Court

B E T W E E N :

VANNIN CAPITAL PCC
(a Jersey Protected Cell Company incorporated in accordance with the Companies
(Jersey) Law 1991)

Claimant

- and -

(1) RBOS SHAREHOLDERS ACTION GROUP LIMITED
(2) THE PERSONS LISTED IN SCHEDULE 1 TO THE PARTICULARS OF
CLAIM

Defendants

Mr Harris QC and Mr Bird (instructed by Reynolds Porter Chamberlain LLP) for the
Claimant

Ms Glover (instructed by Signature Litigation LLP) for the Second Defendants

Hearing date: 17 June 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated authentic.

Introduction

1. At a case management conference on 27 February 2019, I made an order for directions which included an order for Extended Disclosure under the Disclosure Pilot in CPR PD 51U (“**the Disclosure Order**”). In particular, I ordered that disclosure should be provided in the form specified in the joint Disclosure Review Document (“**the DRD**”) and that the parties use all reasonable endeavours to agree a final form of Appendix 1 to the DRD identifying the individual Second Defendants who were to provide the necessary disclosure. Appendix 1 as agreed by the parties included all 46 of the so-called Corporate Defendants in this matter and 9 of the numerous so-called Retail Defendants (as more particularly described and defined in my Judgment in the summary judgment application). Following agreement between the parties, the Retail Defendants included in Appendix 1 were chosen by reference to the size of their shareholding in RBS, which was to be in excess of 200,000 shares.
2. The Claimant and the Second Defendants now each apply to the court in relation to the Disclosure Order. The Second Defendants apply to vary the Disclosure Order pursuant to CPR PD 51U, paragraph 18.1 to exclude SG UK DB Trustee Company Limited (“**SG UK**”) from Appendix 1. The Claimant applies pursuant to CPR PD 51U paragraph 17 to request further searches to be carried out by the entities listed in Appendix 1 so as to ensure compliance with the Disclosure Order.
3. In circumstances where a point of law has arisen during the course of these applications which is capable of affecting future similar applications under the Disclosure Pilot, I reserved judgment. However, insofar as the Claimant’s application is concerned, I granted this application at the hearing and ordered the Second Defendants to start the disclosure exercise immediately. I set out my brief reasons for that decision later in this judgment.
4. Before addressing the detail of the applications, I note that there has been no attempt by either party in this case to seek guidance from the court in accordance with the procedure identified in CPR PD 51U, paragraph 11, in advance of making formal applications to the court. Whilst applications to vary an order for Extended Disclosure do not appear to be contemplated as suitable for Disclosure Guidance Hearings, applications concerning the scope of Extended Disclosure expressly fall within that

provision. Lengthy skeleton arguments have been filed on both sides in respect of these applications and detailed submissions have been made which took more than half a day of court time. This approach seems to me to be both undesirable and contrary to the spirit of the Disclosure Pilot which requires the parties to cooperate so as to promote the reliable, efficient and cost-effective conduct of disclosure. Whilst the differing positions of the parties appear to have been amply explored in *inter partes* correspondence and, it seems, were not capable of resolution without further intervention from the court, this seems to me to be just the sort of situation in which guidance could have been sought from the court under paragraph 11 (at least) on the issue of whether the Claimant's application fell within the scope of the existing Disclosure Order. Had such guidance been sought and obtained, some of the issues arising on this hearing might well have fallen away, thereby saving time and costs.

The Second Defendants' Application

5. As I have already said, the Second Defendants' application seeks a variation to the original order for Extended Disclosure.
6. Ms Glover, on behalf of the Second Defendants, submits that the circumstances in which the court may exercise its discretion to vary an order made under the Disclosure Pilot are set out in paragraphs 18.1 and 18.2:

“18.1 The court may at any stage make an order that varies an order for Extended Disclosure....

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4)”.

7. She relies on two witness statements from Ms Rebecca Hogan dated 14 May 2019 and 12 June 2019 which, she submits, support the proposition that the proposed variation is (i) necessary for the just disposal of proceedings (ii) reasonable and (iii) proportionate. In summary these statements record that shortly after the Disclosure Order was made, Signature Litigation LLP (“**Signature**”), acting on behalf of all of the Second Defendants, became aware that SG UK (one of the 46 Corporate Defendants, all of

whom were to provide disclosure without any reference to the size of their shareholding in RBS by agreement between the parties at the CMC) did not meet the 200,000 share threshold that had been applied to the selection of the Retail Defendants for inclusion in Appendix 1. SG UK's shareholding is only 85,427 shares. Ms Hogan says that "*if [SG UK] were required to give disclosure, it is almost certain that the costs associated with that would completely extinguish any recoveries that [SG UK] may obtain from the Rights Issue Litigation Settlement*". She confirms that the maximum gross recovery from RBS that is attributable to SG UK is £70,000.

8. Mr Harris QC, on behalf of the Claimant opposes this application, on a number of grounds to which I will return shortly. However, his first point is that the court may not exercise its discretion to vary its own order unless it is persuaded that the factors identified in *Tibbles v SIG Plc* [2012] 1 WLR 2591 are present; in particular "*(a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated*" (per Rix LJ at [39(ii)]). Mr Harris points to the policy behind this decision, namely considerations of finality, the undesirability of allowing litigants to have two bites of the cherry and the need to avoid undermining the concept of appeal. He goes on to say that neither of these requirements is present in this case.
9. On the applicability of *Tibbles v SIG Plc*, I reject Mr Harris' submission. That case concerned the general (apparently broad and unfettered) jurisdiction of the court under CPR 3.1(7) to revoke or vary its own order. It is, as the notes in the White Book, Vol 1 at 3.1.17 record, an "*omnibus provision*", designed to deal with orders which, in the ordinary course, would not be revisited. In contrast, the Disclosure Pilot expressly contemplates the potential for orders for Extended Disclosure to be varied and sets out the requirements that a party making such an application must satisfy. In my judgment, the circumstances in which an order may be revoked or varied under CPR 3.1(7) must give way to the specific requirements of paragraph 18 of the Disclosure Pilot, which expressly sets out a different test.
10. Furthermore, I note that Rix LJ made it clear in *Tibbles v SIG Plc* that "*successful invocation of [CPR 3.1(7)] is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation*

or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation” [39(vii)]. There is nothing in the Disclosure Pilot to suggest that applications to vary orders for Extended Disclosure will only be granted where something out of the ordinary has occurred. If the draftsmen of the Disclosure Pilot had intended to import the criteria set forth in *Tibbles*, it is to be expected that they would have made that clear. In circumstances where they have identified a different test in paragraph 18, I can only infer that they had no such intention.

11. Notwithstanding my conclusion on this point I note one curiosity about the wording of paragraph 18. The examples given in 18.1 of circumstances where variations may be made refer to situations where additional orders for disclosure are to be made and the test in 18.2, at least insofar as it requires the court to consider the question of whether the proposed variation is proportionate, perhaps applies more naturally to the situation where a variation is sought to expand the scope of disclosure already ordered. It is conceptually rather more difficult to determine whether a variation which seeks to exclude a disclosure obligation which has already been ordered is “proportionate”, unless what is really meant by this is that the existing order is disproportionate such that it is reasonable and proportionate to reduce its scope.
12. Ms Glover’s submissions proceed on the basis that the question in such a case is whether the existing order for Extended Disclosure is disproportionate (such that it would be proportionate to make the variation), and I have approached the application in that way.
13. Applying the test in paragraph 18, I am not satisfied that the exclusion of SG UK from Appendix 1 is necessary for the just disposal of the proceedings and is reasonable and proportionate. I take on board all of the detailed arguments raised by both counsel at the hearing, but in the end, I prefer those of Mr Harris (notwithstanding that I have rejected his submissions as to the overarching approach I should take to an application of this sort).
14. My reasons are as follows:
 - a. At the CMC, Mr Valentin QC, then appearing on behalf of the Second Defendants, agreed to the proposition that Extended Disclosure should be provided by each of the 46 Corporate Defendants, which agreement included

SG UK. The Second Defendants were well aware in advance of the CMC that the Claimant was seeking an order in relation to all 46 of the Corporate Defendants but did not then seek to suggest that such an order would be inappropriate or unjust in relation to one or more of those entities. Ms Hogan's evidence is that at that time Signature had not carried out a search to determine the extent of the shareholdings of individual Corporate Defendants and that this "*should have been raised sooner*". She is right about this. In light of the scope of the disclosure that was being sought, it seems to me that this information should have been checked and I agree with the Claimant's submission that the fact that such a simple check was not carried out clearly suggests that it was well understood (and ultimately agreed) that the Claimant's position at that hearing was that all the Corporate Defendants should give disclosure regardless of the size of their shareholding.

- b. It is now said on behalf of the Second Defendants that there is no principled reason for differentiating between the Corporate Defendants and the Retail Defendants. However, that was apparently not the view taken by the Second Defendants at the time of the CMC and, as Mr Harris points out, the Corporate Defendants are in a different category from the Retail Defendants. Unlike the Retail Defendants, the Corporate Defendants entered into detailed written Membership Agreements, were appointed to be a '*Bespoke Services Member*' of the Action Group and were entitled to receive regular updates on the case and '*regular access to developments*'. They were also entitled to "*view all material documents when reasonably requested*" and the First Defendant ("**the AGC**") undertook to notify them (including SG UK) "*immediately upon becoming aware of any information which has or may have a material impact on the claim*". It follows that the Corporate Defendants were probably the best-informed members of the Action Group and, in the circumstances, it is more likely that they will have relevant documents in their possession than Retail Defendants (whatever the size of their shareholding). Whilst I accept that any updates they might have received from AGC will already have been captured in the disclosure exercise, nonetheless as an institutional investor and member of a large banking group, SG UK can be expected to have better record keeping, document retention and corporate governance procedures than many Retail

Defendants with a similar sized shareholding and so are more likely to have relevant internal documents evidencing knowledge of the LFAs (as described and defined in my judgment on the summary judgment application).

- c. As is borne out by the evidence of Mr Kouchikali served on behalf of the Claimant, a review of the disclosure provided to date by reference to key word searches has produced a number of documents evidencing knowledge on the part of various of the Corporate Defendants of the funding that was being provided by the Claimant and in granting the Claimant's application I have ordered disclosure of internal board meeting minutes and the like which it is to be anticipated will provide evidence as to the Appendix 1 entities' knowledge of those funding arrangements. In circumstances where the Second Defendants were required to give disclosure from only 55 out of approximately 8000 Second Defendants (less than 1% of the total body), it seems to me that a yet further reduction in numbers giving disclosure, even if limited to only one entity, has the potential to prejudice the Claimant and thereby adversely to affect the just disposal of the proceedings.
- d. Ms Glover argues that the existence of corporate entities in the list of Retail Defendants, including by way of example, SG Hambros, which had a greater shareholding in RBS than SG UK, undermines the distinction between the Corporate Defendants and the Retail Defendants. However, in my judgment this does not provide a satisfactory answer to the points already identified above; the fact that there are corporate entities in the Retail Defendants (however large their shareholding) did not impact upon the approach that the Second Defendants took at the CMC or indeed their preparedness to treat the 46 Corporate Defendants as falling within a separate category when it came to disclosure. It is not suggested by SG UK that it does not in fact have sophisticated record keeping, document retention and corporate governance policies.
- e. I am not satisfied that Ms Hogan's evidence (that SG UK will incur costs in carrying out the disclosure exercise which are likely to exceed the maximum gross settlement recovery in the RBS Rights Issue Litigation) is sufficient to

establish that the Disclosure Order was disproportionate as against SG UK (or indeed that a variation order would be reasonable and proportionate):

- i. Ms Hogan's evidence explains that these costs will be incurred first because two of the relevant custodians are employees of SG UK's investment adviser, Lane Clark & Peacock LLP ("**LCP**"), which will seek payment for undertaking the necessary searches, and second because SG UK, a pension scheme, considers it necessary to obtain legal advice and assistance from its appointed solicitors, an unidentified magic circle city firm ("**the Firm**"). However, she does not attempt to identify the costs that will be incurred by LCP or by the Firm, relying purely on the assertion that it is almost certain that SG UK's recoveries in the RBS Rights Issue Litigation will be extinguished.
- ii. Furthermore, to my mind, Ms Hogan does not provide a satisfactory explanation as to why advice is needed from the Firm in circumstances where SG UK has access to advice from Signature and from the counsel team instructed on behalf of the Second Defendants. It does not seem to me to be at all obvious that (adopting Ms Hogan's words) the Firm is "*inevitably going to be better equipped to advise [SG UK] on its [disclosure] obligations and deal with any issues arising*". I agree with Mr Harris that whilst SG UK is of course free to obtain advice from the Firm, the court would need to have a very clear understanding as to precisely why that advice is necessary and why it cannot be obtained from their existing legal team before it could take the cost of such advice into account on the issue of proportionality. The mere fact that SG UK is a pension scheme does not appear to me to be an answer to the point. Similarly, the fact that other Appendix 1 entities which are also pension schemes have chosen to obtain their own separate legal advice does not assist.
- iii. Overall, I note that the Second Defendants' disclosure costs to date are said to be something in the region of £450,000. A further £70,000 or so (assuming SG UK's costs to be in the region of that figure) would not, in my judgment, render their overall costs disproportionate in light of

the value of the Claimant's claim which is made jointly and severally against the Second Defendants.

The Claimant's Application

15. I can deal with this application, which I have granted, rather more quickly. The Claimant seeks an order that the Second Defendants identified in Appendix 1 to the DRD carry out a search of:

- (i) The minutes of meetings of their boards of directors (or such other written records of meetings of the entities' executive bodies which were responsible for approving that entities' joining of the Action Group) and
- (ii) Such other documents provided to or created by their boards of directors (or such other executive bodies) for documents relating to Disclosure Issues 3 and 4.

16. Disclosure Issues 3 and 4 as set out in the DRD concern whether the Second Defendants ratified the LFAs, issues which depend upon their knowledge of the LFAs. The Second Defendants have themselves put their knowledge in issue in their statement of case.

17. In respect of each of Disclosure Issues 3 and 4, the Categories of Documents identified in the DRD included "*internal authorisations and documents and records created in relation thereto*". The Claimant's skeleton argument for the CMC identified the types of documents that would fall within this category as "*memoranda, board presentations and minutes*" which it was alleged would be "*highly material*" to determining the Second Defendants' knowledge of the Action Group's funding arrangements, including in relation to adverse costs liability.

18. In Section 2 of the DRD in the box entitled "Custodians", the following entry appears: "*The custodians for the purpose of searching documents held by each of the Second Defendants listed in Appendix 1 will be identified following consultation with each of the Defendants listed in Appendix 1 and also by reference to the documents disclosed by DI*".

19. In a letter dated 19 March 2019, Signature informed Reynolds Porter Chamberlain LLP ("**RPC**"), solicitors acting on behalf of the Claimant, that they would seek to identify

custodians in accordance with the DRD but that “*for the purposes of identifying the relevant individuals, we have not been seeking to identify a board member of each of the Appendix 1 entities for the purposes of locating board minutes at which the funding of the participation in the Rights Issue might have been discussed. To the extent that (i) the funding of the Rights Issue litigation was discussed at a board meeting but (ii) the relevant individuals identified in the process described above are not board members, the flow of information to the board can only have come from the relevant individuals in question. As such, to the extent that the board received any relevant information it will be captured within the searches of the relevant individuals*”.

20. On 27 March 2019, RPC replied, objecting to this approach and making it clear that “*by far the best repository of information as to the knowledge of the boards of these Defendants will be the board minutes and materials themselves*”. They pointed out, and I agree, that disclosure of board minutes should be a reasonably straightforward task.
21. Signature continued to refuse to carry out what they referred to in their letter of 3 April 2019 as “*speculative searches of board minutes*” although they did say that they would be willing to revisit the issue if in the course of their review of the documents supplied by the Appendix 1 entities they identified “*documents which suggest that relevant board minutes or meeting packs do exist*”.
22. In short, the Claimant says, and I agree, that board minutes and associated materials are within the scope of the DRD and that in the circumstances the Appendix 1 entities are required to carry out proper searches for those documents. They cannot properly decline to select custodians who would have access to these documents, thereby potentially limiting the scope of the disclosure that is required. The selection of custodians must, to my mind, be determined by reference to the scope of the disclosure ordered. Furthermore, insofar as the necessary documents can more readily be captured by a search of hard copy documents, I fail to see why that search cannot be conducted; *a fortiori* where there is any doubt about their availability on electronic data sources.
23. Further and in any event, the Claimant says that the disclosure exercise conducted to date has thrown up a small amount of evidence (which I have been shown) which clearly indicates that relevant board minutes or meeting packs do exist, and this

suggests that similar documents may also be retained by others. That there is only a small amount of evidence to be found in the Second Defendants' disclosure of board minutes and the like, despite detailed key word searches to which it has been subjected, merely supports the proposition that conducting searches through custodians who were not on the relevant boards would likely be an unreliable way of gathering the necessary information.

24. I have had regard to Ms Glover's submissions in her skeleton and at the hearing. Amongst other things, she pointed out that a number of custodians identified by the various Appendix 1 entities appeared to be board members and so could be expected to have access to board minutes insofar as they were relevant to the issue of knowledge in relation to the LFAs. She also pointed out the very limited nature of the evidence relied upon by the Claimant in support of the proposition that the existing disclosure exercise had been unsatisfactory. She proposed by way of compromise that it might be possible to write to identified custodians who were not board members to seek to determine whether they had authority to enter into LFAs and, only if they did not, then to broaden the search.
25. However, in my judgment, it is clear that the Second Defendants have not complied with the requirements of the DRD and they must now do so. Ms Glover's proposal, whilst welcome, does not satisfy the requirements of the Disclosure Order and was, understandably, rejected by the Claimant.
26. Following the hearing a further issue has arisen between the parties on which they have addressed me by way of written submissions. In short, the Claimant now seeks to widen the scope of the order sought in its application notice to include the minutes/papers of committees that took part in the decision-making process by, for example, making a recommendation to the relevant board. It says that (i) its proposed wording was always intended to deal with documents of this type (albeit that it acknowledges that the text of its draft Order was limited to boards of directors and executive bodies which were responsible for approving the joining of the Action Group), (ii) an example from the existing disclosure justifies its approach, (iii) it was clear from its submissions at the hearing that its application covered these documents and (iv) in any event, a search of this category of documents was required by the DRD.

27. I reject the Claimant's submission and agree with the Second Defendants that this appears to be an attempt to re-open the argument at the hearing in circumstances where I have made the very order that was sought by the Claimant. The Second Defendants have not had a chance to make detailed submissions on the wider form of the order that is now proposed by the Claimant, which I do not regard as falling within the original terms of the DRD. Further, I agree that there is reason to suppose that the wider searches proposed by the Claimant are disproportionate and unnecessary in circumstances where they seem likely only to capture material that is already within the scope of paragraph 2.2 of the draft Order and where the costs of carrying out the additional searches may well be significant. I also accept that the example used by the Claimant to support this application does not assist its argument. If, upon receipt of the documents which must be disclosed in response to my order, the Claimant can identify specific documents or categories of document which must exist and in respect of which it wishes to seek extended disclosure, it can no doubt invite the Second Defendants to cooperate with such a request, failing which it can make an application to vary my order.
28. I will make the Order in the terms originally sought by the Claimant and will give the Second Defendants two months in which to complete this disclosure exercise. The date range for these purposes should be 6 months on either side of the date on which each Appendix 1 entity entered into its written Membership Agreement. Insofar as disclosure is being obtained from individual Appendix 1 entities by Signature on a rolling basis over the course of the two months, I shall order that it be provided to the Claimant as soon as it becomes available (rather than waiting until the end of the two months). This is to ensure no prejudice in the preparation of witness statements which are due at the end of September.
29. In circumstances where the Second Defendants' counsel is away until 30 June and where the costs of attendance before me to deal with costs may well be disproportionate to the sums in dispute, I will reserve the costs of this matter until after the hand down of the judgment in the hope and expectation that if costs cannot be agreed between the parties, they will be capable of being dealt with by way of short written submissions. I understand that AGC has indicated that its preference is for consequential matters to be on paper and I am keen to ensure that costs are not wasted unnecessarily by requiring

attendance. Having said that (and in light of written submissions made to me on behalf of the Claimant after the hearing as to the desirability of an oral hearing to deal with consequential matters) I am not precluding the possibility that there will need to be a further hearing and I invite the parties to revisit this issue upon sight of my judgment.