



Neutral Citation Number: [2019] EWHC 2864 (Ch)

Case No: HC-2013-000606 and 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: 22 October 2019

**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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**Andrew Onslow QC, Alan Roxburgh** (instructed by **Latham & Watkins LLP**) for the  
**Defendant**  
**Stephen Smith QC, Adam Cloherty, Timothy Sherwin** (instructed by **Morrison & Foerester**  
**(UK) LLP**) for the **Claimant**

Hearing dates: 22 October 2019  
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**Approved Judgment**

## MR JUSTICE FANCOURT

1. This is my judgment on an application made on 27 September 2019 by the defendant. The application was made to extend the time specified in paragraph 11 of an order of 20 November 2018 for the parties to give disclosure in this action.
2. The order, in paragraph 11, specified that disclosure should take place in two stages: a first tranche by May 2019 and the final and complete disclosure documents by a deadline of 27 September 2019.
3. The defendant has not complied with that order for disclosure. The claimants did comply and have given inspection of their disclosed documents to the defendant.
4. The defendant now seeks an extension of that time limit to 6 January 2020. That extension is sought on the basis of evidence that it was unable to start the disclosure process without the authority of a body in Saudi Arabia called SAMA, which is the regulator of the defendant bank. That authority of SAMA to begin the process was only given conditionally on 9 June 2019.
5. Thereafter, when the size of the exercise was assessed and the nature of the defendant bank's filing systems were understood, it was realised that new hardware was needed to enable searching of relevant documents by reference to date range, keywords and identified custodians. This hardware was not in place and operational until September 2019; and the process of searching, which is conducted by external consultants, Alvarez & Marsal, only started on 8 October 2019.
6. It is now predicted that stage 1 of that search process will end on 13 November 2019 and stages 2 and 3, which will be conducted by lawyers at the defendant's solicitors, Latham & Watkins, will be completed by 30 November 2019.
7. Thereafter, in accordance with the conditions that the defendant says SAMA imposed, all the disclosure will have to be approved by SAMA before it can be provided to the claimants. The defendant, therefore, says that further time until 6 January 2020 should be allowed for that process.
8. The claimants' case is that the defendant has deliberately created obstacles to prompt disclosure taking place, to give it procedural advantages in this litigation and to obstruct the claimants' orderly preparations for trial in October 2020.
9. The claimants also argue that the requirements allegedly imposed by SAMA are contrary to the judgment that I gave on 21 March 2019 at the second case management conference, or at least that, in light of that judgment, Mr Al-Missaind of the defendant bank has deliberately involved SAMA in the process by making a request for its consent to searches being carried out by either Latham & Watkins or Alvarez & Marsal on behalf of the defendant.
10. The claimants submit that I should disregard Mr Al-Missaind's evidence because of a lack of corroboration and the implausibility that SAMA imposed specific conditions of the kind that he alleges in an oral conversation with him; and also because it can be shown, the claimants say, that the defendant has taken inconsistent positions on the need to involve SAMA on the question of providing documents by the defendant to its own external solicitors. The claimants also say that the defendant has failed to comply with my order at the second case management conference that any application by the defendant

to vary the substance of the disclosure order must be accompanied by the defendant's correspondence with SAMA.

11. In those circumstances, the claimants say that the inference is obvious that the defendant is seeking to do whatever it can to subvert an orderly disclosure process.
12. I feel unable to decide on an interim application of this nature that the defendant or Mr Al-Missaind, in particular, has “concocted” an explanation of why it has been unable to comply, as the claimants submitted in writing. Although Mr Smith QC on behalf of the claimants initially disclaimed, for today's purposes, any allegation of dishonesty against Mr Al-Missaind, what he has alleged about the defendant's conduct really amounts to an allegation that Mr Al-Missaind's evidence is untrue, in which case it must have been knowingly untrue.
13. I am not willing, at this stage, to draw an inference of dishonesty of this kind. I am, however, concerned that the defendant may not be putting a full picture before the court.
14. The claimants invite me, nevertheless, to conclude that the defendant has deliberately created a difficulty and has deliberately not complied with the order for disclosure and that it should therefore be refused any extension of time, at least the extension of time that it seeks, and instead should be required to give disclosure on a rolling basis, which process must end by 15 November; and further that any such order should be made in the form of an unless order.
15. It never was explained to me exactly what was contemplated by a rolling process of disclosure and what exactly that would involve. So I shall take the claimants' submissions as, at all events, requiring disclosure to be completed by 15 November this year.
16. I am not able to conclude on the evidence that I have read that the defendant has acted deliberately to obstruct the disclosure process. I do consider that it has not acted, at times, with the degree of urgency that might have been expected, given the initial delays in starting its disclosure process.
17. It does seem to me to be plausible that, as a point of distinction from the defendant itself providing documents to its external lawyers, the defendant might feel the need to consult a powerful and authoritarian regulator, such as SAMA, about the propriety of allowing Latham & Watkins and Alvarez & Marsal access to all its servers to conduct searches on the defendant's premises.
18. If that consultation was made, I do not find it surprising if SAMA initially refused an oral request for its consent and took some persuading to give the conditional consent that Mr Al-Missaind says that it eventually did.
19. The view that SAMA should be consulted would, I consider, have been a reasonable view for the defendant to form, notwithstanding the terms of my March judgment which, of course, do not bind SAMA or anyone else apart from the claimants and the defendant.
20. It is, as Mr Onslow QC on behalf of the defendant has pointed out, a position as to the appropriate approach that has previously been stated in correspondence on the defendant's behalf, even before the first case management conference took place.

21. I was initially troubled by the fact that correspondence between the defendant and SAMA had not been disclosed on this application, but Mr Onslow is, I consider, right that, despite observations that were made by me in court at the second case management conference, the terms of the court order are clear, and that an application for an extension of time is not an application for a substantive variation.
22. In reaching my conclusions today, I make it clear that I make no positive finding in favour of the defendant on the allegations that have been made and the facts that are in dispute. I am merely willing, for today's purposes, to give the defendant the benefit of any doubt as to its motives and actions in this respect.
23. I am prepared, if it is necessary to do so, to revisit the question of the defendant's conduct in the event of any further application in relation to disclosure or compliance with the court's orders, where it may be necessary to investigate and decide questions of motive.
24. In rejecting the claimants' suggestion that disclosure is to be ordered by 15 November I also take into account the defendant's evidence, which I do accept, that starting from where the defendant is with the disclosure process today it is not realistic or practicable for disclosure to be completed in a reliable and orderly way by 15 November.
25. The defendant has a very large team from Alvarez & Marsal doing the first phase of the exercise. It has lined up seven lawyers now, at Latham & Watkins, to start on phases 2 and 3 in due course. There may well be, and I find that there is, some slack built into the timetable, but if phase 1, with all the resources that are devoted to it, will not be completed before 13 November, it is clear that disclosure cannot be completed by 15 November. An order to that effect would, therefore, inappropriately simply set up the defendant to fail.
26. The defendant is, however, clearly at fault in some respects, not only for the fact of non-compliance with the first case management conference order for disclosure, but, more particularly, for not bringing this matter back to the court when it realised that it would not be able to provide disclosure in accordance with that order and by then waiting until the very last day for compliance before it issued an application for an extension of time.
27. It may be that a knee-jerk application, issued on 15 June, would not have been helpful, because, at that stage, it was probably impossible for the defendant to give any reasonable assessment of what extension of time would be required. But the matter should, in my judgment, have been brought back before the court by the end of the summer term, with an update on the likely position at that time.
28. There was certainly no reason not to have issued an application at the beginning of September, when the defendant was in a position to tell the claimants' solicitors that an extension to January 2020 was required. It was not simply a question of telling the claimants in correspondence that fact and waiting to see if the claimants made a different proposal or made their own application to the court.
29. It is both parties' duty to assist the court in, amongst other things, seeing that the court's orders are complied with: see the overriding objective and the terms of part 1 of the Civil Procedure Rules. The parties have the benefit of a docketed judge. By not informing the court at an early stage the defendant was, in my judgment, in effect presenting the court, at a later time, with a *fait accompli* in respect of its non-compliance and, therefore, the need for a substantial extension of time.

30. However much that conduct of which I have been critical may go to the question of costs it is not, in itself, a good reason for refusing a reasonable extension of time. Proper disclosure from the defendant is clearly in the interests of justice and potentially in the interests of both parties to this litigation. For there to be an unnecessary risk of the defendant being defaulted from defending and the claimants, therefore, not having the documents that will potentially support its case would be the wrong case management approach to take.
31. The claimants complain that they have already been prejudiced in terms of the lesser time that they will have to assess the defendant's disclosure if, indeed, any disclosure is permitted by SAMA, and that the delay that has occurred will impact on the timetable, including the timing of witness statements in January 2020 and expert reports in March and April 2020.
32. However, the claimants do not oppose some extension. The only question is what extension is reasonable and appropriate.
33. As things stand, the preparation of statements and reports for the witness that the claimants intend to call and the expert witnesses is not affected by not having the benefit of early disclosure. If there are further witnesses that, unexpectedly, the claimants do want to call, as a result of digesting late disclosure from the defendant, then the claimants can expect to be accommodated in that respect by the grant of permission on appropriate terms.
34. As far as the general prejudice allegation is concerned, I accept there may be some degree of prejudice. To some extent, that has already been suffered; but I am not persuaded that, by allowing reasonable further time beyond 15 November as the new disclosure date, considerably greater prejudice will be suffered by the claimants.
35. I am, however, persuaded that leaving disclosure until January 2020 without the backing of an unless order is likely to increase considerably the potential prejudice that the claimants will suffer.
36. I am satisfied, on the evidence that I have read, that there is some scope to speed up the second and third stages of the document review by engaging more lawyers for the process at Latham & Watkins. The bank, of course, has virtually unlimited resources and no submission has been made that Latham & Watkins are unable to provide more lawyers for the purpose.
37. I am also satisfied that there is slack built into the timetable that the defendant has proposed to allow SAMA, at a relatively leisurely pace, to make a decision about whether to authorise disclosure.
38. It is clear to me, and Mr Onslow frankly accepted, that SAMA cannot possibly be intending to review all the disclosure documents. Its exercise will therefore be a decision of principle to be taken, based on a summary of some kind that the defendant will provide of the categories of document that are to be disclosed, the extent of disclosure and any particularly sensitive areas.
39. It is a matter for the defendant to manage SAMA's and its own expectations in the light of the order that the court sees fit to make.
40. On that basis, I consider that an extension of time to 13 December of this year is appropriate. I make no direction for rolling disclosure of any kind.

41. That extension of time will allow sufficient time for any consequential application to be issued by the claimants before the end of term.
42. I make it absolutely clear, if it needs to be made clear, that the defendants must not wait until 13 December before issuing any further application that they consider necessary in the circumstances.
43. I can be available to hear any applications that are necessary on Thursday 19 December. I am also available as duty judge and can hear any urgent application on 30 December or 2 January next year.
44. The claimants, of course, urge me to make an unless order at this stage. They made no application for one and provided no draft order for consideration. It was, therefore, unclear until the hearing in court exactly what sanction the claimants were seeking. As it turns out the sanction is that the defendant should be debarred entirely from defending the liability aspects of the claim.
45. I am satisfied this is not a case in which, as things stand, regardless of the extent of the defendant's failure to comply with a new time limit, their defence should be at immediate risk of being struck out. Although there has been serious default in various respects, if the evidence about SAMA that I have read is true then the delay is not wholly inexcusable and the defendant is now acting reasonably with a view to providing disclosure as soon as it can. It is not right, in those circumstances, that a first extension of time should be in the form of an unless order when there is substantial leeway in terms of the timetable leading up to trial. When I say substantial leeway I do, of course, take into account the amount of work that needs to be done to prepare a case of this size for trial, but, nevertheless, the trial is not due to start until the second week of October 2020.
46. In the event of non-compliance by the defendant with the extended deadline that I have allowed the claimants are at liberty, at that stage, to issue an application for an unless order which, as I have indicated, I can hear urgently on various dates before early January.
47. I have, therefore, to an extent, allowed the defendant's application for an extension of time. I have granted the extension that I consider to be appropriate, mainly on pragmatic grounds, in the interests of having a fair trial of this claim in October 2020.
48. The defendant must not be under any illusion about the importance of compliance with that order, both in terms of time and substance. The court will be likely to exercise its more rigorous case management powers in the event of further serious non-compliance. Any application to extend time further, if justified, will have to be made promptly and on the basis of full evidence explaining the need for an extension. This evidence must, in those circumstances, include the communications between the defendant and SAMA relating to the defendant's ability to give disclosure in these proceedings if the reason for any further application is connected in any way with the stance taken by SAMA.