



Neutral Citation Number: [2021] EWHC 230 (Ch)

Claim No: HC-2017-001598

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

The Rolls Building
7 Rolls Buildings
Fetter lane
London, EC4A 1NL

Date: 15/01/2021

Before:

MR. JUSTICE FANOURT

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

MR. STEPHEN SMITH QC, MR. ADAM CLOTHERY and MR. TIMOTHY SHERWIN
(instructed by Morrison & Foerster (UK) LLP) for the Claimants.

MR. ANDREW ONSLOW QC, MR. ALAN ROXBURGH and MR. EDWARD HARRISON
(instructed by Latham & Watkins (London) LLP) for the Defendant.

Hearing date: 15 January 2021

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE FANCOURT :

1. As I have indicated, I will give the claimants permission to appeal against my order on the basis of the issues or any of the issues raised in the section of my judgment dealing with the Law of Knowing Receipt Issue, which is Part 3 of my judgment.
2. The claimants also seek permission to appeal on the basis of my conclusions in Part 4, on the Saudi Arabian Law Issue and also on the basis of various matters that I decided under Part 5 addressing the Valuation Issue.
3. So far as the Saudi Arabian Law Issue is concerned, my conclusions depended on a careful evaluation of the expert evidence that was given by two distinguished expert witnesses, which was evidence about a wholly different legal system from the common law system and where the issues did not just depend on questions of statutory interpretation. In my judgment, it is very unlikely that the Court of Appeal would see fit to interfere with my assessment of the credibility and reliability of those witnesses and the reasons why I felt able to rely on parts of their evidence on distinct issues, which was the basis, ultimately, of the conclusions that I reached. I also do not consider that it is reasonably arguable that there is a logical inconsistency between the conclusions that I reached about the rights as between, on the one hand, a beneficial owner of property and a front or a trustee for him and, on the other hand, as between the beneficial owner of a property and a third-party purchaser of that property. In my judgment, those are two very different cases. Nor do I consider that there is a logical inconsistency between my conclusions about a claim for compensation as between, on the one hand, a beneficial owner and a front or trustee and, on the other hand, a claim for compensation as between a beneficial owner and a third-party purchaser.
4. As I indicated in the reasons for my decision, the fact of registered title and what it stands for is what makes the difference in the outcome of this case and differentiates it from, for example, a claim for the return of a painting or for compensation for the theft of a painting.
5. I have considered whether I should reach any different conclusion and grant permission to appeal in relation to the last part of my judgment on the Saudi Arabian law issue, namely whether there is arguably a valid claim under Saudi Arabian law for compensation from Samba for loss of the shares rather than a valid claim for the shares themselves. Ultimately, the conclusions that I have reached depend upon the same evaluation of the evidence that form the basis of my other conclusions.
6. I therefore do not consider there is a realistic prospect of success and I refuse permission to appeal on any of the issues within Part 4 of my judgment.
7. So far as the Valuation Issue is concerned, I have struggled to understand on what basis it is that the claimants have reasonable prospects of successfully appealing my conclusion. I do not understand them to be suggesting that it was wrong to adopt some basis of value as the means of establishing the objective value of the property. Mr. Smith QC says that I was wrong to adopt the market value of the property, at least if the market value was capable of reflecting a discount from the traded reference price on the valuation date, but the market value is what it is. It does not address independently the question of whether or not a discount should be applied. What Mr. Smith says is that the principle is that compensation is required to put the trust back

into the same position that it was in. In the judgment, I entirely accepted that principle, but the question where one is not restoring the property *in specie* is then how one sets about valuing the property in question in order to measure substitutive performance.

8. In my judgment, there is no realistic argument that can succeed that some other basis of valuation is appropriate.
9. Similarly, I do not consider it to be realistically arguable that the issue should have been resolved by the two transactions in shares in Samba Financial Group on which Mr. Smith sought to rely as comparables, for the reasons that I gave in my judgment.
10. I therefore refuse permission to appeal on any issue arising out of Part 5 of the judgment.

11. Following the judgment that I handed down this morning, and having dealt with the application for permission to appeal, I must now address the costs of the action.
12. The defendant, Samba was successful and seeks its costs of the action to be paid by the claimants on the standard basis. The starting point is, as ever, rule 44.2 of the Civil Procedure Rules and the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. That is only a starting point and, as the rule itself says, the court may make a different order.
13. Particular considerations in deciding what order to make about costs are set out in sub-paragraph (4) of that rule, which require the court have regard to all the circumstances, but including, in particular, so far as relevant in this case, the conduct of all the parties and whether a party has succeeded on part of its case even if that party has not been wholly successful.
14. The course taken by the 2017 claim, which was the claim that I tried, was somewhat unusual. I have dealt briefly with the procedural history in the judgment and I will repeat it only so far as necessary to make sense of my treatment of the costs of the action.
15. The first action was issued in 2013 and went to the Supreme Court in 2017, as a result of which the claimants were given the opportunity to amend their claim. At the same time as amending the 2013 action, they brought a new action in order to protect their position as regards limitation. The new action was issued on 31st May 2017 but may well have been foreseeable for some period of time before then.
16. The application to amend the first action was initially successful in front of Birss J, but then the Court of Appeal allowed an appeal in the early part of 2019, with the consequence that only the 2017 action was pursued to trial. By that stage, the parties had exchanged statements of case in the 2017 action. The defence of Samba in the 2017 action was in fact exactly the same document as the defence that had been served in the 2013 action.

17. A first case management conference in the second action took place in October 2019 at which the court considered all matters, to the extent there was any dispute about them, and gave detailed directions. It is clear that a significant amount of time at that case management conference was concerned, as inevitably is usually the case in a substantial commercial claim, with questions of disclosure.
18. There was then a second case management conference, which I heard in March 2019, where various specific issues, mostly connected with questions relating to disclosure, were addressed, but also some other issues relating to the provision of information about the structure of the defendant bank and an issue about expert evidence.
19. In accordance with the initial directions, a first tranche of disclosure was given by the bank in May 2019, which was a relatively small number of documents, and in July 2019 by the claimants, which was a much more substantial disclosure exercise.
20. The second tranche of disclosure for both parties had been ordered to be provided by the end of September 2019. At the last minute before that date arrived, Samba applied for an extension of time or, alternatively, variation of the disclosure obligations and I granted an extension of time until mid-December 2019. Samba did not comply with their disclosure obligations by that time and made another last-minute application for a further extension of time, alternatively variation of the disclosure applications, and the claimants applied to strike out the defence. Although Samba had spent considerable money preparing to give disclosure, in the event it decided that it could not or would not do so. The claimants never saw the documents for which Samba searched in 2019 and which it had listed ready to disclosure if its regulator allowed it to do so.
21. Further applications were issued in January 2020 for preliminary issues to be decided and all those applications were argued in front of me in February 2020. On 8 April 2020, I handed down a judgment in which I struck out the defence of Samba for non-compliance with the disclosure orders, save in respect of limited and specified issues which I determined could fairly proceed to trial.
22. On 24 April 2020, I made a decision which had the effect, in substance, that judgment would be entered for the claimants on all the other issues in the claim but subject to the outcome of the trial on what turned out to be three discrete issues. On those three issues, the defendant substantially succeeded, which is why the defendant is the successful party.
23. In those circumstances, the question arises what order for costs in favour of the defendants should be made.
24. A number of specific issues were raised in correspondence between the parties following receipt of my draft judgment. Of these, the most significant for the purposes of deciding the order for costs is the costs incurred by Samba in relation to disclosure.
25. In a schedule in the form of precedent H providing a breakdown of Samba's costs, the disclosure costs that Samba claims are in the figure of £6,490,000 or thereabouts and the question raised is whether in the circumstances, bearing in mind the conduct of Samba and the issues on which Samba succeeded in this claim, it should be entitled to

be paid its reasonable costs of the disclosure process. Apart from the small first tranche of disclosure in May 2019, Samba did not give disclosure. It chose not to comply with the court's order for disclosure, with the consequence that the majority of its defence, including all factual issues other than those of Saudi Arabian law, were struck out. No factual issues to which Samba's disclosure could have been relevant were tried.

26. Mr. Onslow QC submits that the costs of Samba in complying with the court's orders in relation to disclosure should be recoverable by Samba as the successful party in this litigation. A substantial part of the very substantial amount of costs claimed for disclosure would have been incurred between about June 2019 and December 2019 at the time when Samba was (he says) complying with the Court's order and performing the exercise of searching for and assessing documents, awaiting the permission of SAMA to permit it to give disclosure of those documents.
27. However, it seems to me that for two reasons essentially it would be wrong and unjust for Samba to be able to recover its costs of the disclosure exercise from the claimants.
28. The first reason is simply that Samba did not comply with its disclosure obligations. It did not give disclosure of the documents in relation to which all those very substantial costs were incurred. In that sense, all the costs were incurred by Samba to no end because no disclosure (other than the small and relatively insignificant first tranche of disclosure) was given by Samba, on its own decision. A party that does not disclose disclosable documents, in breach of the Court's order, should not recover its costs of the disclosure exercise.
29. The second reason is that all of the disclosure related to factual issues on the pleadings, and none of the factual issues were tried. The reason why none of the factual issues were tried was that Samba's defence was struck out as a result of its non-compliance with the court's orders. The consequence is that the claimants are deemed to have proved and succeeded on their pleaded factual case and all the factual issues. The costs in question were therefore incurred in relation to issues that were not examined at trial, which came to a premature end and on which Samba lost.
30. It seems to me that for each of those two reasons separately the claimants should not have to pay Samba's costs incurred in the disclosure process. I will therefore exclude from any costs that the claimants are required to pay Samba the costs incurred by Samba in connection with or in relation to the giving of disclosure by Samba.
31. The claimants, however, go further than that and say that Samba should have to pay their costs of conducting their own disclosure exercise and of giving disclosure. Mr. Smith QC submits that the claimants were properly complying with the Court's order and that the reason why all those costs were in the event wasted was that Samba had failed to comply with its disclosure obligations, resulting in the issues of fact not being tried. However, it seems to me that the default of Samba was not the reason why the claimants incurred the costs they did on their disclosure exercise. They would have been incurred in any event, unless the claimants can show that Samba should have put its hand up, so to speak, at a much earlier stage, before the claimants incurred some or all of those costs, and said that they would not or could not comply with their own disclosure obligations.

32. I was persuaded at an earlier stage in the case management of this claim that Samba was not at fault for failing to acknowledge at an earlier stage that it would not or could not give disclosure. I criticised Samba for not having raised the difficulties that it faced more promptly with the court, so that the court could consider the matter earlier, but I was and am satisfied that up until at least November or December 2019 Samba wished to comply with the court's order, was seeking to do so, but felt itself unable to do so without SAMA's approval. In those circumstances, the potential argument that all or some of the claimants' costs of disclosure were incurred were wasted because of a failure on the part of Samba that cannot be established. The costs that the claimants incurred would have been incurred in any event, even if Samba had complied with all its own obligations or raised its potential difficulty in complying with the order on time in July 2019. The result at trial would still have been the same. In those circumstances, I decline to order Samba to pay the claimants' costs associated with disclosure.
33. The next issues that arise relate to whether any of Samba's pre-action costs or costs associated with the pleadings stage of the claim should be recoverable. Mr. Smith submitted that in view of the existence of the 2013 action, the fact that the 2017 action was initially just an insurance policy for the claimants in case they ran into difficulties in amending the 2013 action, and the fact that the defence in the 2017 action was exactly the same as the documents served in the 2013 action, no pre-action costs or costs at the pleadings stage could properly be attributable to the 2017 action and that, therefore, all of these categories of costs should be excluded. The total amount claimed by Samba in relation to those two categories is approximately £1.45 million. I share Mr. Smith's scepticism that costs of that magnitude could have been incurred properly in connection with the 2017 action in the circumstances of this claim. However, I cannot accept that there can have been no costs properly incurred by Samba at the pre-action or pleadings stage of the 2017 action.
34. What costs, whether relating to the 2013 claim, the 2017 claim or common costs relating to both, were incurred, and the reasonable quantum of such costs, is a matter for detailed assessment and it would be wrong in principle and unjust to exclude from the costs recoverable by Samba all pre-action or pleadings costs.
35. The next category of costs relates to the case management conference. The first case management conference dealt with all and any matters that needed to be dealt with but to a significant extent disclosure matters. The second case management conference dealt with some disclosure matters and other matters, as I have indicated, and various specific orders for costs were made by me in relation to matters considered at the second CMC. The third CMC related only to disclosure and the costs of that third CMC have been separately dealt with. What is in issue, therefore, are any reasonable costs incurred by Samba in relation to the first CMC and part of the matters dealt with at the second CMC.
36. Mr. Smith, in effect, invites me to exclude from the recoverable costs of those case management conferences any costs that are attributable to a consideration of disclosure issues on the basis that I have disallowed Samba's costs of the disclosure exercise. However, I consider that the costs of the case management conferences are properly to be treated as general costs of case management to the extent that they were not separately dealt with at the second CMC as individual costs orders rather than wholly or in part as aspects of the disclosure exercise. It would be right, in my

judgment, in a case of this size and complexity to regard the first case management conference as a general case management matter and the residual issues at the second case management conference are not disclosure-related matters or not exclusively disclosure-related matters.

37. The case management conference costs should therefore be treated as general costs of the action.
38. The next issue relates to the costs of preparing witness statements. These costs by the standards of Samba's schedule of costs are relatively modest. Only the sum of £217,000-odd is claimed by Samba. On the other hand, no witness statements at all were produced. The reason why no witness statements were produced, or at least served, is the reason that I have given. The defendant was debarred from defending all the issues in the claim other than legal and valuation issues.
39. In those circumstances, if substantial costs were incurred in relation to witness statements, they should be seen as costs incurred in preparation for dealing with the factual issues that were not tried because of the default of Samba in complying with the orders of the court and on which the claimants succeeded. Looked at in that way, in my judgment, the costs of the witness statements should be excluded for the same second reason as I excluded the costs of the disclosure exercise, namely that they related to issues that were not tried because of the default of Samba and on which the claimants succeeded.
40. The next category about which there is an issue is the costs of the Saudi Arabian law experts. Mr. Smith submits on behalf of the claimants that the claimants had a measure of success on the Saudi Arabian law issues in that they won some points, albeit they ultimately lost the overall issue.
41. In my judgment this is one of those cases where there was ultimately one single issue of Saudi Arabian law, albeit for the purposes of analysis or exposition one can break down the issue and the evidence into a number of component sub-issues. It would be wrong, therefore, to treat the costs of the Saudi Arabian law experts as if each party had had only a measure of success. In my judgment, the right analysis is that Samba succeeded on the Saudi Arabian law issue that was tried and should have its costs of that matter.
42. A further question is whether, at an earlier stage, there were other expert law issues relating to issues that were not tried because of the debarring order that I made and any adjustment should be made to Samba's costs recovery in relation to those matters. Mr. Smith suggests an overall adjustment should be 50%, but I cannot accept that. It seems to me inherently likely that the majority, probably the vast majority, of the costs in question were incurred in relation to the preparation of the expert reports for trial and the conduct of the proceedings at trial. I will make no adjustment in relation to the reasonable costs of the Saudi Arabian law expert evidence.
43. Having dealt with all of those individual points, I then return to the question of what order for costs overall it is appropriate to make. I had considered at an early stage whether it would be appropriate, convenient and preferable to order simply that Samba should have its costs from 8 April 2020, which was the date of my judgment striking out its defence and identifying the only issues for trial.

44. In view of what I have already said, however, and the fact that earlier costs that the defendant will have incurred should at least to some extent properly be treated as general costs in relation to the claim, I consider that making that order for costs would be inappropriate and unfair to Samba. Samba should have the opportunity at a detailed assessment of showing what, if any, pre-action costs, pleading costs and case management costs relate to the 2017 claim and are reasonable in amount.
45. In those circumstances, the order for costs that I will make is that Samba should be awarded its costs of the 2017 action to be assessed on a standard basis but excluding those costs that I have identified as being costs that it should not recover from the claimants; that is to say, the defendant's costs incurred in connection with or in relation to the giving of disclosure by the defendant and the costs of the defendant in connection with or in relation to the preparation of statements of evidence of fact in relation to the claim.

46. Having decided the incidence of costs, I am now asked to determine an amount that should be paid by the claimants to Samba as a payment on account under rule 44.2 (8). There is no opposition in principle to the appropriateness of my making such an order.
47. I start with the grand total of the amount of costs that Samba will in due course, it says, seek to claim on a detailed assessment. Samba's solicitors, Latham & Watkins, have produced a helpful table providing a breakdown of the various charges and fees in relation to the different stages of the proceedings taken from Table H and in relation to different participants, different categories of solicitor involved, counsel, experts, expert witnesses, disbursements and so on.
48. The table is produced solely for the purposes of this assessment. Today it is therefore, despite considerable care that may have been taken in its preparation, only a provisional schedule and there may be one or more inaccuracies in it. Nevertheless, it is helpful as an indication of how the fees to be claimed break down.
49. The grand total, excluding one item, is £14,150,222.31. The missing item is the fees of Samba's expert witness, Mr. Haberbeck, which have not been able to be included, and it is suggested it is suggested by Mr. Onslow, and very reasonably accepted by Mr. Smith, that there could and should be an extra £200,000, as a round figure, allowed for that. That brings the total, therefore, to £14.35 million. The equivalent figure in Morrison & Foerster's schedule of costs is £9.6 million. So it can be seen that Samba's costs are 50% higher in overall terms than the claimants' costs are.
50. The figures in question are plainly high figures. This was complex litigation about very substantial sums of money. Nevertheless, the costs in question can only be described as high. I express no view as to what sort of figure might expect to be recovered on a detailed assessment in due course. It is simply not possible in a case of this complexity and with fees of that size to make any reasonable assessment at this stage.
51. The approach that I am invited to take is that indicated by Leggatt LJ in the *Dana Gas PJSC v Dana Gas Sukuk Ltd & Others* [2018] [reference], in which he described as

the appropriate figure the lowest amount that a successful party could reasonably be expected to expend in order to have its case conducted competently.

52. Mr. Smith makes one criticism in particular of the schedule, which has gone through at least two iterations, which relates to an element for counsels' fees excluding brief fees in a total amount of £3.1 million, of which only £900,000 approximately is claimed by way of the costs of this action. Something at some stage has clearly gone wrong with the arithmetic and there is an element of doubt about that item.
53. When one looks for a clue as to why the overall grand total of costs is high, as I have described it, an obvious clue is in the fee earner rates charged by Latham & Watkins that have been disclosed in a recent letter. These range from £971 for the most senior grade A fee earner to £327 for a trainee. These rates are at least twice and sometimes almost three times those in the existing guideline, albeit that guideline has to be treated with considerable circumspection on the basis, first, that it is based on appropriate rates as at 2010 and, secondly, in 2021, it is about to be replaced, I understand. It is therefore likely that the guideline rates will significantly increase, although almost certainly not by a factor of two or three times. I bear in mind when forming the summary assessment, therefore, that the rates charged by the fee earners at Latham & Watkins are very substantially higher than a rate that is likely to be recoverable on a detailed assessment. It is simply not possible on the basis of the limited information before me at this stage, for which I make no criticism of anyone, to make any sort of assessment about the appropriateness of the size of counsels' fees or expert fees.
54. Turning to the individual components of the total claimed, I can take, first, the individual totals for the pre-action and pleadings parts of the table. These are claimed at respectively £701,000-odd and £753,000-odd. Mr. Onslow submits that I should allow by way of an interim payment 60% of these fees and indeed he applies the same percentage in relation to all the other categories. Mr. Smith submits that there should be a reduction, in the first instance, in relation to all categories of solicitor costs of 50% on account of the excessively high rates being charged for the fee earners and then a further reduction of the order of 50% or 60% in order to ensure that the test for what is payable as an interim payment, as propounded by Leggatt LJ, is correctly applied.
55. In my judgment, there is a risk in approaching the matter that way in two stages that one does double count some of the reductions. The guideline reduction of 60% or so, which is often applied, takes account of a number of different matters, one of which is the likelihood of some chargeable rates being reduced. Therefore, to make a separate reduction for guideline rates but nevertheless apply the same 60% discount would, in my judgment, in some cases, and perhaps particularly in this case, amount to an element of double deduction. What I propose do therefore is to apply a single percentage deduction which will vary somewhat between the different categories.
56. In the case of categories A and B (pre-action costs and pleadings), I have already expressed scepticism about the very high level of costs claimed in view of the existence and work done on the 2013 claim. I therefore propose to apply a reduction of 75% in both those categories.

57. The next category is case management costs, category C. The individual total claimed for this is £1,162,000 or thereabouts. That appears to be a remarkably high figure for the work done after the closure of pleadings and leading up to and including the case management conferences. I therefore propose to apply a reduction of 60% for that category.
58. Categories D and E: I have already decided in principle that Samba may not recover from the claimants in respect of these costs.
59. So far as the expert reports (category F) is concerned, about half of the costs, the total of which is £1,044,000 approximately, relates to the costs of the expert witnesses themselves and the other half relates to the costs of the lawyers work on the expert reports. In this case, therefore, having no reason to doubt the level of costs applied by the expert witnesses, I propose to make a smaller reduction to reflect the high rates charged by the lawyers and other factors, and will make a reduction of only 50%.
60. In relation to category G, pre-trial review, for costs of just under £119,000 I will apply a reduction of 50%.
61. In relation to trial preparation and trial, the figures are respectively £537,000 and £916,000 approximately. In these cases, I will similarly apply a reduction of 50%.
62. There is a small amount for alternative dispute resolution of £36,000. In this case I will apply a reduction of 40% only.
63. I then come to a category called "Other", the footnote for which in Latham & Watkins' table says that it includes all work done in preparation for and attendance at all team meetings and client conferences. The figure is a remarkably high £1.41 million approximately on top of all the fees separately charged by the fee earners in relation to the previous categories of work. Applying some degree of scepticism about the overall amount of such charges and whether or not those charges are reasonable, both in the level of fees and the quantity of attendances, I will therefore apply a reduction of 60% in relation to that category.
64. There is then a small item for costs of just over £48,000. The reduction will be only 40%.
65. That brings me to the final item on the table, which is the counsel fees excluding brief fees. Although there is some doubt about the item in the table to which Mr. Smith drew attention so far as the total amount of £3.1 million is concerned, the amount claimed is only £909,000 approximately. It seems to me inherently likely that there will have been further meetings with counsel or instructions to counsel other than those relating to brief fees for particular hearings or for drafting particular documents or advising in connection with expert reports. I will, therefore, make a further allowance in the payment on account, but I shall apply a conservative discount in relation to this item of 60%.
