Neutral Citation Number: **[2022] EWHC 2662 (Ch)**

Case No: **BL-2019-000813**

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: **20 July 2022**

Before :

Mr Justice Fancourt

- -

Between :

David Lancaster & Ors	**Claimant**
- and -	
Jonathan Peacock QC	**Defendant**

- -
- -

Andrew Onslow QC and Dominic Kennelly (instructed by **Stewarts Law**) for the **Claimant**
Tom Adam QC and Emma Mockford (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: **20th July 2022**

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Approved Judgment

MR JUSTICE FANCOURT:

1. This is an application issued on 6 June 2022 for an order under either CPR 3.1(2)(f) or the inherent jurisdiction of the court staying all further proceedings in this claim until, as things have turned out, the hearing of an appeal in the case of McClean v Thornhill for which permission was granted by the Court of Appeal as recently as 14 July 2022; and in stand out the trial of this claim which is fixed to start on 12 January 2023. Alternatively, the application is for an extension of time for exchange of witness statements for the trial.

2. McClean v Thornhill, which I will refer to as McClean, was a claim by a large number of investors in a tax mitigation scheme promoted by a company advised by Mr Thornhill QC, an eminent tax silk, for damages for losses caused by Mr Thornhill's alleged breaches of a duty of care owed to the investors. It was decided against the investors by Zacaroli J on 8 March 2022 on virtually all points, except a particular limitation defence raised against them.

3. Zacaroli J held that, on the facts of that case, Mr Thornhill did not owe a duty of care to investors in the scheme who were unknown and unidentified to him, even though he had agreed, when advising the promoter of the scheme, that his name and his approval of it could be used in their promotional materials, and indeed that his opinions could be given to investors who asked to see them.

4. Zacaroli J further held that if there was a duty of care owed to the investors, then Mr Thornhill was not in breach of that duty by failing to advise that the scheme would not work, or that there was a significant risk that it would not work; and he further held that any losses claimed by the claimants were not caused by any breach of duty by Mr Thornhill.

5. The claim before me is, it is accepted, very similar in its essentials, though with some potentially important factual differences, and the main issues are the same, namely whether Mr Peacock QC owed a duty of care to the unknown and unidentified investors who sue him, whether his advice about the validity of the scheme was in breach of duty, whether the claimed losses or any of them were caused by the alleged breaches of duty, and whether any of the claims are statute-barred.

6. The parts of the claim due to be tried in January 2023 are the claims of ten sample claimants. These sample claims were directed to be tried on the basis that certain issues in the claims are common issues in all the claims and the outcome of those issues, when decided, will bind the other 113 claimants too; and also on the basis that there are other issues, not common issues but ones that are likely to be representative of the fact patterns of many of the other claims, so that resolution of the sample claims will assist in settling the remaining claims, even though not technically binding on those claimants.

7. The claim form in this action was issued on 26 April 2019. The first CMC took place in April 2020, at which machinery for identifying the sample claimants was decided. Shortly after that, the McClean trial was set down to be heard in November 2021. The solicitors and the funders acting for the claimants in this action also acted for the claimants in McClean.

8. There was a second CMC in March 2021, when the trial date was fixed, directions were given for disclosure and witness statements, originally for exchange on 25 February 2022, and then provision for a six-week stay in the summer of 2022 to engage in ADR.

9. The parties agreed a number of extensions to that timetable. The timetable had considerable slack in it because the court was not able to provide a trial date as soon as the parties wished to have it.

10. At the time when the McClean judgment was handed down in March 2022, the witness statements were due to be exchanged on 27 May 2022, but following the hand down the claimants then requested a two-month extension to that date to enable them to take stock. The defendant did not agree but there was an agreed extension to 24 June 2022. That deadline has now passed and although the defendant was ready to exchange witness statements, the claimants were not.

11. On 9 May 2022 the claimant solicitors wrote requesting a stay of the proceedings pending the determination of the appeal in McClean. The defendant did not consent and this application was therefore issued shortly after the McClean claimants had applied to the Court of Appeal for permission to appeal. The defendants urged the claimants to exchange witness statements nonetheless but the claimants declined to do so.

12. The "hear by" date for McClean to be heard in the Court of Appeal is 2 October 2023 but that is really a long stop and it is accepted that the case will very likely be heard sooner, perhaps much sooner, but most probably in March 2023. That would mean that there was likely to be a judgment handed down by about June 2023.

13. If this action is stayed and the trial has to be relisted, there is a lead time for listing a trial of this length of 19 months. That means that even if it there were not technically a stay and the trial were relisted today, the earliest date it could be heard would be January 2024 but that might have to be April 2024 for reasons connected with my availability. But of course, if there is a stay and the trial is not relisted until the stay is lifted in the summer is of 2023 or afterwards, there will be a significantly longer delay in this matter coming to trial.

14. The court, of course, has power to stay proceedings where appropriate and in my judgment it is a power that should be exercised in accordance with and in order to further the overriding objective. I reminded myself, or rather I was reminded by Mr Adam QC, who appears on behalf of the defendant, that the overriding objective is dealing with the claims justly and at proportionate expense, which includes, in particular, the following matters: saving expense; dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, the complexity of the issues, the financial position of each party; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources.

15. So far as any authority on the exercise of a case management power such as a stay is of assistance, the parties agree that the appropriate guidance is that of the Court of Appeal In Re Yates Settlement Trusts [1954] 1 WLR 564 and in particular the following words:

> "If an important case is known to be subject to appeal to the House of Lords or to appeal from a judge at first instance to the Court of Appeal, a judge may reasonably and properly think that it is in the public interest not to decide another similar case until the rest of the case under appeal has become known. Whether he should so decide depends very much on all the circumstances of the particular cases."

16. In support of his argument that this is a similar case to McClean and that I should exercise the power to stay it, Mr Onslow QC on behalf of the claimants has made the following submissions.

17. First, the McClean case is factually and legally similar and the issues in it are of direct relevance to the issues in this claim and may have a significant, possibly even a decisive bearing upon this claim. Subject only to some reservation as to whether McClean will have a decisive bearing, I accept that argument, though it is right to add that there are in this case two different factual issues that are of importance on the question of whether a duty of care was owed to the claimants by the defendant.

18. Second, Mr Onslow submitted that a trial before the Court of Appeal hearing in McClean will result in the same argument as to the correctness of Zacaroli J's decision being heard by me at trial as will be heard by the Court of Appeal some time in 2023, which he submits cannot be a sensible use of the parties' or the court's resources.

19. Since, as a matter of convention, I would follow the decision of Zacaroli J on the decisive legal conclusions, unless I was persuaded that they were wrong, I accept that at trial the claimants will have a burden of persuading me that the decisive legal conclusions were erroneous, which is the argument essentially that the Court of Appeal will hear later in the year. Alternatively, of course, the claimants will seek to distinguish the claim on the facts.

20. Then Mr Onslow said that the main issue that the Court of Appeal will have to decide is an important issue of principle along the following lines: whether the court's avowed reluctance to impose on a legal advisor to one party to a transaction a duty to take care to protect the other party applies where the advisor has agreed or allowed his advice to be held out, or made available to the other party, or be summarised in some way or invoked, in order to sell the product that his client is selling.

21. I agree that that is an important issue. Whether it is properly characterised as an issue of principle, as opposed to an issue on the particular facts of that case and similar cases, I am not so sure. But it is right to bear in mind that the facts of this claim are argued to be materially different.

22. Then Mr Onslow said that the reasoning of Zacaroli J as to different categories of claimant, depending on the extent to which they saw the defendants' opinions or were told about them, is relevant to similar categories of claimant in this claim, and I agree that that does appear to be so.

23. He submitted that the language of the scheme documentation as regards reliance on independent legal advice is similar in both cases. It is similar but by no means the same, and the differences may be important, in my judgment.

24. Mr Onslow submitted that while issues relating to breach of duty are highly fact-sensitive, the Court of Appeal's consideration of the state of the law at approximately the same time (2007) as is relevant in this claim will be material. I agree that it will be material but it is also relevant that the type of scheme at issue in this claim is a different type from the scheme in McClean. It is a sale and lease-back of intellectual property rights scheme rather than what is described as a 'print and advertising' scheme designed to take advantage of film-specific tax relief provided by statute. So it is unlikely that conclusions on breach will be determinative, possibly not even persuasive, on this claim.

25. Mr Onslow said that causation issues are particularly relevant given that a substantially similar case on reliance and causation is advanced in this claim as in McClean, and I accept that. I accept that the Court of Appeal's decision will certainly be relevant.

26. So in short I am able to accept that the Court of Appeal's decision is likely to be relevant and will decide, at a level that will bind me, certain issues of law that may be directly applicable in this claim; though, of course, the argument will then focus on whether the particular facts of this case mean that the conclusions in the claim do not apply in the same way.

27. It is impossible to say how broadly or narrowly the Court of Appeal may approach the issues in that appeal. It is also unknown whether the appeal may settle before it is heard. It is a possibility and I cannot assess the chances of that happening, but it is possible. It is also possible that whatever decision the Court of Appeal reaches, the matter may be appealed further to the Supreme Court. Indeed, the more that Mr Onslow urges on me important issues of principle which arise, the more likely that outcome becomes. So there may still be an argument after the Court of Appeal that important issues of principle await an authoritative determination.

28. The main arguments, therefore, for a stay which are urged are: first, the potential for the Court of Appeal to decide issues of importance in this claim, and second the consequential saving of the court's and the parties' time and money if the trial is delayed. It is likely to be the case that if the Court of Appeal hears the appeal and gives judgment, argument as to the correctness of Zacaroli J's decision would not need to be heard at trial and some time would therefore be saved. If the parties were then to reach a settlement of their claims, there would of course be much time and costs saved.

29. I pause to consider whether it is to any degree likely that a stay would be likely to result in a settlement; but the difficulty with evaluating that is obvious. I do not know whether the appeal will succeed or fail and if it fails, whether for the reasons given by the judge or for other reasons. If the appeal succeeds it seems to me, instinctively, that it would be less likely to lead to a settlement, but on the other hand if the judgment of the judge were upheld for the reasons he gave, then I infer there would be a greater chance of settlement.

30. However, the claimants were not willing to say that they will withdraw their claims if the judgment is upheld even for the same or substantially the same reasons that were given by Zacaroli J. I consider that to be an important point because it implies that the claimants consider that they can succeed even in the face of the judgment of Zacaroli J, and that regardless of the outcome of the appeal they may pursue their claims.

31. If they were willing to say that they would withdraw if the appeal was unsuccessful, I would probably grant a stay, since there would then be a very real prospect of further costs and court time being saved; but instead they have emphasised, both in correspondence and argument, that many of the issues are highly fact-sensitive.

32. Another factor that I think I can and should take into account is that these are sample claims that are being pursued. The issues are being litigated not just for the benefit of the sample claimants, but for the benefit of all the claimants. That, it seems to me, has a bearing on the likelihood of an overall settlement being achieved.

33. As far as the saving of costs and court time is concerned, the trial is currently estimated to last between 21 and 23 days. To date the claimants have spent about two-thirds of their budgeted costs, £4.3 million. The defendants have spent less than half of their budgeted costs of £2.45 million. There are of course substantial costs to be spent between now and the end of trial, but the amounts in issue in the sample claims and the other claims are also very substantial.

34. The position in this case is that although the costs of trial will be substantial, they are far exceeded by the sums in issue and both sides have deep pockets as far as the costs are concerned. The claimants are funded by litigation funders and the defendant is funded by insurers. There is therefore no significant financial prejudice if the trial is to proceed. It may be that the trial takes a day longer, certainly no more than two, than it might if the Court of Appeal decision had come first.

35. An important issue on the facts of this case is prejudice to the defendant if the action is stayed. As I have said, the trial could not be heard, even if relisted today, before January or April 2024. That is a delay of more than one year and the delay would be substantially greater, until 2025, if a stay were granted and the trial not relisted until the stay were lifted.

36. Mr Peacock QC has made a witness statement explaining the problems that having this claim hanging over him is causing in his professional life. He says he is spending considerable time dealing with and preparing for the claim, which is understandably a source of worry and a distraction.

37. There is perhaps a limit to the weight that can be put on such matters, given that a claim in negligence is, unfortunately, an occupational hazard and has to be accepted, albeit one that for most barristers is rarely or never encountered. It is also the case that engaging on the sort of work on which the defendant chooses to engage is at the higher end of the risk spectrum, and no doubt carries commensurate rewards, but there is no suggestion that the defendant is not fully insured.

38. Of rather more weight, it seems to me, is the defendant's evidence about loss of work and income caused by the uncertainty associated with this claim, which would be significantly exacerbated if the trial were delayed for between one and two years. Although the defendant does not point to particular work that is lost, he says that he is confident that he has lost some work and that some clients are reluctant to instruct him, as things stand.

39. As Mr Onslow submitted, one has to take the alleged prejudice with a pinch of salt nonetheless, given to the references in the evidence to two upcoming appeals to the Supreme Court, and Mr Adam's submission that rearranging the trial date would cause some havoc with the defendant's diary commitments.

40. But it is not difficult to accept, in principle, that the known proceedings hanging over the defendant may have some impact on his desirability as a QC for certain work. I can certainly accept that it is unsettling and potentially harmful.

41. I also accept the defendant will have cleared his diary for not just the trial period, but some weeks beforehand and that there may be difficulties for him, and indeed for his representatives, in now accommodating a later trial date.

42. Mr Onslow said that there is also prejudice to the claimants to some extent in delay and being kept out of their money, but that is entirely their choice in making this application.

43. In the final analysis, it seems to me that the main factors that I have to take into account, consistently with the overriding objective, are:

44. First, a very substantial delay in the trial taking place if there is now a stay, meaning that there would be a delay of five to six years after issue of the claim form before trial. Such a lengthy delay, which involves a further delay of one to two years from the current trial date, is self-evidently contrary to the interests of justice generally, particularly as these are sample claims and particularly as I am satisfied there are factual issues in this case that do depend on recollection of events going back as far as 2007.

45. Second, the likelihood of some increase in the cost of the trial, which would not be incurred if the trial followed the Court of Appeal's decision in McClean, if there is one.

46. Third, a degree of duplication of court time in hearing the same argument about the correctness of Zacaroli J's decision.

47. Fourth, subject to those points, the difficulty of knowing whether further costs and court time would ultimately be saved by the grant of a stay.

48. Fifth, real prejudice to the defendant in extending the period during which these allegations of negligence in advising on the success of tax schemes are hanging over him and his work.

49. Sixth, the potential benefit of guidance to the trial judge from the Court of Appeal on the relevant law.

50. In my judgment, the interests of dealing with the case without further substantial delay, by adhering to a timetable that has been fixed since March 2021 and to which everyone is working, and prejudice to the defendant in delaying that trial for between one and two years, outweigh the relatively small increase in costs in the context of this very large claim and any advantage to be derived from a Court of Appeal decision.

51. The extra costs and court time are really quite limited in the context of a 21-day trial, and there are numerous factual and legal issues that fall to be decided.

52. The extra court time, probably no more than a day but certainly no more than two days, that will be spent on arguing about McClean is not a significant factor given that the time estimate for the trial has actually reduced rather than increased as a result of other matters, and having to relist the trial for a further date in the future, following a stay, would absorb more of the court's resources to hear long trials of this kind than would proceeding with the current fixture. It may also involve the parties in increased costs, purely as a result of the stay.

53. For those reasons, in the exercise of my discretion, taking into account all the factors that I have identified, I dismiss the application for a stay.