[2018] EWHC 4096 (Comm)

Case No: D40BS071

IN THE HIGH COURT OF JUSTICE
BRISTOL CIRCUIT COMMERCIAL COURT

2 Redcliff Street,
Bristol,
BS1 6GR

Date: 20 June 2018
Start Time: **14.26** Finish Time: **15.20**

Before:

HIS HONOUR JUDGE RUSSEN QC

- -

Between:

MOHAMMED ARIF & ORS

Claimants

- and -

BERKELEY BURKE SIPP ADMINISTRATION LIMITED

Defendant

- -

- -

MR JOHN VIRGO of Counsel appeared for the **Claimants**
MR JONATHAN KIRK QC and **MR THOMAS SAMUELS** of Counsel appeared for the **Defendant**

- -

APPROVED JUDGMENT

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HIS HONOUR JUDGE RUSSEN QC:

1. By the GLO order as made, I, or technically the President of the Queen's Bench Division, made provision for publicity to be given to the existence of the GLO order. I made that direction, as subsequently endorsed by the President, having not acceded to an application by the claimants that the appropriate way of advertising the litigation to others who might have an interest in it, but had not yet joined in it, was by way of the defendant being required to write to the relevant investors. I was not persuaded that that was the appropriate course.

2. I am now asked by the claimants to revisit this issue in circumstances where the claimants rely upon the terms of a letter dated 8 March 2018 written by the defendant to a certain class of investors, each SIPP holders who have an interest in the store pod investment, because by that letter Berkeley Burke, the defendant, referred to recent developments with Store First Limited, the provider of the store pods, and enclosed what they described as a list of frequently asked questions, or FAQ's. The letter speaks for itself and I need not read it in full, save that I will come back to one aspect of it.

3. The FAQ's have two sections within them, in the form of standard answers, to which the claimants express surprise and dissatisfaction. The first deals with the notional question that the investor has been contacted by a specialist claims management company about claiming his money back using the Financial Services Compensation Scheme. The question posed and addressed at the general level is: "*Is this genuine or is it a scam that I should avoid?*" An answer is given to the effect that the investor should perhaps be wary, I summarise, and that there is no reason why contact with the FSCS should necessarily be through a claims management company. The second aspect of the FAQs to which the claimants take exception relates to the valuation of store pods at zero pounds with the rhetorical question: "*Why don't Berkeley Burke do the same?*"; and the gist of the answer given to that question is that it is the rules of the FSCS which permit and perhaps almost compel - I summarise again - a valuation of nil in circumstances where it is difficult to put an actual value upon the underlying investment.

4. Mr Virgo for the claimants says, and I read from paragraph 33 of his skeleton argument, that:

> "The thrust of the bulletin is to encourage customers to complain to the FSCS. That is likely to be a distraction, a waste of their time and, as noted above, the FSCS cannot compensate investors suffering losses as a result of the failed performance of unregulated investments. If an investor is to be directed anywhere, it should be to the Financial Ombudsman Service and with a warning that in doing so the opportunity to participate in the GLO proceedings may be lost."

5. In his oral submissions, Mr Virgo also drew my attention to the fact that the date of the letter broadly coincides with the as ordered provision for publicity to which I have

referred at the outset of this short ruling, namely the publicity authorised per the order in March 2018.

6. Mr Kirk QC and Mr Samuels for the defendant urge me not to revisit my earlier conclusion, saying that it would not be appropriate and, indeed, would be unnecessarily burdensome and demanding to require the defendant to write to its investors, or to a section of them. In that regard, Mr Kirk has provided me with a copy of a witness statement made on 18 June 2028, two days ago, by Mr Andrew Emery who is the group compliance director within the defendant group of companies but which was only seen today by the claimants.

7. In that witness statement, which I must of course take at face value at a hearing such as the present, Mr Emery makes the point that the terms of the answers, within the FAQs at any rate, were ones that reflected consultation with a Mr James Derbyshire, who is the general counsel at the FSCS, and he, Mr Emery, in his final paragraph 87 of that witness statement explains that the document to which I have referred came into existence as a result of the FSCS being inundated with claims from claims management companies. He says Mr Derbyshire had concerns over the confusion that that was creating. From that expression of concern and the discussion which Mr Emery says he has with Mr Derbyshire, the existence of the FAQs derives.

8. As I say, I have no reason to doubt what Mr Emery says in that witness statement even though the claimants express surprise that Mr Derbyshire should be endorsing what they, the claimants, say is the misconceived route of making a complaint or claim upon the FSCS rather than proceeding with the Financial Ombudsman Service. The question which, in essence, I have to address is whether or not the writing of the letter with the FAQs undermines the process of publicity that I had endorsed by the initial GLO; and whether or not the terms of it sustain the point made by Mr Virgo in his paragraph 33.

9. After initially harbouring some doubt on the point, in particular in circumstances where the FAQ's are said to have resulted from investors already having been directed towards the FSCS and therefore having had some doubt as to whether or not this could, in fact, be analysed as encouragement to go down the wrong and time-wasting track of proceeding with the FSCS, I am persuaded that the document could potentially have operated to discourage a party from joining in the present GLO.

10. I am persuaded of that view not so much by the terms of the attached FAQs as they stand but the terms of the covering letter which they accompany and I said I would return to. The letter dated 8 March 2018 says that Berkeley Burke have:

> "*Put together a list of frequently asked questions on all matters relating to your investment complete with answers detailing all the information we know on the subject which is enclosed for your reference. Please note we do not know anything beyond what is included in this update and we are unable to make any further comments thereon. We will let you know should we become aware of any developments*."

I need read no further.

11. It is those statements, made in circumstances where the attached FAQ's make no reference to the GLO as made, that in my judgment do sustain the submission made to me by the claimants. Indeed, on a literal reading of the letter, namely "*we will let you know should we become aware of any developments*", allowing for the fact that the GLO is not a supervening development but was, in fact, a matter know to the defendant at the time, what the claimants ask me now to direct is something that the letter perhaps itself volunteers.

12. The precise language of the order that the claimants seek from me today in terms of drawing the investors' attention to the existence of the GLO has not, so far as I am aware, been formulated but in principle I accept the claimants' submission that it would now be right and in accordance with the overriding objective for Berkeley Burke to let the store pod investors know of the existence of the GLO and, indeed, the cut-off date for joining the litigation of, I think, 23 July 2018. As I say, I have not found this an easy question and wrapped up in it not being straightforward is the point, of which I am very mindful, that writing to investors will be a relatively burdensome and costly exercise for Berkeley Burke. I make two further points on that.

13. Firstly, it is an exercise on which they embarked by this letter of 8 March 2018 and what in substance has gone wrong is the failure to mention also within the FAQs the existence of the GLO.

14. The second point I make on this aspect is that I am not receptive to the claimants' submission that it is all investors, whether or not store pod related, to whom Berkeley Burke should write. In my judgment, the evidence goes no further than showing that the advertisement of the GLO and the intended effect of that advertisement might have been diluted in relation to store pod-based investments only. I see no basis for revisiting my earlier order so that the defendant should have to write to investors who are unconnected with the store pod investment. In those circumstances, I propose that the circulation list, presumed to be policeable, of the further communication to investors in store pods should be the same as that which was acted upon in relation to the 8 March 2018 letter.

(For proceedings after judgment see separate transcript)

15. I must now address an application made by the claimants, described by them as the insurance issue, by which they seek an order that the defendant company do provide in the form of a witness statement, rather than disclosure of any relevant insurance policy, information justifying or, rather, clarifying whether or not the defendant can fund this litigation to trial and beyond; by which I think is meant any appeal from any adverse judgment or, indeed, any appeal to which it is a respondent. That is the order sought by the claimants and they urge me to make it by reference to the decision of Thirlwall J, as she then was, in the group litigation known as *XYZ v Various* [2013] EWHC 3643 (QB).

16. As is clear from that authority and a number of other authorities, the court does not either by reference to Part 18 or by reference to any more general "cards on the table" type of reasoning have the power or jurisdiction to order disclosure of financial or matters going to the financial wherewithal, or lack of it, of a litigant. Of course, such disclosure may come out in the context of an application for security for costs by a

defendant against a claimant but here the application is sought by the claimants who have chosen to sue this limited company defendant. Mr Virgo makes the application on behalf of his individual client claimants in circumstances where he has shown me some accounts from 2016 for the defendant suggesting a relatively modest amount of shareholder reserves when compared with the past and anticipated costs of it defending this litigation.

17. It being clear that it cannot be ordered under Part 18, perhaps with a few exceptions which are academic here, the suspected insurance cover of the defendant not having been deployed in the past in a way that has influenced the court in making any past orders, and there being no general cards on the table type of jurisdiction, the only justification can be under the court's case management powers. In particular, CPR 3.1(2)(m) which was relied upon by Thirlwall J in the group litigation case before her which, reading it from her judgment, says:

> "Except where these rules provide otherwise, the court may take any step or make any order for the purpose of managing the case and furthering the overriding objective."

18. The judge, as appears from [13] and [35], made it clear that she was ordering the relevant defendant, Transform, to provide a witness statement as to whether it had insurance to fund its participation in the proceedings, including any appeal, as the information could affect the case management directions in the case. If Transform was not able to continue funding the litigation then more than a few "minor adjustments" (as urged by Transform) to existing case management directions would be necessary. In the judge's view what would be required:

> "As a minimum, will be new sample cases with different claimants, different defendants and (for the defendants) different legal teams. I would hope that the arrangements for experts would be amenable to rearrangement without the need for change of individuals but I do not know."

19. It is therefore clear that that decision by the judge turned on the point that the claimants' feared lack of financial ability in Transform to fund the litigation to trial and any appeal, which was the basis of the requested disclosure, would, if shown to be well-founded, mean that the case management directions already made would have to be substantially recast. In essence, if that were shown to be the case by the witness statement directed by her, the case management directions made to date, with Transform the lead defendant in sample cases selected for trial, would be seriously jeopardised.

20. There is, in my judgment, a crucial distinction between the situation in which the claimants found themselves in *XYZ* and in which the present claimants find themselves. There is here only one defendant to the group litigation claims. In *XYZ* there were other defendants who potentially might have carried the can; though I note it does appear that, allowing for another defendant facing similar claims to Transform

which had already gone into liquidation, Transform had been selected as the defendant to claims under the Supply of Goods and Services Act 1982 the outcome of which was considered to be most likely to be determinative or otherwise dispositive of others brought on that and other bases.

21. It is trite law, as Mr Kirk reminds me, that a claimant, or in this case the numerous claimants, take their defendant as they find it. Whether or not Berkeley Burke is good for any judgment that might be obtained against it at the end of case is not a question that relates directly or sufficiently to the directions that fall to be made in managing the case towards that end. The claimants wish to bring Berkeley Burke to judgment. I find it difficult to see what case management decisions I would otherwise make towards that end, if it were to be shown that Berkeley Burke cannot fund its litigation, than those which I have already made today.

22. Very attractively, Mr Virgo made the submission to me that the position might be different were the claimants' fears well-founded, and shown to be so by disclosure of financial information, because, as he put it, the present eight lead claims might be significantly reduced in number; so that, for example, only four lead claims went forward. There is some force in that submission but, in my judgment, it does not carry the day for two principal reasons.

23. Firstly, I remind myself that this is group litigation and, as urged by the claimants at the first hearing of the matter at which the GLO order was made, it is a case which ought properly to proceed and is now going to proceed by way of lead claims. Therefore, there comes a point, in particular a point when the number of lead claims is reduced to below a certain critical mass, where the very essence and purpose of the group litigation is jeopardised if all that the defendant might afford in its defence is an engagement with a relatively small part of the wider litigation dispute raised by all the claimants.

24. The second, related reason relates to the likely difficulty in the exercise of what I now describe inelegantly as cheese-paring in the fashioning of case management directions better suited to a sole defendant, as the claimants on this scenario still intend Berkeley Burke to be, whose financial resources are not as great as the claimants would like. As Mr Kirk QC observed, it will of course be the case that defending eight lead claims will be more expensive than defending, say, four such claims. But, allowing for that, it is difficult to apportion anticipated litigation costs in a way that will lead the court to be able to conclude with the requisite degree of assurance that a certain number of cases (but no more) can be taken to trial. And, as I say, even if the court could reach a firm conclusion on that score, there could come a point where the number of issues to be taken to trial might be such that the GLO status and purpose of these proceedings is undermined.

25. Therefore, with considerable sympathy for the claimants, which really reflects the overarching point - not specific to this case or the parties to it - that it would always be nice as a claimant to know whether or not you are suing a worthwhile defendant, but where I cannot equate sympathy with a jurisdictional ground or with the overriding objective, I do not accede to the application. The language of 3.1(2)(m) being permissive as to what the court may order, I am not persuaded to order the witness statement evidence as to the defendant's means.

(For proceedings after judgment see separate transcript)

Postscript: Paragraphs 1 to 25 above reflect what I said in extempore rulings given on 18 June 2018 and a request for my approval of a transcript of the draft judgment which was made almost 5 years later, on 21 March 2023. Any perceived shortcomings, beyond the typographical or stylistic, in the approved judgment could well be the result of the draft not being subject to a more timely review. HHJRKC 21.3.23

(This Judgment has been approved by HHJ Russen QC.)

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