Neutral Citation Number: [2024] EWHC 3438 (Ch)

Claim No. BL-2020-001343

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

13 December 2024

BEFORE:

MR JUSTICE MILES

B E T W E E N :

(1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))

Claimants

-and-

(1) MICHAEL ANDREW THOMSON
~~**(2) SIMON HUME-KENDALL**~~
~~**(3) ELTEN BARKER**~~
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENTS LIMITED
~~**(10) HELEN HUME-KENDALL**~~

Defendants

APPROVED JUDGMENT

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Lower Ground 46 Chancery Lane WC2A 1JE
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

MR JUSTICE MILES:

1. This judgment concerns a number of issues arising from my principal judgment given on 14 November 2024 ([2024] EWHC 2894 (Ch)).

2. The first question is whether to include a number of declarations giving effect to the judgment.

3. The draft order proposed by the claimants sets out a number of declarations. The relevant defendants, other than the first defendant, have not objected to these. The first defendant does object on two grounds.

4. The first is that a number of the declarations, namely 1, 2, 3, 4, 11 and 12, simply replicate findings in the judgment but add nothing of value. There is, second, a separate objection to declarations 9 and 10, which is that they go beyond what is set out in the judgment.

5. On the first point, Counsel for the claimants submits that there are likely to be further hearings in this matter in relation to enforcement, and that the declarations serve a useful purpose. Courts, considering the matter in the future, may be able to rely on the declarations in an order, rather than having to be taken to particular passages of the judgment, which runs to 335 pages.

6. Counsel for the first defendant took me to a passage in *Office Depot International (UK) Limited v UBS Asset Management (UK) Limited* [2018] EWHC 1494 (TCC), at paragraph 49, where Mrs Justice O'Farrell said this:

> "49. As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court's power to grant declaratory relief is discretionary. The court has to consider whether, in all the circumstances, it is appropriate to make such an order: *Financial Services Authority v Rourke* [2001] EWHC 704 (CH) per Neuberger J:
>
> "It seems to me that when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant a declaration.""

7. Applying this approach, it seems to me that there is good reason in the present case for the inclusion of the declarations, essentially for the reasons given by counsel for the claimants. The declarations other than declarations 9 and 10,

which I shall come to separately, are not objected to by reason of their contents. What is said by the first defendant is that they are essentially unnecessary, and they would not serve a useful purpose. However, I think they would serve the useful purpose submitted by the claimants.

8. As to declarations 9 and 10, the first defendant says that these go beyond the judgment and are not justified by it. No submission was advanced that they are otherwise objectionable, in terms of stating the legal outcome of the findings that I made in the judgment.

9. In the judgment, I explained the conclusions I had reached on the basis of the legal principles I was taken to and the facts. I said that I would invite submissions as to the terms of any declarations. It is commonplace for declarations to be expressed in slightly different language from the judgment of the court. The judgment of the court is not intended to set things out in the same way as a formal order of the court, and it is usual for declarations to be formulated, after judgment has been given, in different language.

10. I am satisfied that both declaration 9 and 10 give proper effect to the conclusions I reached in the judgment, on the basis of the legal principles and facts found, and that, to the extent that there are differences of language from the judgment, there is no objection to the declarations. I do not think that they go beyond what is set out in the judgment.

11. So, for these reasons, I shall make the declarations contained in the draft order.

12. I deal now with paragraph 33 of the draft order and the question of the appropriate contribution to be made by the defendants who have been found knowingly to have participated in the fraudulent trading of the company.

13. The jurisdiction arises under section 246ZA of the Insolvency Act 1986. That provides that where a person is found liable for fraudulent trading in relation to a company in administration, the court may order them "to make such contributions to the company's assets as [it] thinks proper".

14. In *Morphitis v Bernasconi* [2003] Ch 552, at paragraphs 53 and 55, Lord Justice Chadwick explained that there must be a:

> "... nexus between (i) the loss that has been caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power and (ii) the contribution which those knowingly party to the carrying on of the business in that manner should be ordered to make to the assets in which the company's creditors will share in the [insolvency]."

15. Lord Justice Chadwick gave some obvious examples of the quantification of the contribution. One was the value of any assets misapplied or misappropriated.

Another is where the carrying on of the business with fraudulent intent had led to claims against the company by those defrauded.

16. In relation to the second case, he said that:

> "The appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to say an amount equal to the amount which has to be applied out of the assets available for distribution to satisfy those claims."

17. He also said that the amount of the contribution should reflect and compensate for the loss caused by the carrying on of the business in the manner which gives rise to the exercise of the power. Lord Justice Chadwick also explained that the jurisdiction was compensatory and not punitive.

18. In assessing what contribution to require from the defendants, the court should consider each defendant separately. It may hold defendants liable on a joint and several basis. There is no presumption either way that the court will hold all of the defendants to be liable jointly and severally for the same amount. See *Re: Overnight Limited* [2010] BCC 796 at paragraphs 30 to 32.

19. In that case, one of the defendants was made liable for the full loss caused to the company and the second was liable to contribute 50 per cent of such loss on a joint and several basis. The appropriate contribution depends on the facts of the given case and how the court considers responsibility can be fairly apportioned.

20. The first question is whether all of the relevant defendants should be held liable for the full amount of any contribution I order, or whether there should be some other order. This point has been raised by the first defendant and the fifth defendant.

21. The first defendant emphasises that the court has a discretion and that there must be a nexus between the conduct complained of and the contribution. The court should take account of the degree of control of the relevant defendant and the benefits received by that defendant.

22. Counsel for the first defendant emphasised two principal points. First, that on the court's findings, the first defendant was subject to the direction or instructions of the fourth defendant. The fourth defendant, she says, was effectively the mastermind behind the fraud that the court has found. The court has also found that the fourth defendant had power to require the first defendant to do what he said and to overrule the first defendant.

23. She also referred to the position of other defendants who, on the court's findings, had a greater role in the misappropriation of assets than the first defendant but who settled with the claimants before trial. She said that they had a greater culpability than the first defendant.

24. The second principal point was that the first defendant received much lower benefits from the fraudulent trading than the other defendants. On the court's findings, the first defendant received something over £5.3 million, whereas some of the other defendants received much greater sums.

25. Counsel for the first defendant said that the first defendant was not very aware of or diligent in the exercise of his duties as a director, that there were other directors who have not been sued, and that there were many other people involved in the affairs of LCF.

26. She said that one should start by taking the culpability of the people most seriously to blame (in particular, the fourth defendant) and make some form of apportionment by considering the comparative or relative culpability of the first defendant. She said that the first defendant should not be liable for the entire shortfall and that would not be a fair and just outcome.

27. Counsel for the claimants submitted that the first defendant should be liable for the full amount of any contribution that I order. The first defendant was central to the entire conduct which amounted to fraud. He was the CEO of LCF. He was involved in all of the matters complained of. These included raising monies by false pretences, by running and operating LCF as a Ponzi scheme and participating in each of the transactions by which sums were misappropriated from LCF.

28. Counsel for the claimants points out that I have found that the first defendant knew of all of these matters. He clearly participated in all of the misappropriations because he approved the various payments that were made from LCF. He was, so counsel submits, at the heart of LCF's fraudulent trading.

29. I have no hesitation in finding that the first defendant should be liable for the full amount of any contribution I order. It seems to me that this is an inevitable consequence of the findings I have reached on liability.

30. I do not accept that the right approach in a case of this kind is to take the person who may be regarded as most responsible for the fraud and then apply, as it were, a sliding scale of culpability and then order anybody who is not at the 100 per cent point to make a lesser contribution. The court has to take into account the extent of the culpability of the relevant defendant, but on the facts of this case, I have no doubt at all that the first defendant must make a full contribution.

31. I turn to the position of the fifth defendant. I made detailed findings about the participation and knowledge of the fifth defendant in the judgment. In particular,

I dealt with participation at paragraphs 1705 to 1710 and Mr Careless's knowledge at paragraphs 1713 to 1830.

32. I found there that Mr Careless knew of a number of the main elements of the claim. He knew in the legally relevant sense that monies were raised by LCF through making false representations; in other words, that members of the public believed that they were investing in a business which in turn was investing in the SME market when he knew that was not the case.

33. Secondly, I found that he knew in the legally material sense that the company was operating a Ponzi scheme and third, that he knew that there were misappropriations of the assets of LCF. The misappropriations included the very large commissions, which were paid by LCF to the sixth defendant, which was the fifth defendant's company. I found that, in the legally material sense, the fifth defendant was aware that those commissions might well render LCF's business entirely unsustainable.

34. I did however make findings that he was not aware of everything which others were aware of. I found that he did not know of the various contrived and artificial SPA transactions and that he did not know of the amounts that were paid to the various other defendants. I also found that he did not know that the statements being made by LCF to the public about the value of the security held by it were false.

35. I also found that the fifth defendant was not an insider in the same way that other defendants were. He was not a director or shadow director of LCF; he was not involved in the management of its affairs as a director or other officer; and nor was he involved in the affairs of the London Group companies.

36. Counsel for the fifth defendant says that, in these circumstances where he was not involved in every aspect of the fraud and did not know of some of the relevant and significant aspects of the fraud, he should not be treated in the same way as the other defendants. He says that it would not fairly reflect the differing culpability of the various defendants to require the fifth defendant to pay the full amount of the contribution.

37. Counsel for the claimants says that the fifth defendant played a central role in the fraud. A key part of the overall fraudulent scheme was the raising of monies on a false basis. I found in the judgment that it was essentially after the Surge defendants became involved that large amounts of money started to be raised and I also found that it was through the efforts of the Surge defendants that so much money was eventually raised.

38. Counsel for the claimants also said that Mr Careless knew the essential or key elements of the fraud: he knew in the sense of suspecting and not making enquiries that the business model was unsustainable and that it was being operated as a Ponzi scheme. He also knew that monies were, in fact, being

misappropriated. He also paid bribes to other defendants in order to maintain the commissions to Surge.

39. Counsel for the claimants submitted that a defendant cannot escape liability by saying that he was not aware of the details of fraudulent conduct where he suspects that a fraud is taking place and does not fully inquire because he does not want to know all of the facts. He says that that principle extends beyond liability and is relevant too to the appropriate contribution under the statutory jurisdiction. Overall, he says that the fifth defendant was a central player in the fraud and that he should be made liable for the full amount.

40. I heard comparatively brief submissions on these matters from the parties. I can understand why that is so, because the economic circumstances of the parties make it very unlikely that the defendants will be able to pay anything like the amounts which the court is likely to order.

41. Counsel for the fifth defendant did make some suggestions as to the appropriate contribution from the fifth defendant. He suggested first that it should be measured by the amounts which the fifth defendant himself had received; as an alternative, that the contribution should be measured by reference to the commissions that Surge had received, which were in the order of £65 million; and third, as a fallback, that there should be some proportionate order as a percentage of the amounts to be contributed by other defendants.

42. I do not think that an order by reference to the amounts received by Mr Careless personally would be an appropriate contribution. As explained in the main judgment, he had an important function in relation to the raising of money by LCF, which drove its success. As I have already explained, he knew that LCF was doing so through false representations. I have also explained that he knew that it was operating, at least in part, as a Ponzi scheme. For similar reasons, I do not think that his contribution should be assessed by reference to the commissions earned by Surge.

43. However, I do think that his culpability should be set at a somewhat lower level than some of the others. It seems to me that he was not as central to the fraud as those who were running either LCF or the London Group. I do however think he had a very important role in relation to the fraud and, taking a broad view of matters, which is all that the court can do, I have come to the conclusion that he should make a contribution of 75 per cent of the full amount of the contribution to be made by the others. This applies also to Surge and the seventh and ninth defendants.

44. There is then a question of the quantum of the contribution. The claimants have provided up-to-date information which shows that the net deficit in the insolvent estate of LCF is some £329 million-odd, comprising £237 million odd in principal and £150 million odd in interest, less £57 million odd in realisations.

45. This does not take account of the fees and expenses incurred by LCF's administrators. The claimants wish to reserve their position as to whether the fees and expenses incurred by them should be included in the calculation, but they did not seek that at this hearing. That decision is partly a pragmatic one because of the economic reality that it is unlikely that the defendants will be able to pay anything like the amounts being sought.

46. Although I did not hear submissions on the point, it appears to me that there may be a basis for questioning the inclusion of the interest figure of £150,000. That is because the interest has been calculated by reference to the contractual obligations of LCF to bondholders under the bonds.

47. It is at least arguable that, for the purposes of section 246ZA of the 1986 Act, the losses to the company's creditors should not include contractually promised interest, as that would effectively be to compensate them for the non-performance of promises made under the bonds and would be akin to the contractual or measure of loss. It appears to me at least arguable that under the section, compensation is to be assessed without including expectation losses of that kind.

48. I did not hear any argument on this point, but I am concerned that the court should not simply make an order of this kind, particularly since some of the defendants are not represented.

49. Again without hearing any argument, it does seem to me that the loss covered by the section for which compensation should be made should include interest, albeit it is likely that that interest should be measured by reference to the opportunity that the creditors would have had to earn returns elsewhere, rather than by reference to the rates agreed in the bonds. There is no calculation of such interest before me.

50. It seems to me, in the circumstances, that the court should make an order now in respect of the amounts of principal, which are owing on the bonds, namely, £237 million-odd. There will have to be credit for realisations.

51. Counsel for the claimants contended that the court had power under section 246ZA(2) of the 1986 Act to make a series of orders for contributions to the company's assets and that therefore an order of that kind was available under the section itself. It is clear in any case that the court has power under part 25 of the CPR, where it has given judgment on liability, to make orders for the payment of sums on account of the total to be paid under the judgment.

52. There was no contrary submission. I am satisfied that the claimant's interpretation of section 246ZA is correct, and that as long as the court records that there can be further awards, the court's power over the case does not come to an end by the making of an interim order. But, for the avoidance of doubt, it seems to me that the order of the court should record that the amount of the contribution being ordered today is without prejudice to the ability of the claimants to seek further contributions, and is also, in the alternative, made under part 25 of the CPR.

53. So the order I shall make at this stage is for a contribution in relation to the principal sums, but with the claimants to be at liberty to apply for further orders in respect of interest hereafter. I shall make the order on a joint and several basis, but as I have said in respect of the fifth defendant (and other relevant defendants), they shall pay 75 per cent of the full amount.

54. I turn next to equitable compensation for breaches of duty. Paragraph 34 of the draft order concerns the liability of the first and fourth defendants to pay LCF a sum of £329 million odd by way of equitable compensation for their breaches of duty. That sum is again explained as comprising £329 million odd, representing the £237 million principal amount outstanding on the bonds, £150 million odd in interest, less £57 million odd in realisations. The resulting sum was not contested by the first or fourth defendant and I shall make that order.

55. I turn next to paragraph 35 which concerns the liability of the fifth, sixth, seventh, eighth, and ninth defendants to pay equitable compensation in respect of their liability for their dishonest assistance in breaches of fiduciary duty.

56. Counsel are agreed that the principles on which the compensation for accessory liability under this head are accurately stated by Mr Justice Mance in *Grupo Torras SA v Al-Sabah* [1999] CLC 1469. On page 1667, he said:

> "The starting point in my view is that the requirement of dishonest assistance relates not to any loss or damage which may be suffered, but to the breach of trust or fiduciary duty. The relevant enquiry is in my view what loss or damage resulted from the breach of trust or fiduciary duty which has been dishonestly assisted. In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss. To that extent the accessory nature of the liability presently under consideration distinguishes the present from the situation in *Target Holdings Ltd v Redferns (a firm)* [1995] CLC 1052; [1996] AC 421, where the House of Lords was concerned with a simple breach of trust. But it is necessary to identify what breach of trust or duty was assisted and what loss may be said to have resulted from that breach of trust or duty. An allegation of a single and continuing conspiracy to commit and cover up a misappropriation is one thing. But it may involve a series of breaches of trust or fiduciary duty. The actual loss may have resulted at the early stage of misappropriation, rather than from the cover up. Dishonest assistance confined to the cover up stage may not or not necessarily attract liability for such previous loss."

57. Hence the test involves identifying the breach of fiduciary duty in which a relevant defendant has assisted, and then asking whether that breach of duty has led to losses. It is not necessary to show that the relevant assistance itself was the cause of the loss.

58. The claimants contend that the fifth, sixth, seventh and ninth defendants have all been found liable for assisting in a breach of fiduciary duty by the first defendant and the fourth defendant. They say that the correct characterisation of the breaches of duty amounted to causing LCF to incur liabilities in circumstances where LCF would not be able to repay the liabilities, or in circumstances where there was a real risk that LCF would not be able to repay the liabilities.

59. The claimants say that that is the proper description of the breaches of duty found by the court in this case, and that the losses caused by those breaches of duty amount to the full deficiency as regards creditors, which amount to the sum of £329 million-odd that I have already explained. That is the principal which was invested by investors on a false basis, and the interest which LCF incurred to those investors under the bonds which it issued, less realisations.

60. Although the sixth, seventh and ninth defendants are not represented, it seems to me that they are essentially in the same position as the fifth defendant in relation to this point, largely for the reasons set out in the judgment. I treat them as all covered for present purposes by the submissions made on behalf of the fifth defendant.

61. Counsel for the fifth defendant, started by saying that it was necessary to consider the pleadings to see what duties were said to have been breached by the first and fourth defendants and assisted in by the fifth defendant. He said that when one analysed the re-re-re-amended particulars of claim at paragraph 90 and 56, the breaches of duty which the fifth defendant is said to have assisted in amount to a broad allegation of fraudulent trading, and secondly, assisting in making false representations to bondholders. He accepted that the pleading also covered assistance in misappropriation to the extent of the payments made to Surge. He went on to say however that when one then comes to analyse the breaches of duty in which the fifth defendant is said to have assisted, essentially they amounted to those two points: first, assisting in making false representations about LCF and its business to prospective bondholders; and secondly, accepting the 25 per cent commissions paid by LCF to Surge. He said in particular that the judgment did not hold in terms that the fifth defendant had assisted in other misappropriations of assets.

62. He submitted that the losses caused by the relevant breaches of duty essentially amounted to losses under two heads: first, he accepted that the losses must include the amounts paid to Surge; secondly, he said that the breaches of duty in relation to the misrepresentation to bondholders had led LCF immediately to incur contractual liabilities to bondholders of the amounts promised in the bonds. However, as the principal amounts were by definition invested by the bondholders, and it was the misappropriation of those amounts which led to those sums being lost, unless there was a finding that the fifth defendant assisted in that part of the misappropriations, that part of the loss could not be claimed against the fifth defendant.

63. He accepted, however, that by incurring the liability to the bondholders on a false basis, there was a loss in respect of the contractual interest that was not paid. He

said that the extent of the liability for such contractual interest was some £8 million odd, which was the interest due on the bonds wrongly sold by LCF in the time prior to the administration of LCF.

64. Hence he submitted that the compensation payable by the fifth defendant should amount to some £69 million as a starting point. He then said that a sum should be deducted for the realisations made by the claimants since the administration.

65. Counsel for the claimants took issue with these points. His overarching point was that these defendants should be liable for the full amount of £329 million odd that I have already mentioned. He repeated that the relevant breach of duty was causing the company to incur liabilities in circumstances where it would be unable to repay the liabilities, and that a broader view of the breaches of duty found by the court and found to have been assisted in by the fifth defendant was required. He said that it was inappropriate to carve up the duties more narrowly. He said that there was no basis for restricting the interest element of the losses which were accepted by the fifth defendant to £8 million odd. The only basis that seems to have been advanced by the fifth defendant was that the administration somehow broke the chain of causation. He said that the proper amount of interest was, £150 million-odd. To that should be added the commissions paid to Surge. He also said that there was no basis for deducting realisations if that is the way in which the loss was to be assessed; it was only logical to deduct the amount of realisations if the starting point was the full amount of the deficit as regards creditors.

66. It seems to me that this is a matter where the court would potentially have been assisted by far fuller submissions on some of the points. As explained in the judgment, I was leaving open the question of quantum, and that included a closer analysis of precisely which duties these relevant defendants had assisted in.

67. However, I am satisfied that a sum of at least £211 million odd is payable by these defendants on any view. The £211 million is made up of the £150 million odd for interest plus £61 million in respect of commissions paid to Surge. I do not think there is any rational basis for limiting interest to the period before the administration. The administration has not broken the chain of causation in any way. If the liabilities were incurred when the breaches of duty took place, by making promises which could not reasonably be met, the amount of those liabilities continues until they are discharged in full. The administration does not therefore break the chain of causation. There was no real dispute about adding the £61 million commissions. I do not think there is any logical basis for deducting realisations from this measure of loss.

68. In the circumstances I shall make an interim payment of the amount of £211 million-odd, against the relevant defendants that I have mentioned. The remaining defendants did not take issue with the draft order.

69. There are two further points to deal with in relation to the order, both raised by the eighth defendant. The first is that the draft order at the moment requires him

to disclose assets of a value in excess of £1,000. He has asked that this obligation be worded in such a way as to make it clear that the order relates to assets that the eighth defendant himself reasonably regards as having a value in excess of £1,000.

70. I am not persuaded that I should make an order in the terms suggested by the eighth defendant. It is normal for orders of this kind simply to require the disclosure of assets over a certain value. Where the relevant party has doubts about the value of the asset, then they should generally err on the side of inclusion or seek a valuation. The purpose of an order of this kind is to exclude assets which certainly have a value less than the threshold so that the maker of the affidavit is not put under an undue burden. But if there are doubts about it, then the defendant should include the asset.

71. The second point concerns the provision of bank statements for the purpose of accounting. The eighth defendant does not oppose this, but says that he should be entitled to redact the names of persons or companies paying money into his account where they were other than the LCF or LOG connected parties. The eighth defendant explains that he provides consultancy services to other people who have no connection with LCF or LOG and points out that he owes them a duty of confidentiality and is probably bound by the data protection legislation to keep their identity confidential.

72. I am not persuaded that I should allow those redactions to take place. The purpose of the order is to assist in the accounting process, and it is important that the claimants should be able to see by whom the payments were made. While it is relevant to take into account duties of confidence whenever making an order of this kind, where the court does make such an order, it overrides any obligation of confidence that may be owed by a party to a third party and overrides any requirements under the data protection legislation. Hence, I take into account the duty of confidence, but decide in the exercise of my discretion that it should be overridden here. I also note that the claimants are bound by the usual requirements under the rules in relation to the use of documents disclosed in litigation for proper purposes.