Case No: HC-2015-003085

[2016] EWHC 2141 (CH)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Tuesday, 12 July 2016

BEFORE:

CHIEF MASTER MARSH

BETWEEN:

SIGNIA WEALTH LIMITED

Claimant

- and -

(1) MARLBOROUGH TRUST COMPANY LIMITED
(2) MS NATHALIE DAURIAC-STOEBE

Defendants

ANDREW HOCHHAUSER QC and EDWARD BROWN (instructed by Mishcon de Reya LLP) appeared on behalf of the Claimant

JONATHAN COHEN QC and ANDREW DE MESTRE (instructed by Rosenblatt) appeared on behalf of the Defendants

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JUDGMENT
(As Approved)

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8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.DTIGLOBAL.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

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1. CHIEF MASTER MARSH: Today is the hearing of the first case management conference in this claim which was commenced approximately 12 months ago. Any attempt by me to summarise the issues is likely to do some violence to them. It suffices to say that the second defendant was, until January 2015, the Chief Executive Officer of the claimant company. The first defendant is the trustee of a trust which held shares in the claimant beneficially for the second defendant and for other family members.

2. The issues in the claim concern the lawfulness, or otherwise, of actions taken by the claimant concerning the second defendant's departure from the company. At paragraph 36 of the Amended Particulars of Claim, the claimants seek a number of declarations concerning the ending of the second defendant's employment and the effect of that termination upon her entitlement to be paid for shares held in the company. The principal issue which the court will have to determine at the trial of this claim is whether the second defendant is properly characterised as a "good leaver" or a "bad leaver". Those are, of course, defined terms within the Articles and the shareholders' agreement. There will, however, be issues for the court concerning the second defendant's performance as the claimant's Chief Executive Officer and the effect of that performance on the company's financial position.

3. There is an additional claim of some substance brought by the second defendant which brings in the fourth and fifth parties. To some degree the additional claim is the mirror image of the claim brought by the company. Again, without I hope doing violence to the detail of the claim, it suffices to say that the additional claim seeks further declaratory relief and financial remedies arising from the second defendant's departure from the claimant. By a recent amendment to the additional claim, the second defendant seeks to allege that she was the victim of a conspiracy which has caused her loss.

4. It is fair to characterise this litigation, perhaps euphemistically, as being heavily contested. It has taken some 12 months to arrive at the first case management conference. The parties have managed to disagree about most issues but happily the case management conference today has largely resulted in the directions to be given in court being the subject of agreement.

5. I observe that this type of claim cries out for a resolution, but, whether the parties are able to achieve that, is very much a matter for them. I am pleased to note that both parties have now provided a commitment to attempt to resolve the issues in the claim at a mediation. The court has not made any order in that connection, save for the standard order as part of the directions timetable, but I remark that the court expects the parties to make genuine efforts to resolve this claim.

6. The two issues I have to deal with in this short ruling are, first, whether this claim should be taken out of the costs management regime and secondly, whether there should be a split trial. I will deal with them in that order. The question of whether or not this claim should be taken out of the costs management regime has had a somewhat chequered history, but both sides have not been entirely consistent throughout. The story starts with Mishcon de Reya's letter of 21 January 2016 written on behalf of the claimant. They rightly identified that, because neither the claim nor the additional

claim had specified a monetary value in excess of £10 million, the claim was not automatically taken out of the costs management regime by virtue of CPR 3.12(1)(b).

7. The response from Rosenblatt, who act for the defendants, was in the first instance to suggest that, because the claim had a value in excess of £10 million, costs management was not required. At that point the additional claim was said to have a value of close to £20 million. It is now suggested that the additional claim has a value in the region of £13 million.

8. In any event, shortly after Rosenblatt wrote on 26 January 2016, they saw the claimant's costs budget and raised concerns about the level of costs which had been incurred and costs which were expected to be incurred by the claimants. It was then suggested by Rosenblatt that costs management was desirable and this was repeated on 16 February and 21 March 2016.

9. At that point the court was proceeding on a misunderstanding of the position. The court had been told that the parties had agreed that the claim should be taken out of the costs management regime and thus the court fixed a case management conference rather than a costs case management conference. The CMC was originally listed for 23 March 2016. In view of the issues which have arisen between the parties about cost management, it would of course have been desirable that the court made a determination on that date about whether costs management should or should not apply at that hearing. However, that was not to happen, as both parties agreed that the CMC could be adjourned and it appears that today was the first available date taking into account leading counsel's availability.

10. Mr Cohen QC, who appears for the defendants, raised the issue of costs management in his skeleton argument and I have been asked to make a decision about it.

11. The costs budgets have been helpfully updated by the parties so that they are relatively current. The claimant's budget, which is dated 4 July 2016, shows that the claimant has incurred costs up to that date of slightly less than £967,000 and forecasts expenditure up to the end of the trial of £1,374,000. That is therefore a total expenditure of £2.34 million. It is based upon an assumption that there will be a ten day trial, excluding expert evidence, in other words, it anticipates an order for a split trial. In passing, I note that the case management costs which are incurred and anticipated themselves exceed £100,000 and that the claimant's budget for disclosure is in excess of £500,000 with some £268,000 having been incurred to date. It is to be hoped that, as a result of the indications given by the court today and the agreement it is to be hoped the parties will reach, that disclosure costs will be kept to a minimum.

12. The defendants' budget shows that up to the date of the budget, which is 5 July 2016, they had incurred costs of £776,000 with forecast costs being slightly in excess of £1 million. Taking those two budgets at face value, the total costs of this claim are expected to be approximately £4.14 million. Its value is put at £13 million. To my mind it is plain that issues of proportionality are engaged. That is not to say necessarily that the figure I have indicated for the total costs expenditure is

disproportionate but proportionality is engaged in the sense that it is an issue which will need to be considered.

13. It is not in doubt now that this claim is within the costs management regime. That is so because neither the claim form nor the additional claim mentioned the value of £13 million, which is said to be the value of the shares which were held by the first defendant. Had the figure been mentioned in the additional claim form, then the costs management regime would not have applied.

14. It seems to me that, given that this claim is within the regime, the proper approach for the court to adopt is to apply the test set out at CPR 13.15(2), namely the court must be satisfied, if this case is to be taken outside the regime, that the claim can be conducted justly and at proportionate cost in accordance with the overriding objective without a costs management order being made. If the court is not so satisfied, then the claim must stay within the costs management regime.

15. The sort of factors which are relevant to such a decision include, to my mind, the following. First the nature of the claim. As I have already indicated, this is a claim which is characterised by a considerable depth of ill-feeling on both sides. Serious allegations have been made as against the second defendant and the manner in which the litigation is being conducted is one where all proper points are being taken. That type of claim, on the face of it, is eminently suitable for some degree of control by the court.

16. Secondly, the court should take into account the size, in absolute terms, of the costs. On any view, a claim which may be conducted through to a trial lasting ten days with a total cost of £4.14 million is an expensive piece of litigation, albeit, as I have remarked earlier today, this claim is broadly in the middle range of size and complexity for this Division in London.

17. Thirdly, it is helpful, as leading counsel on both sides have invited me to do, to look at the costs already incurred as against the future costs. Plainly, if a point had been reached at which the future costs were to be **de minimus**, there will be little point in requiring the parties to undertake the expense of cost management when the court's ability to control the costs is very limited indeed. Here, the costs which are budgeted for the future are approximately £1.4 million on the claimant's side, and that excludes the possibility of expert evidence at trial, and just over £1 million on the defendants' side. It cannot be said that the court's ability to control costs would be entirely wasted or largely wasted with such figures involved.

18. Fourthly, there is some concern about inequality of arms between the parties. Mr Hochhauser QC, who appears for the claimant, has rightly pointed out to me that there is no evidence on this issue. I am able to take judicial notice of the fact that the second defendant is an individual, but I do not know anything of her financial circumstances and it seems to me, in the absence of evidence on the point, it would not be right to make a decision in relation to cost management, placing any reliance on there being a great disparity of financial strength as between the parties.

19. Fifthly, it is right to have regard to the differences between the budgets. Without undertaking a detailed analysis, there are significant differences between the budgets. If they are adjusted to take account of the possibility that there will be expert evidence, there is a difference of approximately £700,000 between the parties.

20. It is not possible for me to be satisfied here that this litigation can be conducted justly and at proportionate cost without costs management. Although a cost management order will be made at a later stage of the claim than is generally desirable, there are significant future costs to be incurred.

21. Indeed, it seems to me that there are positive reasons why cost management is desirable here. The court has power in appropriate cases, and this may well be such a case, to make observations about costs which have been incurred. Without having formed a concluded view on that subject, such observations may be useful here given the size of the incurred costs.

22. The court has power to set a budget for future costs and, as I have indicated, there are issues of proportionality which are engaged and which need to be considered. Overall, it seems to me that there is likely to be a real benefit for the parties if there is a cost management order and I propose to give directions for a costs management conference to be held on the earliest available date, having made directions for the proper preparation for that hearing.

23. The second issue concerns whether or not there should be a split trial. The issue here concerns whether expert evidence about the value of, speaking loosely, the second defendant's shares, should be before the court and the court should be asked to make a determination about the valuation of those shares on the two alternative valuation premises (it is the defendants' case that there are two valuation premises).

24. The principles in relation to split trials, were considered by Hildyard J in **Electrical Waste Recycling Group Ltd & Ors v Phillips Electronics UK Ltd & Ors** [2012] EWHC 38 (Ch). This decision provides a very helpful summary of the approach the court should take. The starting point is for the court to consider the court's management powers which are set out in the CPR. The starting point is, of course, the overriding objective and the provision in CPR 1.4(2)(i) that the court, wherever possible, should manage as many issues as it can at one hearing. But that is not to say there is a presumption against a split trial. As Hildyard J puts it in **Electrical Waste Recycling**, a decision of the court is essentially a pragmatic one, taking into account a range of issues that will be bespoke for each case where the question arises.

25. Here the relevant context, as it seems to be, before looking at particular issues, are these. First, the claimant's estimate of the length of trial, without expert evidence, is that it will take ten days of court time on the basis that the court will need one day of reading time and there will be a one day break after evidence has been concluded and before closing submissions. If the trial includes expert evidence, and a determination of the valuation issues, the claimant's estimate is that the trial will last 12 days. Secondly, the claimant's approach is that, if there is a split trial with valuation issues left over, it is estimated that the second trial could be concluded within two days. (I am

bound to say that seems to me to be a somewhat optimistic time estimate for a second trial given that the judge will necessarily need to undertake pre-reading and given the gap between the trial and the second trial, even if it is the same judge involved, which is unlikely, there will some need to open the case and to deal with the issues in closing submissions).

26. Thirdly, assuming that the second trial were to have a time estimate of two to three days, it is almost certain that it would take place some nine to twelve months after the first trial. That period is in part a function of the court's listing periods, but it also recognises that some separate trial preparation will be needed and it seems to me that a period of twelve months is rather more likely than nine months.

27. Fourthly, the court needs to consider whether there is likely to be a significant costs saving by ordering a split trial. Here the evidence before the court is somewhat limited, but I proceed on the assumption that, if the court is not required to deal with share valuation issues at trial one, there will be a saving of approximately £300,000.

28. Fifthly, the court needs to consider what the additional cost would be if the second trial becomes necessary. Again, the information available to the court is somewhat limited, but it seems to me very likely that the additional cost would far exceed the saving and the costs of a second trial are likely to run to many hundreds of thousands of pounds; thus the court needs to balance potential saving on the one hand of some £300,000 as against the possibility that additional expenditure of a far greater sum will be incurred.

29. Looking at the factors which Hildyard J has identified, I make the following observations. First, are there advantages or disadvantages in relation to the terms of trial preparation? Given that this is the first case management conference, to my mind there is no real advantage in terms of trial preparation to order a trial of all issues at this stage as opposed to a split trial.

30. Secondly, will there be unnecessary inconvenience and strain on witnesses if two trials are ordered? It seems to me in that connection I must take into account the nature of this litigation and the manner in which it has been litigated to date. There is a real depth of ill-feeling between the parties and there is a real likelihood that, even if the second trial is principally concerned with valuation matters, that the second defendant, and others involved in the management of the claimant, will need to give evidence twice.

31. Thirdly, would a single trial lead to excessive complexity and a burden on the judge? It seems to me that there is no reason to suppose that requiring the trial judge to deal with valuation matters which are relatively self-contained would impose a difficult or heavy burden. The trial would be slightly longer, but it will be of no greater complexity than many trials which are already conducted in this Division.

32. Fourthly, would a split trial cause prejudice? There are two sub-factors here. First of all, it seems to me, and here I accept Mr Cohen QC's submission, that there is a relationship between valuation of the shares and the second defendant's case. Her case is that the claimant and the additional parties have sought to acquire her shares at a

figure far below their real value. Thus, the second defendant would wish to cross-examine on that basis. Plainly, it will be of assistance to the court to have expert evidence before it about the valuation of the shares, which of course will be placed upon a valuation of the company. Secondly, there is a significant part of this case which concerns the second defendant's performance and the effect that has had on the company. Again, it seems to me to separate out of that issue and to require it to be dealt with solely at a second trial, is unsatisfactory.

33. This leads me to the fifth and final consideration, which is whether a clean split is possible? It is always of concern when directing a split trial that the first trial can take place without unforeseen difficulties. It seems to me there is a real likelihood in this case that matters of share valuation will be directly relevant to the principal issues in the claim and there is a very real risk that, if a split trial is ordered, the court will either have to go over similar issues on two separate occasions or will find at the first trial that it simply does have the evidence which it needs to determine the issues between the parties.

34. For all those reasons I am satisfied that this is not an appropriate case in which to order a split trial and I will now give directions for the trial to take place on the basis that it will resolve all the issues between the parties and that there is a need for expert evidence.

(**After further submissions**)

35. I have carefully considered Mr Cohen QC's submissions on the issue of whether there should be exchange of experts' reports or sequential service. What I said earlier this morning about experts' reports was merely an indication and I am concerned to hear that it is thought sequential service of experts' reports, with the defendants going first, might be unfair to them. I am bound to say I am not persuaded that that is so. It remains my view that it is the right order in this case. First of all, it seems to me it gives the defendants a positive advantage in laying out the field for valuation and, secondly, this is a case where the court and the claimant need to know precisely what the defendants' case on valuation is.

36. There is a subsidiary issue which is perhaps not evidentially based, but it seems to me there is a real likelihood that if the defendant serves a report, so there is sequential service, then it may well facilitate the possible resolution of this claim and it may, in any event, in the expert evidence process, achieve a saving so that there are not two experts undertaking precisely the same exercise, producing lengthy valuation reports which overlap. I would not encourage the claimants to provide a merely responsive report, but seeing the defendants' expert's report in advance, will enable them to provide a targeted and measured response to it, with a full understanding of the way in which the defendants approach the case.

37. I will direct sequential service of reports with the defendants going first.

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