



NEUTRAL CITATION NUMBER: [2018] EWHC 1429 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
FINANCIAL LIST

No. FL-2016-000017

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 8 May 2018

B E F O R E:

THE HON. MR. JUSTICE MARCUS SMITH

B E T W E E N:

BILTA (UK) LIMITED (IN LIQUIDATION) AND OTHERS

Claimants

- and -

(1) ROYAL BANK OF SCOTLAND PLC
(2) MERCURIA ENERGY EUROPE TRADING LIMITED

Defendants

Mr. C. Parker, Q.C. and **Mr O. Gledhill Q.C.** and **Mr. O. Butler** (instructed by **Rosenblatt Solicitors**) appeared on behalf of the Claimants.

Mr. J. Wardell, Q.C. and **Mr. M. Ryan** (instructed by **Pinsent Masons LLP**) appeared on behalf of the First Defendant.

Mr. K. Maclean, Q.C. and **Mr. S. Elliot, Q.C.** (instructed by **Slaughter and May**) appeared on behalf of the Second Defendant.

Hearing date: 8 May 2018

Approved Judgment

MR JUSTICE MARCUS SMITH:**Introduction**

- 1 I shall refer to the various claimants in these proceedings as the “Companies”. The Companies are all in liquidation and act by their liquidators. Prior to their liquidation, the Companies were, it is alleged (and it may now be common ground) vehicles for large scale missing trader intra-community fraud, or “MITC” fraud for short. The Companies allege that MITC fraud has been a major EU-wide criminal activity that has cost the UK taxpayer many billions of pounds.
- 2 It is unnecessary, for present purposes, to set out the Companies’ case in any great detail. Suffice it to say that this case is said to involve spot trading in EUAs. EUAs are a form of carbon credit issued under the EU Emissions Trading Scheme. The basic mechanics of the fraud were described by the Supreme Court in *Bilta (UK) Limited v. Nazir (No.2)* [2015] UKSC 23 at [57] (*per* Lord Sumption) and [114]-[115] (*per* Lord Toulson and Lord Hodge).

The application

- 3 In these proceedings, the Companies by their liquidators bring dishonest assistance claims, further or alternatively claims under section 213 of the Insolvency Act 1986 against the Defendants on the basis that spot EU trading was carried out by the Companies and that they, the Defendants, assisted dishonestly in that trading. These claims are presently pleaded in Amended Particulars of Claim. The Companies seek permission to amend the Amended Particulars of Claim, and I shall refer to the amendments for which the Companies seek permission as the “Proposed Re-Amendments” and the pleadings setting out the Proposed Re-Amendments as the “Draft Re-Amended Particulars of Claim”.
- 4 In substantial part the Defendants oppose the Proposed Re-amendments. In certain, minor, respects the Proposed Re-amendments are not opposed and to this extent the Companies’ application is uncontentious. This Ruling obviously considers only the contentious Proposed Re-Amendments. The contentious Proposed Re-Amendments fall, very broadly, into two classes:
 - (1) Amendments related to patterns of trading and the conclusions to be drawn from this. Although the line is difficult to draw, it seems to me that some amendments are really an elucidation, expansion or further particularisation of something that has already been pleaded, whereas other amendments plead an altogether new pattern of trading. This distinction between new and already pleaded patterns relates in particular to allegations regarding aggregation business and the Defendants’ trading with an entity known as Vertis.
 - (2) Amendments relating to the Defendants’ anti-money-laundering policies and procedures.

The procedural history

- 5 The procedural history of this claim has been as follows. The claim form was issued in June 2015 and pleadings closed in August 2016. Disclosure concluded with disclosure statements on 28 April 2017 for the Companies and the Second Defendant; and on 26 June 2017 for the First Defendant. Witness statements and expert reports were exchanged between December 2017 and May 2018, when supplemental carbon expert reports were exchanged. The main

carbon expert reports were exchanged on 9 February 2018, and that – for reasons I shall come to – is an important date.

- 6 The trial is due to begin mid-June 2018. That is to say next month. On any view, the Proposed Re-Amendments are being moved extremely late in the day. The application to amend is dated 26 April 2018, although I accept the Defendants had notice of the substance of the amendments materially before this date. The application is supported by the eighth witness statement of Ms. Clatworthy (a solicitor in Rosenblatt, the firm retained by the Claimants).

Approach

- 7 When considering the permissibility of a proposed amendment, the following principles apply:
- (1) In general a proposed amendment will be refused if it has no real prospect of success. That will be the case whenever the amendment is moved.
 - (2) A proposed amendment ought also to be refused if it is insufficiently clear or precise. Such a defect is, of course, capable of cure. But, absent the wholly exceptional case, it seems to me that that deficiency should be cured before the amendment is allowed. That is particularly so where, as here, one has allegations of dishonesty. I shall not repeat the strictures of the House of Lords in *Three Rivers v Governor and Company of the Bank of England* [2003] 2 AC 1 regarding the pleading of dishonesty, but I have them well in mind.
 - (3) If the purpose of the amendment is unclear – if, for instance, albeit in itself clearly drafted, it cannot clearly be tied to the case being advanced – then the amendment ought to be refused.
 - (4) The later in time the amendment is moved, the more sensitive the court should be to such amendments. The court should always bear in mind that a pleading must contain only a statement of the material facts on which the party pleading relies and not the evidence by which they are to be proved. Nor, I stress, is a particulars of claim to provide a running commentary on the state of issues between the parties as it emerges as the pleadings develop.
 - (5) Even if a proposed amendment passes the criteria of arguability and clarity and materiality, it may still be refused. In this context lateness is a critical factor. Lateness is a critical factor because of the disruption that an amendment may cause to the other party or parties to the proceedings. Thus, the court must consider precisely what prejudice the other party or parties to the proceedings will suffer. It may be that such prejudice can be compensated for in costs but that is not always the case. The closer to trial, the more likely the other party or parties will be prejudiced in a way that cannot be compensated in costs simply because they will be forced to fight on two fronts. They will be forced to deal with the response to the amendments that are allowed and they will be forced to prepare for trial.
 - (6) Of course, I accept that amendments may be formal in nature. In such cases, the proposed amendments will stand a greater chance of being permitted. An amendment may be formal in one of two ways. First, it may be intrinsically minor; secondly, it may be substantive but have been sufficiently flagged in prior witness statements, experts' reports or correspondence so as to render it effectively formal. In each of

these cases, the prejudice or potential prejudice to the other parties to the litigation is likely to be minimal.

- (7) The most extreme case of lateness is one where permitting the amendments would cause the trial date to be lost. The parties, the court and other court users have a legitimate expectation that trial fixtures will be kept. In such a case the burden on the party seeking to amend is particularly heavy. In this case I should say neither party has raised the question of an adjournment with me today.
- (8) The court must always take into account the amending party's explanations as to why an amendment is being moved at a particular time, and weigh this explanation in the balance.
- (9) One point that featured in argument regarding pleadings and amendments to them related to the general traverse that is usually to be found in a reply. Unsurprisingly, a general traverse is to be found here: it is the default position, where a claimant elects either not to plead a positive case in response to a plea in a defence or not to make an admission. If a claimant neither admits nor pleads a positive case, then the defendant must prove the point: the point remains open and remains in play. Simply because a point is in issue on the pleadings as between the defence and the reply does not mean that such a point can, without more, simply be incorporated as a new point in the particulars of claim. That is not how pleadings work.

The nature of the Proposed Re-Amendments

8 In this case the Proposed Re-Amendments are undoubtedly late. It will be necessary to consider various Proposed Re-amendments with a degree of particularity. I consider that they can be classified more specifically under four heads:

- (1) *Where the pleading is an elucidation of an already pleaded pattern of trading.* Under this heading I include paragraphs 39(1)(a), 39A, 42 and 43 of the Draft Re-Amended Particulars of Claim.
- (2) *Where an altogether new pattern of trading is pleaded.* Paragraphs 40A, 41-42B, 45A and 45B of the Draft Re-Amended Particulars of Claim all raise entirely new patterns of trading.
- (3) *The general conclusion that is drawn regarding patterns of trading and the nature of the trading that was alleged to be going on.* This is pleaded in paragraph 54 of the Draft Re-amended Particulars of Claim.
- (4) *The plea based upon the Defendants' anti-money-laundering policies.* This is pleaded at paragraphs 46, 51A-51C and 52.

I propose to consider the various amendments that are being moved in relation to these four heads. I shall begin with the second class – amendments where an altogether new pattern of trading is pleaded.

Class (2): pleading of new patterns of trading

9 The Companies contend that the amendments they propose, although in themselves substantial, in actual fact are merely formal or a mere formality because the substance of the Proposed Re-Amendments was adverted to in the carbon expert reports exchanged on 9

February 2018. Indeed, it was said on occasion that the points have been live even before the exchange of expert reports in the witness statements and elsewhere in response to various allegations made in the Amended Particulars of Claim.

- 10 In suggesting that the Proposed Re-Amendments were merely formal, the Companies put their case very high. Mr. Wardell, Q.C., for the Second Defendant, characterised the submission them as bold and I would not dissent from that. Essentially, the Companies say that when once they had received the report of the Companies' carbon expert (Mr. Redshaw), the Defendants should have appreciated, on reading that report, that the Proposed Re-Amendments were live. That is to say, that these points, albeit not pleaded, were being moved by the Companies and needed to be responded to substantively by the Defendants. It is said on behalf of the Companies, that the Defendants, instead of simply inviting their own experts to consider the substance of Mr. Redshaw's report (which, of course, is what they did) should have engaged with the new points and flushed out the issue. In other words, the Defendants should either have dealt with the points substantively or gone on the attack and asserted that these points, not being pleaded points, could not properly be made in an expert report.
- 11 Instead, so the Companies appeared to be suggesting, the point was allowed to linger silently and unresolved until the Defendants could take illicit advantage. That, it is said, was contrary to the obligation of cooperation inherent in the CPR.
- 12 The force of this point turns on whether or not it was obvious, through the expert reports, that a new unpleaded point was being taken. I accept that if it is obvious that this is the case, then it is incumbent upon the party receiving the report to raise the matter, so that the point is out in the open and any controversy dealt with sooner rather than later. But I do not want to overstate the obligation. Fundamentally, it is for a claimant to plead his, her or its case, not for a defendant to monitor what is said in documents other than pleadings to see if there is a mismatch. The Defendants' obligation to engage turns on whether it was obvious, through the expert reports, that a new, unpleaded point was being taken by the Companies.
- 13 It is notoriously hard to tie an expert report back to the pleadings. Points of opinion in an expert report may very well be entirely relevant to the case, and yet be very difficult to tie back to specific sections or paragraphs of the relevant pleading. Expert reports, I stress, set out the independent judgment and opinion of an expert: and the expert will obviously exercise his or her discretion in how these points are addressed in their report.
- 14 I also bear in mind that a pleading pleads only material facts. How those facts are to be proved is not pleaded but is left to the evidence. So there may well be large tracts of an expert report that relate to perhaps a sentence or two in the pleading. Equally, it is most unlikely that an expert report will address each and every pleaded point.
- 15 In my judgment, it will not often be the case that an expert report will reveal, in a stark and obvious way, that a new point is being taken. In this case, I do not consider that a carefully advised defendant, and both Defendants have very experienced legal teams, would have appreciated from the expert reports that new points – in the form of the Proposed Re-Amendments or any of them - were being run by the Companies.
- 16 I tested this matter with Mr. Parker, Q.C., leading counsel for the Companies, using paragraph 45A of the Draft Re-Amended Particulars of Claim as an example. Paragraph 45A is one of those paragraphs that pleads an altogether new pattern of trading. I invited Mr. Parker to show me where the points that are pleaded in paragraph 45A are to be found in the report of Mr.

Redshaw. Mr. Parker, with commendable speed and the assistance of his team, was able to provide me with such references. I set them out in tabular form:

Reference in the Draft Re-Amended Particulars of Claim	Corresponding reference in Mr. Redshaw's report
Paragraph 45A(1)	Paragraph 213
Paragraph 45A(2)	Paragraphs 258-259
Paragraph 45A(3)	Paragraphs 262 and 443(h)
Paragraph 45A(4)	Paragraph 57
Paragraph 45A(5)	Paragraph 182(b)
Paragraph 45A(6)	Paragraphs 378-382

- 17 I have looked at all of these paragraphs and considered whether the points now taken in paragraph 45A are so clearly foreshadowed in Mr. Redshaw's report that it can be said that the proposed amendment is a mere formality.
- 18 This is an untenable proposition. It is fair to say that – in terms of subject-matter – there is a loose correlation between the expert report and the pleading. But the points averred in paragraph 45A are diffusely spread across the entirety of Mr. Redshaw's report (as can be seen from the paragraph references) and are meshed and interspersed with many other points that are also being made by the expert. There is in my judgment no way in which anyone could appreciate, on a fair reading of Mr. Redshaw's report, that new points were being taken by the Companies. I do not consider that Mr. Redshaw's report constitutes any basis for suggesting that new points were being flagged by the Companies so as to render the Proposed Re-Amendments purely formal. I reject that contention as entirely unfounded.
- 19 It seems to me, therefore, that the new pattern of trading amendments cannot be said to constitute – by reason of Mr. Redshaw's expert report – mere formalities which the court can properly permit. Nor does the fact that the witness statements of the Defendants or, indeed, their Defences make reference to some points contained in the Proposed Re-Amendments help. For instance, the Defendants rely on the trading patterns with Vertis in response to the allegation that they were dishonestly assisting in VAT frauds: see, for example, p.24 of the Defence of the First Defendant. Of course, the Claimants will be entitled to cross-examine on points in issue and on the positive averments that are made by the Defendants in their pleadings and witness statements. But it does not follow that a point that is made by the Defendants in their defence can, by virtue of that fact alone, be inserted as a new claim in the particulars of claim. The fact that a point is mentioned by a defendant does not give licence to the claimant to insert the opposite point in the particulars of claim by way of amendment. The fact is that an entirely new case regarding the operation of Vertis and its trades has been advanced by the Companies in the Proposed Re-Amendments. That case has been made without due notice and too late.
- 20 It was suggested that I need only have regard, in considering this pleading, to the traders' understanding of Vertis' business. That, it seems to me, is an illogical shortcut. In order to establish that there is some form of dishonesty that can lead to an inference of dishonest assistance one needs first to establish that the trades of Vertis themselves were dishonest. Only then does one proceed to considering what the trader actually knew and understood. The point emerges very clearly in respect of the allegations that are pleaded by the Companies in paragraph 39 of the Amended Particulars of Claim:

“As Mr. Gygax and Mr. Shain [these were the traders in question] were aware, on or from 15 June 2009 the number of spot EUAs acquired by RBS increased suddenly and dramatically.”

There are then set out a number of particulars which go to this allegation. The general allegation is, in fact, a twofold one:

- (1) First, there is the allegation that the number of spot EUAs acquired by RBS increased suddenly and dramatically. That is a point of fact that needs to be established.
- (2) Secondly, there is the question of whether Mr. Gygax or Mr. Shain, the traders, were aware of this.

The majority of the pleadings in the Amended Particulars of Claim have this twofold set of issues in relation to trading patterns. A point of fact – a pattern or manner of trading – is asserted and then there is the question of knowledge or appreciation of that point of fact by the traders. In a dishonesty claim this is an altogether unsurprising way of pleading the case. But it is important not to lose sight of the fact that the plea is a twofold one as I have described.

- 21 The Proposed Re-Amendments, not having sufficiently been flagged in either the expert report of the Companies nor in the responses between the parties taking place on the pleadings or in the witness statements, it seems to me that I must treat the Proposed Amendments as amendments that are genuinely late and not in any way, shape or form, formal. They are substantive amendments and they are late.
- 22 The point was made in argument that it is difficult for a claimant to know when amendments have to be moved. It is unsatisfactory, it was said, to have a rolling set of amendments with pleadings being amended left, right and centre on a regular and frequent basis.
- 23 So far as it goes that point is a fair one. But the point does not go very far. The fact is there are well established points in the time-line of a case going to trial at which pleadings are amended. Amendment post disclosure is one. Amendment post witness statements is another. It is a matter for the judgment of the legal teams engaged when amendments are moved on behalf of their clients. It is an issue that is considered as a matter of course by any legal team worth their salt. Any legal team would appreciate that moving substantial amendments a mere six weeks before trial is asking for trouble. That takes me to the question of prejudice to the Defendants.
- 24 As I have noted (see paragraph 21 above), the allegations I am considering involve a twofold allegation of *(i)* alleging the fact of the pattern together with *(ii)* an allegation that the Defendants appreciated that that this pattern was so unusual as to render it and them dishonest. I have referred already to paragraph 39, where this bifurcation of pattern of trading and knowledge of pattern is clear, but the same is clear of the wholly new paragraph 39A, where it is (now) accepted that in addition to the bare assertion of frequency of RBS’ spot trading, an awareness allegation needs also to be pleaded. Again, in paragraph 40, one can see that there is a plea as to Mr Gygax’s and Mr Shain’s knowledge (“would have been aware”; “would have been aware had they cared to enquire”) of the facts set out in that paragraph.
- 25 Although these averments involve what I call a twofold allegation, it is significant that the question of knowledge on the part of Mr. Gygax and Mr. Shain has, to my mind, been unsatisfactorily pleaded so far. What one has in the present pleading, the Amended Particulars of Claim, is the bare averment of awareness without any form of additional particularity.

- 26 Significantly, the response to such pleas in the Defences deals very precisely with the question of knowledge. Purely by way of example, I refer to the First Defendant's Defence at paragraphs 28ff, which are responsive to paragraph 39 of the Amended Particulars of Claim. What is clear that the pleaders have considered the allegations very carefully, and indicated what knowledge is admitted and what knowledge is not admitted or denied on the part of their clients.
- 27 It is nothing to the point that the experts have traversed this ground. An allegation of knowledge needs, in the first instance, to be taken back to the factual witnesses and requires direct engagement with them. The witnesses need time to consider the point and to respond and that response then needs to be pleaded. Indeed, the point may well have to be dealt with in further witness statements in due course.
- 28 There is in my judgment absolutely clear and unequivocal prejudice in this case. In the run-up to a six-week trial commencing in just over a month, to have the Defendants' teams diverted, in having to speak to their witnesses on new points, amend Defences and consider putting further factual evidence, is self-evidently prejudicial. The prejudice speaks for itself, and it cannot be compensated for in costs.
- 29 I appreciate that the Proposed Re-Amendments were flagged by the Companies earlier than the date of the application notice. I have taken that fact fully into account. Even taking that fact into account, these points have been raised far too late. In these circumstances I refuse the new pattern of trading amendments.

Class (1): an elucidation of an already pleaded pattern of trading

- 30 The Proposed Re-Amendments to those patterns of trading that have already been pleaded are different. Clearly, by definition, they have already been flagged in the pleadings and considered by the Defendants. These amendments, as it seems to me, ought to be permitted subject to the issue of knowledge or awareness on the part of the traders being properly pleaded.
- 31 Mr. Parker, Q.C. made the point – and as far as it goes, it is a perfectly fair and correct one – that in response to the bare plead of knowledge in (for example) paragraph 39(1) of the Amended Particulars of Claim, the Defendants have not pressed for further particulars as to why it is said that Mr. Gyax and Mr. Shain were aware of the facts and matters pleaded in that paragraph. Yet the point is taken now, in relation to these Proposed Re-Amendments. Both Defendants say that in relation to the Proposed Re-Amendments the Companies must properly plead the knowledge allegations.
- 32 Subject to knowledge being properly pleaded, I am satisfied that these amendments ought to be made. The question of prejudice, as Mr. Wardell, Q.C. frankly accepted, does not arise in the same way because these are points that have already been articulated and have already been dealt with with the witnesses of fact that the defendants intend to call. Since these points have been considered, the question or issue of prejudice is to my mind minimal and I therefore permit, subject to the knowledge question being properly pleaded, these amendments.

Class (4): the plea based upon the Defendants' anti-money-laundering policies

- 33 That brings me to the anti-money-laundering policies (or "AML" policies) of the Defendants. These documents were received by the Companies in May 2017 as part of the Defendants' disclosure.

- 34 The new point that is pleaded is set out in paragraphs 51A to 51C and 52 of the Draft Re-Amended Particulars of Claim. Significantly, these paragraphs appear after paragraph 50 of the Amended Particulars of Claim, which makes the conclusory averment that, at all material times, Mr. Gygax and Mr. Shain would have been aware that the nature and pattern of RBS' EUA trading with CarbonDesk was suspicious and called for inquiry as to whether the trading was legitimate or whether there was a substantial chance that it was a part of a VAT fraud.
- 35 So, paragraph 50 pleads the dishonest knowledge of the traders. The averment regarding the money-laundering obligations of the Defendants comes after this. What emerged in the course of submission on the part of the Companies was that this was regarded as an alternative way of proving the requisite dishonesty on the part of the Defendants. What appeared to be contended was knowing of and not complying with the AML policies was *prima facie* evidence of dishonesty on the part of the traders and sufficient in itself to justify reaching the conclusion that there was dishonest assistance in the unlawful VAT trades.
- 36 I confess I am still uncertain as to how this plea works. I quote from paragraph 51C of the Draft Re-amended Particulars of Claim:
- “By reason of their reckless failure to have regard to and act in accordance with their obligations to monitor their trading so as to avoid facilitating financial crime, alternatively their reckless failure in circumstances where they were aware of the risk of VAT fraud in the spot EUA market, Mr. Gygax and/or Mr. Shain were dishonest in respect of the trading with CarbonDesk from 15 June 2009 and their dishonesty is to be attributed to the defendants. Further or alternatively, at all material times Mr. Gygax and Mr. Shain were acting in the course of their employment and the defendants are vicariously liable for their wrongful acts.”
- 37 I can quite understand the relevance of the AML policies to the dishonesty that is already pleaded. The AML policies are actually referred to by the Defendants. They refer to their compliance and use of those policies to suggest that they were not in fact dishonest in complicity assisting the fraudulent VAT trades. Clearly, to the extent that such points are made and arise for cross-examination, cross-examination can take place and it may be that if it is demonstrated that there was knowing non-compliance with the AML policies that this would justify an inference that there was dishonesty in conducting the trades. That much I understand. It may be that there is a sufficient connection or nexus between following (or not following) the AML policies so as to permit some kind of inference to be drawn as to the Defendants' state of mind for dishonest assistance purposes.
- 38 But the Defendants' compliance with the AML polices is only relevant if such an inference in relation to dishonest assistance is capable of being drawn. I fail to understand how, absent such an inference being drawn, the AML policies can be relevant. Unless the inference is drawn or capable of being drawn, then dishonesty in one aspect of business says nothing about dishonesty in another aspect of business.
- 39 It seems to me that this is an instance where, the point having arisen on the issues between the defence and the reply, the Defendants and the court are now presented by this most unsatisfactory attempt to insert into the particulars of claim in a very circular way a point that arises later on in the pleadings. It may be that the plea as formulated in the Draft Re-Amended Particulars of Claim actually adds nothing. But I am not confident of that. Indeed, I am not confident of the ambit of the issue actually being raised. In these circumstances, I am not going to permit the amendment. It seems to me that to permit, at this late stage, an amendment that I regards as uncertain in its scope gives rise to a real risk of prejudice to the Defendants in this case.

40 I also refer to the point made in paragraph 7(3) above. Pleadings should at all times be clear and unambiguous, but it is imperative, when one comes close to a major trial, that pleadings be particularly lucid and absolutely clear. I am not satisfied that this is the case here.

Class (3): the general conclusion

41 I turn, finally, the point pleaded in paragraph 54 of the Draft Re-Amended Particulars of Claim. Here, the Companies seek to amend their pleading by describing the claims against the Defendants by reference to the recycling of EUAs in order to perpetuate a trading carousel. What is said here is that the EUAs that were traded were recycled in the shape of a carousel, and so far as it goes that averment is clear. The problem is it is entirely unparticularised. It seems to me that there is nothing in the pleadings that would enable the Defendants to understand why or how it is that this case is being articulated. There is nothing of substance for them to attack by way of response.

42 It is fundamental that when one is describing a dishonest scheme such as, the scheme needs to be described properly, fully and clearly, so that the Defendants know what case it is that they have to meet.

43 The amendment to paragraph 54 fails to meet these requirements, and for that reason I refuse it.