Neutral Citation Number: [2023] EWHC 2567 (Ch)

Case No.: BL-2021-000121

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

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 16 October 2023

Before:

HIS HONOUR JUDGE BAUMGARTNER
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

MERCY GLOBAL CONSULT LIMITED
(IN LIQUIDATION)

Claimant

- and -

(1) MR ABAYOMI ADEGBUYI-JACKSON
(2) MR ALAIN LUDOVIC BOISDUR
(3) MR MICHAEL OSEMWEGIE
(4) MR ABAYOMI AYANKUNLE OLUNLADE
(5) MRS GIFT ENOCH
(6) MRS FUNMILAYO OJUOLAPE ADEGBUYI- JACKSON
(7) CORNERSTONE GLOBAL SYSTEM UK LIMITED
(8) MERCY GLOBAL PROPERTIES SOLUTIONS LIMITED
(9) DOMINION PAYROLL SOLUTIONS LIMITED
(10) OLUGBENGA TITUS JONES SOMADE
(11) OJUOLAPE ARCADE LIMITED
(12) ~~ADEKANMI (ALSO KNOWN AS KANMI) OLAOLU ADEDIRE~~
(13) DMO CONSULTANCY & ACCOUNTING SERVICES LIMITED
(14) PURPOSE IP CONSULT LIMITED
(15) HANSTAL CONSULTING LIMITED

Defendants

- -
- -

Clara Johnson with **Hannah Fry** (instructed by **Wedlake Bell LLP**) for the **Claimant**
Juliette Levy (instructed by **Estate & Corporate Solicitors**) for the **First, Third, Sixth to Eleventh, and Thirteenth to Fifteenth Defendants**
The **Second, Fourth and Fifth Defendants** did not appear and were not represented

Hearing date: 13 October 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down (subject to editorial corrections) may be treated as authentic.

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand down is deemed to be 10.30am on 16 October 2023.

HIS HONOUR JUDGE BAUMGARTNER:

INTRODUCTION

1. Before me last Friday was a Pre-Trial Review (**"PTR"**) in this action, which is listed for a 12 day trial in a five day window from 13 November 2023 to 4 December 2023.

2. A number of issues arose for determination:

   (1) first, the Claimant's application by notice dated 26 September 2023 to strike out the Defences (or Amended Defences) of the First to Eleventh Defendants, for them to be debarred from defending the Claim, and for there to be judgment for the Claimant in respect of its claims against the Thirteenth to Fifteen Defendants, with quantum to be assessed at trial (the **"Debarring Application"**);

   (2) secondly, the First, Third, Sixth to Eleventh, and Thirteenth to Fifteenth Defendants' (which, for brevity's sake, I shall refer to as the **"E&C Defendants"**) application by notice dated 10 October 2023 to adjourn the PTR and the trial (the **"Adjournment Application"**) and to also adjourn the hearing of the Debarring Application; and

   (3) thirdly, practicalities for the trial, including presentation of evidence and bundles, the trial length, and trial timetable.

3. For reasons which will become apparent, I was unable to consider the third issue at all, and only able to consider the first issue in part after I refused the Adjournment Application and adjourned hearing of the Debarring Application for the E&C Defendants and the PTR on an expedited basis (given the impending trial window) to the next business day, 16 October 2023. These are my reserved reasons for doing so.

BACKGROUND

4. The background to the dispute is set out [3] to [10] in Richards J's judgment given on 31 March 2023 in respect of earlier case management issues ([2023] EWHC 749 (Ch)). The Debarring Application was made following the repeated failures of each Defendant to comply with the court's case management orders. Those failures are set out at [38] in the skeleton argument of Clara Johnson and Hannah Fry dated 5 October 2023, and can be summarised as follows:

   (a) no Defence has been filed by the Second, Third, and Fifth Defendants; these were due in April 2021;

   (b) no Responsive Defence has been filed by the First to Eleventh Defendants and the Thirteenth to Fifteenth Defendants; these were due on 9 June 2023;

   (c) no disclosure has been provided by any of the Defendants; this was due on 14 July 2023; and

   (d) no witness statements have been filed or served by any of the Defendants; these were due on 14 September 2023.

5. In their skeleton argument, Ms Johnson and Ms Fry set out a long history of the Defendants' non-compliance with courts orders throughout the proceedings, drawing upon the facts and matters set out in the seventh witness statement of Jason Stuart Ainge dated 25 September 2023. I need not rehearse that history again here, save to fairly say that the Defendants' engagement in their preparation for trial in complying with the orders of this court has, at times, been listless and sporadic.

ADJOURNMENT APPLICATION

6. Juliette Levy, who appeared on behalf of the E&C Defendants, sought to persuade me to adjourn the PTR, the Debarring Application and the trial, with the E&C Defendants' application to adjourn the trial resting on a pending application by the First, Seventh and Eighth Defendants for leave to appeal to the Supreme Court the Court of Appeal's refusal to allow an appeal from Richards J's judgment of 31 March 2023 refusing permission to amend their Defences to include a "VAT Defence". In doing so, she proposed a revised timetable for the service of Defences or Amended Defences, witness statements, and forensic evidence, and a timetable for the service of responsive evidence to the Debarring Application. The E&C Defendants pursue this course despite the fact that there is no (or at least, no proper) application on notice before me for the service of these documents outside of the directions made by Richards J at the Case Management Conference (**"CMC"**) on 5 May 2023. That, in and of itself, should have resulted in the court refusing to disturb the CMC timetable set by Richards J, especially given the trial window is only four weeks away. I shall return to this aspect of the E&C Defendants' applications shortly.

7. The basis for Ms Levy's submissions are set out in her skeleton argument dated 10 October 2023. She relies upon the tenth witness statement of Rory Khilkoff-Boulding dated 12 October 2023, which, I was told, formed part of a hard copy bundle delivered to the court around 5pm on Thursday. The hard copy had not found its way to me by the time the matter was called on, although I was sent a copy via email by the Claimant's solicitors during the early course of the PTR, and was able to consider Mr Khilkoff-Boulding's witness statement in the hearing.

8. The reasons given for the Adjournment Application are succinctly put in Ms Levy's skeleton argument. On 20 September 2023 the Court of Appeal refused an expedited appeal from Richards J's order of 5 May 2023 (for the reasons given in his judgment dated 31 March 2023) refusing the E&C Defendants' draft amendments to plead the VAT Defence, and gave an immediate decision, but handed down their reasoned judgment on 4 October ([2023] EWCA Civ 1073). The E&C Defendants "*are currently in the process of finalising their petition for permission to the Supreme Court*", and by this application seek to adjourn the trial pending the determination of the leave application.

9. The Chancery Guide 2022 (June 2023 Edition) states, at paragraph 12.27:

> "Once a trial date has been fixed, it will rarely be adjourned. An application for adjournment should only be made where there has been a change of circumstances not known at the time the trial was fixed. The application should be made as soon as possible and never, unless unavoidable, immediately before the start of trial."

10. Clearly the Court of Appeal's judgment and reasoning were unknown to the E&C Defendants at the time the trial was fixed at the CMC, and the Adjournment Application appears to have been made as soon as possible and, unavoidably, immediately before the start of trial, now four weeks away.

11. A factor to weigh in the balance in considering an application to adjourn a trial on the basis of a pending appeal to the Supreme Court is that the Supreme Court is unlikely to grant an appeal: see *Trafalgar Multi Asset Trading Company Limited v Hadley* [2023] EWHC 651 (Ch), at [26] to [27] per Nicholas Thompsell, and *Mandrake Holdings Limited v Countrywide Assured Group plc* [2005] EWCA Civ 840, at [23] per Rix LJ.

12. It seems to me here that the grant of permission to appeal to the First, Seventh and Eighth Defendants is intrinsically unlikely. The Supreme Court only grants permission where an appeal raises an arguable point of law of general public importance which it should consider at that time. These Defendants seek to overturn *Mainpay Limited v Commissioners for HM Revenue and Customs* [2022] EWCA Civ 1620, a unanimous decision of the Court of Appeal, where the taxpayer in that case had also lost their appeals before the Upper Tribunal (Tax and Chancery Chamber) and before the First-tier Tribunal (Tax Chamber). Here, the Court of Appeal (Underhill, Arnold and Phillips LJJ) delivered a unanimous reasoned judgment (and, I am told, provided in draft form to the parties only two days after the hearing of the appeal on 20 September 2023, having advised *ex tempore* that the Defendants' appeal was dismissed), and considered (at [34], per Arnold LJ) that the Defendants' arguments were "elusive", and, further, that they had misunderstood Whipple LJ's judgment in *Mainpay*.

13. There is, in any event, a general principle that proceedings should not be held or delayed pending the resolution of appeals of case management decisions. CPR r.52.16 provides that the appeal of an order or judgment does not automatically operate as a stay on the proceedings. Consistent with this principle, in *Royal & Sun Alliance Insurance plc v T&N Ltd (In Administration)* [2003] PIQR P26, Arden LJ said this (at [47]):

> "The principle that an appellate court should only interfere in matters of case management where a judge is plainly wrong is well-established and has been emphasised on many occasions since the introduction of the CPR. Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process."

14. A party who seeks a stay of proceedings pending the resolution of their appeal should properly apply for one pending the outcome of their appeal: see *Mahtani v Sippy* [2013] EWCA Civ 1820, where it was held by Aikens LJ that an appellant must normally show "some form of irredeemable harm":

> "13. The general approach of the courts is that the court must first of all consider whether or not there are solid grounds for seeking a stay. If the appellant puts forward solid grounds for seeking a stay the court must then consider all the circumstances of the case. It must weigh up the risks inherent in granting a stay and the risks inherent in refusing the stay. … The general starting point, however, is that neither the commencement of an appeal nor the grant of permission to appeal affects the enforceability of a judgment

> below. If an appellant desires a stay, he has to apply and put forward solid grounds for doing so.
>
> 14. It has been said … in *DEFRA v Downs* [2009] EWCA Civ 257 … that a stay is the exception rather than the rule and that the 'solid grounds' which an applicant must put forward are normally 'some form of irremediable harm if no stay is granted'."

Here, the E&C Defendants have not sought any stay and, it seems to me, having considered all the material placed before me, that they would have no proper basis to do so.

15. Pulling those threads together, the possibility that case management decisions would have to be reconsidered pending an appeal does not in and of itself justify suspending ongoing proceedings. If that were so, then it would apply in relation to any appeal of a case management decision, and the entire process of litigation would risk being derailed.

16. In my judgment, those factors alone provide good reason for this court not to grant the Adjournment Application.

17. A consideration of other factors points in exactly the same direction. As Ms Johnson and Ms Fry set out in their skeleton argument at [11.2], the implicit assumption of the E&C Defendants that the adjournment of the trial, followed by substantial delay, and then a single trial, is preferrable to a swift trial followed by the small possibility of a further reopening if the Supreme Court decides in the First, Seventh and Eighth Defendants' favour, is wrong. In my judgment, the trial can (and should) proceed in November, and if the Supreme Court both grants permission and allows those Defendants to plead the VAT Defence, the trial judge can make directions or orders which allow any judgment to be revisited.

18. Ms Johnson and Ms Fry further submitted that the court should be very slow to grant an adjournment at the request of a party that has missed deadlines and caused delays. They rely upon *GASL Ireland Leasing A-1 Ltd v SpiceJet Ltd* [2023] EWHC 1107 (Comm), where Foxton J (at [5]-[13]) refused an application for an adjournment, even where this resulted in a party not being able to participate in the trial. Factors which persuaded Foxton J that it would not be appropriate to adjourn a long outstanding trial included a long-running series of attempts by a parlous defendant to play for time; that it would push the trial back for a substantial period of time, well into 2024, causing serious prejudice to the claimant, and disrupting other court users at a time when court resources are under considerable pressure; that an adjournment would involve significant wasted costs for the claimant, in circumstances where the defendant's ability or willingness to pay them was gravely doubted; the defendant's difficulties in meeting its legal fees; and the absence of evidence that the defendant was making serious attempts to prepare for trial.

19. It seems to me that the directions sought by the E&C Defendants upon the Adjournment Application reveal the primary reason for seeking an adjournment of the trial: to give them time to serve Responsive Defence(s), to provide disclosure and to prepare witness statements in circumstances where they have not complied with the directions of this court. All that should have been done months ago, in the knowledge

that a 12 day trial had been fixed for November. The case management directions of this court must be complied with, unless there is good and sufficient reason not to. The reasons for the E&C Defendant not doing so, given by Mr Khilkoff-Boulding in his witness statement, do not, on the papers I have seen, provide good and sufficient reason to merit extension of the deadlines which have now expired (as provided by CPR r.3.1(2)(a); see also the White Book, at para.3.1.2.1, citing the three-stage approach for determining such applications set out in *Denton v TH White Ltd* [2014] 1 WLR 3926, per Lord Dyson MR and Vos LJ, with whom Jackson LJ agreed). I make it clear that I am not determining any application to extend any of the E&C Defendants' case management deadlines, as there is no such application before me; I consider this aspect only within the factors arising upon the Adjournment Application.

20. I have also considered whether any prejudice to the Claimant caused by the adjournment sought could be remedied by costs. The immediate prejudice would, of course, be the delay in the trial of the Claimant's action. The Claimant no longer has any business or creditors, but is said to owe HMRC some GBP 21M in under-declared VAT. The Claimant's Claim alleges that VAT was misappropriated by the First Defendant with the assistance of his wife (the Sixth Defendant) and other Defendants. The Claimant alleges this misappropriated VAT was the subject of a significant VAT fraud perpetrated between at least 2015 and 2020 by the First Defendant. I was told by Ms Johnson that the Defendants' costs are being paid from a finite single pool of assets against which the Claimant will in due course seek to enforce, but which is being eroded by costs. I am also told that the claim is of a size such that, if judgment is given for the Claimant, the Defendants' disclosed assets would be insufficient to pay such an award in full, let alone costs. In those circumstances, I do not consider costs to be a sufficient remedy.

21. Having considered all those factors, I came to the inevitable conclusion that the trial can and should proceed in November, and that the Adjournment Application should be dismissed. I ordered accordingly.

DEBARRING APPLICATION

The E&C Defendants

22. Through Ms Levy, the E&C Defendants sought to adjourn the Debarring Application together with the PTR to the week commencing 30 October 2023 on the basis that it is a "heavy application" within the meaning of paragraph 14.44 of the Chancery Guide and, as such, the Claimant had improperly had it listed for hearing at the PTR. I did not accept that submission, and dismissed the E&C Defendants' application to adjourn.

23. After a short break to allow Ms Levy to obtain instructions on the consequences of my ruling, I was told the First Defendant (who at all material times was the sole shareholder of the Claimant, and who was not present at the PTR) had very recently taken ill and was consulting a psychiatrist about his mental health later in the afternoon. Ms Levy asked me to adjourn the Debarring Application and the PTR insofar as the E&C Defendants were concerned to the next business day, 16 October 2023, because it might be that the First Defendant wished to give evidence in opposing it. Given what I had been told about the First Defendant's mental health, and the gravity of the Debarring Application for the Defendants, I granted that application so as to enable the court and the Claimant to be provided with a report about the First Defendant's mental

health in order to consider the appropriate way forward. For the adjourned PTR to be effective on 16 October 2023, I directed that any psychiatric report relied upon by the First Defendant by served upon the Claimant and the court by 4.00pm on 15 October 2023.

24. My reasons for refusing to adjourn the Debarring Application and the PTR on the basis initially sought by the E&C Defendants are as follows.

25. In his witness statement, Mr Khilkoff-Boulding relied upon the length of the Debarring Application's supporting witness statement by Mr Ainge – which is 26 pages plus an exhibit comprising 938 pages – as grounds for the Debarring Application being a "heavy application", to which his clients needed more time to respond. Ms Levy further relied upon the complexity of the law in applications of this nature as placing it within the "heavy application" category. She said that the E&C Defendants wished to defend the Debarring Application, and that they should be offered a full and fair opportunity to do so, particularly given the draconian nature of the relief that the court was being asked to grant against them.

26. Having considered those submissions against Mr Ainge's witness statement, the Application Notice and the Claimant's skeleton argument, I cannot accept Ms Levy's submission that the Debarring Application is a "heaving application". As I see it, the Debarring Application is a relatively straightforward one. The supporting witness statement from Mr Ainge simply sets out the procedural background and the extent of each Defendants' noncompliance with case management orders throughout the proceedings, which, as I mentioned, are summarised in Ms Johnson and Ms Fry's skeleton argument. It goes on to set out the explanations proffered for those breaches by the Defendants, the overarching basis for which is that the Defendants have been severely restricted in their ability to fund legal expenses, and that the Claimant and its solicitors have made it impossible for them to obtain the use of non-proprietary assets for funding legal fees.

27. Putting those explanations to one side for the moment, all of the matters spoken to in Mr Ainge's witness statement are matters within the E&C Defendants' knowledge; the Debarring Application was served at least 14 days ago, and the sole though lengthy exhibit simply comprises documents which go to support the procedural background set out by Mr Ainge in the witness statement. Mr Khilkoff-Boulding says that he was unable to properly consider the Debarring Application because he was busy preparing for disclosure, the Amended Defences, and witness statements (despite the time for service of all these already having passed), and an application to appeal from the Court of Appeal to the Supreme Court. But the factual issues are simple. The Debarring Application was issued two weeks ago, and well after the Court of Appeal's draft reasons were circulated to the parties two days after the appeal hearing on 20 September 2023. The E&C Defendants could have, and should have, been ready to deal with the Debarring Application when the PTR was called on before me. They were not.

28. As to the E&C Defendant's procedural failures, that is work that should have been done within the timetable set by the court at the CMC. Mr Khilkoff-Boulding concedes there has been slippage by his clients in complying with the CMC directions given by Richards J on 5 May 2023, but says he has been busy with other applications and the expedited appeal to the Court of Appeal. This is, however, the first time those matters

have been raised with the court, and, in my judgment, in and of themselves do not provide sufficient reason to accede to an application to adjourn the Debarring Application, which in my judgment can be properly defended in short order on principle.

29. It was for those reasons that I refused the E&C Defendants' application to adjourn the Debarring Application and the PTR to 30 October 2023.

The Second, Fourth and Fifth Defendants

30. Ms Johnson told me that the Debarring Application had been served upon the Second, Fourth and Fifth Defendants and that they were aware of the PTR being listed hearing on 13 October. They did not, however, appear before me, and were not represented. Ms Johnson invited me to consider the Debarring Application against those Defendants, and, given the proximity of the trial, I saw no good reason why I should not.

31. The Second Defendant, Alain Ludovic Boisdur, is a litigant in person. He failed to file a Defence, which was due in April 2021, and a Responsive Defence, due on 9 June 2023.

32. The Fourth Defendant, Abayomi Ayankunle Olunlade, was represented by Estate & Corporate Solicitors until 25 July 2022. They came off the record for him on 22 August 2023, and thereafter Mr Olunlade has been a litigant in person. He filed a Defence on 4 February 2021. On 4 September 2023, Mr Olunlade served, out of time and without the court's permission, a document entitled "Defence Re-re-re-amended Particulars of Claim". This document is akin to a witness statement and has documents annexed to it. Mr Olunlade did not file a disclosure list, nor has he served any documents upon the Claimant. His Responsive Defence was due on 9 June 2023.

33. The Fifth Defendant, Gift Enoch, is also a litigant in person. She too failed to file a Defence, which was due in April 2021, and a Responsive Defence, due on 9 June 2023.

34. Each of Second, Fourth and Fifth Defendants was, at times material to the Claim, an officer of the Claimant company.

Legal framework

Power to strike out defence and debar from defending claim

35. CPR r.3.4(2)(c) provides that the court may strike out a statement of case where it appears to the court that there has been a failure to comply with a rule, practice direction or court order. CPR r.3.1(3) also provides a specific basis on which the court may make an unless order providing for a statement of case to be struck out; the order may also provide for the relevant party to be debarred from further participation in the proceedings in the event of non-compliance. The court also has the power to strike out a defence and debar a defendant from defending proceedings as part of its inherent jurisdiction to regulate its proceedings: see *JSC BTA Bank v Ablyazov (No.8)* [2013] 1 WLR 1331, per Rix LJ (with whom Maurice Kay Toulson LJJ agreed) at [168]. Further, the White Book says at paragraph 29.9.2:

> "In response to major or repeated rule disobedience by a claimant, claims are sometimes struck out or dismissed with costs. The equivalent sanction for

> defendants is an order striking out that defendant's defence and debarring that defendant from defending the claim."

Immediate strike out/debarring order

36. An immediate debarring order (*i.e.* one not preceded by an unless order) may be appropriate in cases where the fairness of the trial would otherwise be put in jeopardy: see *WWRT Limited v Tyshchenko* [2023] EWHC 907 (Ch), per Bacon J at [26]; see also *Al-Najjar v Majeed* [2022] EWHC 363 (Ch), per Leech J at [6]-[7].

37. An immediate debarring order was made in *Arrow Nominees Inc v Blackledge* [2001] BCC 591. In that case, Chadwick LJ (with whom Ward and Roch LJJ agreed) said (at [54]):

> ".. where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

38. Sharp J sounded a similar note in *Hayden v Charlton* [2010] EWHC 3144 (QB), a claim which was struck out and where judgment was entered for the defendants without a prior unless order on the basis of the factors which she identified at [75]:

> "First, … there has been a deliberate and wholesale non-compliance with the rules and orders of the court by the claimants, amounting to a total disregard of the court's orders. Second, the claimant's [sic] conduct of the litigation and their breaches of the case management directions of the court are contrary to the overriding objective, and have resulted in a serious delay to the progress of the actions. … As a result, the trial window has been lost … . Third, there has been no proper explanation for these failures, which in my view, as a matter of reality, remain unexplained. Fourth … the most recent failures follow a pre-existing pattern for the claimants' conduct of the litigation of delay, defaults, and disobedience to court orders. Fifth, the claimants made no attempt to respond to these applications, save for the last minute appearance by Mr Starte … . Sixth, the significant prejudicial and oppressive effect that the claimants' conduct of the litigation has had on the defendants, who as litigants in person have been placed in the position where it is they who have had to struggle to progress the actions brought against them."

39. Having considered those authorities, Leech J in *Al-Najjar* made an immediate debarring order in circumstances where he was satisfied that the defendants' failure to plead to

the core allegations in the case, their failure to give disclosure and their failure to serve substantive witness statements, addressing the issues made it:

> "almost impossible for the Claimants to understand the case which they have to meet at trial. Moreover, because the Defendants are accounting parties, there is significant prejudice to the Claimants. It is for the Defendants, as the accounting parties, to plead and prove what they have done with the money, and presumptions are made against them if they fail to do so. An accounting party who fails to provide that information is not only in breach of the rules of pleading but also of his or her substantive obligations as a fiduciary" (at [12]).

The defendants were, he considered:

> "responsible for deliberate obfuscation of the disclosure process and of the material upon which the Claimants needed to rely in order to prove their case and to establish the scope of the Defendants' accounting obligations" (at [14]).

Leech J concluded (at [17]):

> "In summary, Mr Hornett submitted that the inevitable effect of the Defendants' breaches of the Order will be that there will either have to be an adjournment of the trial or the Claimants will be unfairly prejudiced. I accept that submission. In a case of this kind, where the Defendants are accounting parties, and it is their obligation to put before the Claimants and before the court a true and proper account of their dealings with the funds of the partnership and there is bound to be prejudice if they fail to comply with those obligations right up until the eve of the trial itself. In my judgment, it will jeopardise a fair trial of the action as Chadwick LJ described in *Arrow Nominees*."

40. When assessing the overall proportionality and justification for a debarring order, the court will have regard to all of the circumstances of the case. Particular factors to consider will include the seriousness of the breach, the extent to which it is excusable and the consequences of the breach: *Byers v Samba Financial Group* [2020] EWHC 853 (Ch), per Fancourt J at [123]. In *Byers*, Fancourt J went on to say (at [188]-[189]) that, in the circumstances of the case, making an unless order first would be "pointless" and the trial date would not be effective.

Consequences of strike out and debarring order

41. The usual rule is that where an order debars a defendant from defending particular proceedings, this should mean what it says: at the trial of the relevant proceedings, the defendant should not be permitted to participate in the normal way, such as adducing evidence, cross-examining witnesses, or making submissions: *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWHC 3732 (Ch), per Edwin Johnson QC at [55]-[56]; and, see further, *Financial Conduct Authority v London Property Investments* [2022] EWHC 1041 (Ch), per Trower J at [38-[53], and *Integral Petroleum SA v Petrogat FZE* [2023] EWHC 44 (Comm), per David Edwards KC at [46]-[49].

Analysis and conclusions

Serious and significant breaches

42. Ms Johnson submitted that the breaches by the Second, Fourth and Fifth Defendants are so serious and significant such that any Defence (where filed) should be struck out and they be disbarred from defending the claim. She submitted that there has been a blatant, flagrant, and wholesale non-compliance by the Second, Fourth and Fifth Defendants with the rules and orders of the Court, amounting to a total disregard of the Court's orders. The breaches are both serious and significant, and contrary to the overriding objective. She submits the non-compliance is comparable to *Hayden* and *Al-Najjar* in which such non-compliance justified the making of immediate debarring orders.

43. I accept that submission. The Second and Fifth Defendants have failed to file Defences and Responsive Defences at all, and the Fourth Defendant has, in my assessment, failed to file a Responsive Defence properly in accordance with the CPR and the orders of this court. The result is that it is almost impossible for the Claimant to understand the case which it has to meet against these Defendants at trial. Each of the Defendants failed to appear before me on Friday to oppose the Debarring Application, despite being on notice of the PTR and the Debarring Application.

No good reason

44. Ms Johnson submitted that no good reason has been proffered by the Second, Fourth and Fifth Defendants for their breaches of the court's orders. I accept that submission. At no stage has any of these Defendants applied to vary the dates set out in the CMC order of Richards J, nor have any of them provided any or any sufficient explanation for their failure to serve defences when they were required to.

All the circumstances of the case

45. Ms Johnson further submits that the non-compliance with the court's orders in this case is particularly egregious as these proceedings are concerned with breaches of duty by fiduciaries and trustees who have a duty to account to provide information and disclosure explaining what has happened to the Claimant's money. She submits the position is akin to that in *Al-Najjar*. I agree with that submission. In my judgment, these Defendants, by failing to comply with the court's orders and to provide such information, are in breach of their substantive obligations as a fiduciary or trustee, given their former role as officers of the Claimant company. Their non-compliance will jeopardise a fair trial in the way in which Leech J described in *Al-Najjar*.

46. There has, I am also told, been no disclosure from any of these Defendants. I accept Ms Jonhson's submission that this is especially serious in a case like this, involving allegations of fraudulent breach of trust and where the authenticity of documents has been put in issue by the Claimant. This, in my judgment, provides further grounds for an immediate debarring order.

47. As the Claimant has filed and served a Reply to the Amended Defences, given disclosure and prepared witness statements upon which it will rely at trial, I do not

consider an unless order would be appropriate. Such an order would be pointless in the circumstances, and likely result in the loss of the trial date.

48. It was for all those reasons that I granted the Debarring Application against the Second, Fourth and Fifth Defendants.

DISPOSALS

49. Consequently, I made orders:

(1) dismissing the E&C Defendants' application to adjourn the PTR and the trial;

(2) adjourning:

(a) the Debarring Application against the E&C Defendants; and

(b) the PTR,

for hearing on an expedited basis to 16 October 2023;

(3) granting the Debarring Application against the Second, Fourth and Fifth Defendants, such that

(a) any defence filed by the Fourth Defendant be struck out; and

(b) the Second, Fourth and Fifth Defendants be debarred from defending the Claimant's Claim; and

(4) standing over determination of Claimant's costs of and incidental to the Adjournment Application, and the Debarring Application, and of the proceedings against the Second, Fourth and Fifth Defendants, to the adjourned PTR on 16 October 2023.