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

BL-2020-001343

BETWEEN:

(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

Transcript of proceedings made to the court on

Day 35 - Tuesday, 14 May 2024

The claimants are represented by Mr Stephen Robins KC, Mr Andrew Shaw & Mr Philip Judd

Michael Andrew Thompson (D1) is represented by Miss Anumrita Dwarka-Gungabissoon

Simon Hume-Kendall (D2) & Helen Hume-Kendall (D10) settled and are no longer appearing

Elten Barker (D3) settled and is not appearing

Spencer Golding (D4) is debarred from defending the claim

Paul Careless (D5) and Surge Financial Limited (D6) are represented by Mr Ledgister & Mr Curry

Russell-Murphy (D7) and Grosvenor Park Intelligence Investments Limited (D9) appear in person

Robert Sedgwick (D8) appears in person

Tuesday, 14 May 2024 (10.30 am)

MR ROBINS: My Lord, I call Mr Osborne.

Examination-in-chief by **MR ROBINS**

MR ROBINS: Could you tell the court your name, please?

A. My name is Christopher Osborne.

Q. And your business address?

A. My business address is 27 Throgmorton Street in London.

Q. Can we have <D2/1> at page 1 on the screen, please. Do you recognise this as your first report in these proceedings?

A. I do.

Q. At page 54, is that your signature?

A. It is.

Q. Do the opinions set out in this report represent your true and complete professional opinions on the matters to which they refer?

A. Yes, they do.

Q. Can we look at <D2/3> at page 1, please. Do you recognise this as the joint statement of you and Mr Wright in these proceedings?

A. I do.

Q. At page 19, is that your signature on the left?

A. That is my signature on the left, yes.

Q. Ignoring the opinions expressed in here by Mr Wright, do the opinions expressed by you in this joint statement represent your true and complete professional opinions on the matters to which they refer?

A. They do.

Q. Finally, <D2/4> at page 1, please. Do you recognise this as your supplemental report?

A. I do.

Q. At page 27, is that your signature?

A. It is.

Q. Again, could you confirm that the opinions set out in this report represent your true and complete professional opinions on the matters to which they refer?

A. Yes, I do. I confirm.

MR ROBINS: If you could stay there, please, my learned friend will have some questions for you.

Cross-examination by **MS DWARKA**

MS DWARKA: Good morning, Mr Osborne.

A. Good morning.

Q. You provided two expert reports which set out your views on the value of LOG's interest in IOG for the court and for the parties to use, and a joint report. Is that right?

A. Yes, that's correct.

Q. Now, if we can just have your first report open, at <D2/1>, we will use that mostly, so I can just refer to it for you. Now, in your first report, you describe IOG as a junior exploration and production company focused on extracting oil and gas from legacy assets in the UK waters of the North Sea and tell us that its shares are listed on the AIM. Do you remember this or would you like to see the paragraph?

A. If it is convenient to see the paragraph.

Q. It is <D2/1>, page 5, and the point you refer to it is 1.8.

A. Yes.

Q. Now, you explain what IOG had in terms of licences to explore for and extract hydrocarbon from fields in the same region, in the North Sea, at the first time LOG first invested in IOG. Do you recall that one? It is at <D2/1>, page 10, top of the page. Paragraph 2.11.

A. Yes, that was, and, in fact, still is, my understanding.

Q. Now, as part of your analysis, you looked at the events that unfolded throughout the years and spent some time analysing LOG's facility agreements with IOG; yes?

A. Yes, correct.

Q. LOG used money borrowed from LCF to then lend to IOG. Did you know that?

A. That's my understanding, yes, my Lord.

Q. So, all in all, you provide the reader with an explanation of which method you chose to use, the Black-Scholes Merton method, why it is the most appropriate method. You set out the various issues and risk factors that you could foresee that could affect the valuation analysis and which may make your analysis less robust, but still conclude it is the best method of valuation. Is that right?

A. My Lord, my view is that it's the best starting point for a valuation.

Q. Yes. So you provided us with some figures on what you think the valuations were for a certain period throughout the report, just to explain.

A. Yes, my Lord, that's fair.

Q. At internal page 14, so that's page 17 of the first report, you explain that LOG could subscribe to 239.6 million new shares in IOG on 18 March 2019. Can you see that? It's 2.42?

A. I can see that, and, my Lord, yes, I do say that, but I say "in principle".

Q. Yes. Immediately after that, at 2.43, you then explain why, potentially, they did not do so by referring to the UK Takeover Code and its impact. Essentially, you explain that the mandatory takeover rules would have been an issue if they did acquire more shares due to their current shareholding because they could not own more than 30 per cent without triggering the relevant provisions?

A. That's correct, my Lord, and that was, and is, my understanding.

Q. But had they sold some shares gradually or via any other disposal route, that would not have been an issue, would it?

A. I think that's fair, my Lord, yes.

Q. Now, you also provide the reader with some information as to what happened with warrant 1 and warrant 3. In relation to warrant 1, you tell the administrator -- you say that the administrator did not exercise 5.4 million of the warrants which expired in 2021. That's <D2/1> at page 32, paragraph 4.16. Do you remember?

A. If you give me a second.

Q. Have a look.

A. Yes, my Lord, and indeed I'm explaining that --

Q. That they didn't exercise their rights?

A. That they did not because that would otherwise have obliged them to make an offer for the entire equity.

Q. In relation to warrant 3, you say that the administrator didn't exercise 20 million of the warrants which expired on 31 August 2023. That's at page 39, top of the page, paragraph 4.37. I think straight after you mention that the rights had been out of money since September 2022?

A. Indeed, the rights were out of the money, my Lord.

Q. So exercising it after that would have had no benefit, if it was done?

A. It would have involved a net cost, rather than a net benefit, yes, my Lord.

Q. So, then, at page 37 of your report, we then get -- because you have gone through an analysis of the method that you use. Then you place the maximum theoretical value of the portfolio as 70.7 million, and we are talking about -- that's in September 2018. That's at <D2/1> at page 40, bottom of the page.

In that same paragraph --

A. Yes, indeed. I was just pausing because there was a moment when the value was higher, at 88.8 million.

Q. Yes, you say, in May 2022, the value was higher because there was a cash value of 21 million added to the pot, making the total value of 88.8 million, so you do mention that, and that's your position?

A. Well, yes, I would just clarify, my Lord, that we are talking here about a maximum theoretical value prior to any considerations --

Q. Yes, I will go through your section 5 in a minute. I am just going through your report as I understand it, just to make sure we are on the same page.

A. I'm grateful.

MR JUSTICE MILES: Can I just understand that? You say "a maximum theoretical value prior to any considerations~..."

A. Of discounts that might be applicable for anyone actually seeking to transact in these shares.

MR JUSTICE MILES: Yes.

MS DWARKA: In section 5 of your report, you then look at market-related factors which may affect the value of IOG to explain why the theoretical value of the investment that you have given is likely going to be different from the actual value?

A. My Lord, yes, I think that's almost correct. I think the point is not so much the factors that would affect the value of IOG; it's rather the factors that would affect the values of large tranches of shares in IOG.

Q. If we go to that page, that's page 42, so that you can see, and your Lordship can see, those factors. At 5.1, you list the four factors, you explain the position in that section. You talk about the Norwegian Bond; you talk about the fact there was no active market in derivative securities; and you talk about what's happened as at today's date. I mean, in terms of the Norwegian Bond, that's something that we know now, but that was not information that we would have known before, so it's not information that would have affected the value of the shares prior to this event happening?

A. So, I think, as of --

Q. Is that fair?

A. No, not quite, if you will just allow me to expand slightly, my Lord. There were times when optimism was high and the Norwegian Bond was trading at or close to, or even above, par value, and there were times when it was trading below. Those times when it was trading sometimes at a quite significant discount to par value, there would, by definition, have been doubts on the part of the bondholders as to whether it was likely to be repaid in full. So it's not just a factor that --

Q. No, no --

A. -- is something that we know about today.

Q. -- I think you have set out all the other factors, but two of it seem to talk about the Norwegian Bond which happened at a certain point, so September 2019. It wouldn't have affected the valuation before that. That's what I'm talking about?

A. That's absolutely correct --

Q. So this is information --

A. -- it would not have affected the valuation prior to September 2019.

Q. In terms of the other problem that you suggest, so you talk about the need to consider that a discount would need to be applied to different types of disposal strategies, but the value of the discount would have been dependent upon what's happening around the time, wouldn't it, and what strategy the person is using to dispose of the shares as well? Is that the position?

A. Yes. My Lord, if I may, I would like to give a slightly expanded answer. I will try to remain brief. The value of a large block of shares is, of course, whatever anybody is prepared to pay for it at the time. The strategies for disposal of a large block of shares are ways of thinking about what might be the difference between the theoretical value and the actual market value. So, I'm not so much thinking about strategies for actual disposal, but more about ways to think about the scale of the discount that might be required.

Q. Now, you explain to us that there are generally three ways of disposing substantial holding in a company. That's at page 45, paragraph 5.15. It is set out at points (i), (ii) and (iii) there, but in the gist, you talk about a slow release in the market, block trade through one or more investment banks, or sale to a strategic acquirer.

A. Yes.

Q. RockRose -- you have heard of RockRose, have you?

A. I have heard of RockRose, yes, my Lord.

Q. They would have been a strategic acquirer?

A. I think RockRose absolutely was a strategic acquirer.

Q. I think in your report -- I don't actually have the reference for it -- you say it is unlikely that block trade would have happened. I think you say that somewhere in your report. But did you spend time looking at that point? Was that something that you looked into when --

A. My recollection, my Lord, is that I/we did not spend much time looking at that point.

Q. So, on what basis, then, do you say that's unlikely?

A. Well, just as a function of the illiquidity of the market. I think there are some reasons that are given, which is that -- which were to do with the fact that the buyer of a large block of shares would face the same liquidity issues, would be unable to dispose of them other than slowly, and would be exposed to share price movements during the period in which they were holding the shares that they were taking time to dispose of.

Q. But you didn't really test it to know whether that's likely or unlikely; you just took a view?

A. I think that's fair, my Lord, although I think testing it would have required some primary market research, perhaps us speaking to potential buyers and investment banks --

Q. So that's not something that you did?

A. -- which would have, I think, been out of scope for an exercise of this kind.

Q. So, in order to assess the value, you don't think it was important to check if it was possible to dispose of substantial asset via a certain type of method, because your scope, the expert report, was meant to deal with the valuation and what was likely or not likely, in terms of --

A. I think, my Lord --

Q. -- well, the valuation of the shares at a different point?

A. My Lord, I think primary research of that kind is not something that I have ever attempted across many valuations over time. I can see that it might have yielded some insight, but I would not have expected it to yield any insight proportionate to the amount of effort that would have been involved.

MR JUSTICE MILES: I'm just trying to think about how such primary research would work for a retrospective valuation. Presumably, you would have to be saying to people in the market, "What would you have done, had you been offered this block of shares several years ago?".

A. Indeed, yes, my Lord. I think -- I mean, one would be lucky to get a thoughtful, considered, honest answer.

MR JUSTICE MILES: It's different from the situation where you're testing the market prospectively, seeking to sell something.

A. Indeed, my Lord.

MS DWARKA: So, it is hard to say whether it is likely or unlikely, in a sense? Rather than say it is unlikely, it is just hard to say because it is hard to test what could have happened in the past?

A. My view, and, my Lord, you must take it or leave it, because I'm not as experienced as I could be in such matters, is that a block trade would have been difficult and is, indeed, unlikely. I don't know if it's fair to refer to the opinion of Mr Wright, but he was in agreement on that point.

Q. Now, at paragraph 5.4, page 40 -- no, it is 43 externally; internally, it is page 40 -- you say that, for most of the period between 2016 to April 2019, IOG loan could have likely been sold at quite close to their face value?

A. Indeed.

Q. Within your report and in your supplemental report, you estimate and maintain that the discount to apply to the theoretical value you provided should be between 20 to 30 per cent. In your first report, it is page 36, bottom of the page, if you want to have a look.

A. That's a different thing.

Q. No, sorry, 46. You do say in there that that rests on a qualification -- last sentence -- "namely that LOG could have sold its holdings down in a structured and measured way over time". So your range of 20 to 30 per cent is a general range, but for had they sold it in a structured manner or measured way, that would have been different?

A. I'm sorry, I think the intended meaning of the paragraph is that, if they could have sold it in a structured and measured way over time, then the appropriate discount --

Q. Would have been different?

A. -- would be likely to sit between 20 and 30 per cent.

Q. So you don't mean that, if it was sold in a measured way, the discount would have been different? You still think it's still between 20 and 30 per cent?

A. Yes. I can see now that the wording is unfortunate. That opinion rests on a qualification. But the intention is to say, provided you can do that, then a discount at the 20 to 30 per cent range might be appropriate.

Q. Now, generally, when I read your report, I felt that you were essentially saying that the interest in IOG was good security and could have been realised but for some of the choices made of whether to sell or not to sell the shares and also the technical difficulties which the company then encountered that happened in January 2022. Would you agree to that statement?

A. I would agree with that statement in part. Just to say that -- I mean, as a result of the farm-out arrangement with CER, many of the instruments were, in fact, redeemed at the loan value with accumulated interest. So, in reality, the warrants and convertible loans, with one exception, were redeemed in full and with accumulated interest.

Q. I'm actually particularly interested in a section of your report that deals with the offers made by the administrators for the purchase of LOG investment in IOG by RockRose in 2019 --

A. Yes.

Q. -- and then you also referred to two other established companies in 2022. Do you remember that part of your report?

A. I do, yes, my Lord.

Q. If we can turn to the relevant sections, they are at 50 and 51, external page. It is internal 47 and 48. You have set out the three offers made by RockRose Energy Plc in early 2019 between March and April and the non-binding offers made by Waldorf Production UK Plc and Petrogas E&P LLC in around May 2022 in that section?

A. I think it's on the next page, in fact.

Q. Sorry, 47 and 48, is it?

A. I think it would mainly be on 48 and then later.

Q. I think the non-binding offers are found at page 49, paragraph 5.44?

A. Indeed.

Q. Those were made in early May 2022. So Petrogas offered 61.2 million, while Waldorf offered 40 million in May 2022.

A. Yes.

Q. Do you know why the administrators didn't accept those? Were you provided with that information?

A. No, I was not, my Lord.

Q. Because they were made after the technical difficulties were out in the open that you mentioned in your report. That was in January 2022. Do you want to have a look at that paragraph? It is paragraph --

A. By all means. I'm just trying to remember the precise timing of the emergence of --

Q. Paragraph 2.35, page 15, middle of the page. That's where you talk about technical difficulties which the company encountered in January 2022. So it says: "As noted above, however, IOG's share price has declined steeply since January 2022 on account of technical difficulties and lower gas recoveries from the Blythe and Southwark licences."

Do you see that?

A. I see that, and I can obviously read the words. If you look at --

Q. Would they have been really good offers? That's my question to you. Because you haven't said anything about it. Considering there's already out in the open technical difficulties, lower gas recoveries, should the administrator have accepted these offers or gone ahead?

A. So, my recollection is that the knowledge about those technical difficulties emerged gradually during 2022, and I think you can see, if you look at the share price graph, that, although one might say in words that the share price has declined since January 2022, it declined and then rose, and then declined, and then declined some more, so, at the time of the offers, I think it would be wrong to say that the share price was in full decline. I think -- or indeed that all of the technical difficulties were known.

But, in any case, my Lord, it would not be my opinion that these offers were good ones or bad ones. The offers are the offers, and when one is thinking about what's a market value, the offers are what people, participants, in the market -- it tells you something about how they have valued these various instruments. So --

Q. You can't say whether they were good offers or bad offers. You just --

A. I can definitely say, my Lord, that one of them was better than the other, to the extent that either would have been followed through.

Q. But you weren't given any information about those bits. You only mention it, but say nothing --

A. Correct. I do not know, and have not looked at, the reasons why those offers may have been rejected.

Q. Now, coming back to RockRose, you provide a valuation of the shares in early January and around the time that the RockRose offers were made. Do you recall that?

A. I do.

Q. Now, it's at page 51 of your first report, middle of the page. Paragraph 5.37. You assess the value of LOG's investment to have been 59.5 million on a theoretical basis and between 36.9 million and 51.4 million on an adjusted basis. Is that right?

A. That's correct, yes.

Q. I think straight after it -- no, below -- above it. Above it. At paragraph 5.36, we can see that their last offer was 52.5 million?

A. Yes, that's right, my Lord.

Q. Now if we can go to page 52. As at 24 April 2019, when you say you understood the restructuring took place and the value you attribute with a discount is 35 million -- can you see that?

A. Yes, I see that.

Q. When the discount you apply here -- that's in the table at the very bottom -- is 12.5 per cent, so it is a lower discount than your range of 20 to 30 million, isn't it?

A. So, if I might explain -- I mean, yes, of course, 12.5 per cent is lower than 20 to 30 per cent. The 20 to 30 per cent was, I think, generally applied to equity holdings. The actual discount that I applied to the loan portions of the instruments was typically smaller, at or around 5 per cent. So, I think this, because it includes the loans only, I think you'll see the first line there, "Warrants 1, 2 and 3 (loans

only)", it's not directly comparable to either the range that I was using as a discount for equity components or to the number that I used for straight loan components.

Q. So your opinion is that, even then, you would still apply 20 to 30 per cent in that period?

A. In relation to the equity components of the instruments, yes.

Q. Now, just looking generally at the figures and at the offers, because this was one of the ways that you say they could have disposed of the shareholding, the offers made by RockRose were good offers, weren't they, and should have been taken by the administrators, do you not think?

A. You're asking a contemporaneous question. I think, contemporaneously, would they have been understood as good offers? I'm not sure I can tell you that. In hindsight, plainly, it would have been better if those offers had been accepted.

Q. Do you know they say that they rely on having taken experts to assist them, but they clearly didn't invest in proper experts to assess the deal or do their job properly, did they?

MR ROBINS: I'm not sure that's really a fair question for this witness. He is an expert in valuation.

MR JUSTICE MILES: I will allow Mr Osborne to address it, but I think one question is whether this is something that Mr Osborne has even considered.

MS DWARKA: Yes, that's fine.

MR JUSTICE MILES: Mr Osborne, did you understand the question?

A. I did understand the question.

MR JUSTICE MILES: Do you want to make any comment on it, or answer it, indeed?

A. If you will allow me to answer as naively as is feasible, I will say that the figures for which the administrators held out at the time of the RockRose offer strike me as high. But then I want to add to that that I have, and indeed Mr Wright did, looked only at the share price as indicative of the value of the shares, and I think others paid much more attention to the progress reports on the drilling, the flow rates that were being achieved. There was some optimism at the time, and the upside, or what would have been understood as the upside, at that time, might well have been significant.

MS DWARKA: Thank you, Mr Osborne. I have no further questions.

A. Thank you, my Lord.

MR ROBINS: My Lord, I have no re-examination.

MR JUSTICE MILES: Thank you very much for giving your evidence, Mr Osborne.

A. I'm grateful.

(The witness withdrew)

Housekeeping

MR ROBINS: My Lord, there are two points of housekeeping that I need to raise now to prevent any risk of things being disrupted or derailed. The first relates to the legal principles schedule.

Your Lordship made an order at the PTR -- if we could have it up please, <P0/1> at page 2. No, I've got the wrong document. I will read it out. Your Lordship ordered:

"The claimants should lodge a separate document setting out legal propositions on which they intend to rely."

And then, next paragraph:

"At the time of lodging their skeleton arguments, the defendants shall inform the claimants whether any part of the claimants' separate document containing legal propositions is not agreed by them." We prepared the schedule setting out the legal propositions on which we have relied. We filed and served that on 15 December last year, some five months ago.

At the time of lodging their skeleton argument, the first defendant did not notify us whether he disagreed with any of the points we had set out. Similarly, the fifth and sixth defendants didn't notify us whether they disagreed with any of the points that we'd set out. Last week, on the last day of Mrs Venn's evidence, your Lordship referred to the fact that the first and fifth and sixth defendants hadn't complied with your Lordship's directions, and said it would be helpful for there to be an indication as to the extent to which those are in issue before the claimants have to produce their closing submissions.

My instructing solicitors wrote accordingly to ask for such an indication. Kingsley Napley, for the fifth and sixth defendants, said they couldn't respond because they were busy preparing for cross-examination of experts. My learned friend Ms Dwarka says, if we go to <Q6/8> at page 9, in the second paragraph: "Unfortunately, I will not be in a position to confirm which of the legal propositions contained in your clients' opening submissions on the law we disagree with any time soon. We will be in a position to file a list of points of disagreement to your clients' legal propositions when we file our closing submissions." Mr Sedgwick has emailed to say he is not able to agree or disagree with any of our propositions. My Lord, it may be that there is nothing we can do about this, but it is deeply unsatisfactory. Ms Dwarka, in particular, has had our schedule of propositions for five months. If she doesn't tell us before she files her written closing submissions, then we won't know before we file ours. We won't be able to address any points of disagreement. The only option will be to deal with these points in oral submissions, which could take a lot more time and add unnecessarily to the length of the closing submissions, which is obviously something that we want to avoid.

So that's, I think, the first point on which the parties might benefit from some guidance from your Lordship as to how to deal with the issue. The second point relates to documents in the trial bundle. At the PTR, your Lordship said the default position should be, if it has not been referred to in the opening submissions or in the course of evidence, then it can't be referred to in the closing submissions, so there are not rabbits popping out of hats. Now, we are in a position in which Mr Thomson, the first defendant, is asking us to add, at this stage, a very large number of documents to the bundle, over 1,000 in total, none of which were referred to in his opening submissions or in the course of evidence, and over 750 of which have been disclosed by him extremely late in the course of these proceedings, on 25 March 2024.

Similarly, the fifth and sixth defendants are asking us to add almost 2,000 documents to the bundle, none of which were referred to in opening submissions or in the course of evidence. In terms of rabbits popping out of hats, we therefore have approximately 3,000 rabbits, and it's really not a very satisfactory position. We have asked the relevant defendants to explain the propositions for which these documents are sought to be relied on, what is the point that the document is said to show or substantiate. If that were explained, then some of this issue, at least some of it, might go away. It

might be, for example, that we agree the proposition or the point and we say, "Yes, that's not controversial". Equally, we might think that it is a point that was raised by them fairly and squarely at the appropriate moment, that we had an opportunity to cross-examine on it and that this is simply another example of a document in a particular category. But what we are concerned to avoid is a situation where, to take Mr Careless, for example, he is now scrabbling around trying to find documents to make new points that were not advanced in his witness statement, not mentioned by his team in advance of his cross-examination, on which, therefore, I had no opportunity to cross-examine him. It would be very unsatisfactory, from our point of view, if he were now permitted to make new points, relying on new documents, in circumstances where there was no further opportunity to cross-examine him on them or to put the documents to him and to challenge what he might say about them. So, we do say that the defendants seeking to add documents to the bundle should, as a first stage, identify in respect of each document the proposition for which the document is relied on. We need to know that sooner rather than later. We will consider that. We might, as I say, agree the document to be added if the proposition is uncontroversial or if the proposition is one that was raised fairly and squarely at the appropriate moment. But if it is some new point on which we are being denied the opportunity to cross-examine the relevant witnesses, we may well oppose that. But they need to tell us the proposition. They should do that within the next 24, or possibly 48, hours. They must know why they want to rely on these documents. It shouldn't be too difficult for them to explain that. But, obviously, we need to know that now. What we don't want is a situation where this is disrupting closing submissions or where we are only finding out, at the time we file our written closing submissions, that there are lots of additional new points being relied on that we have never been given any notice of and that we haven't, therefore, had an opportunity to address in our written closing. So that's the second point on which I think the parties may benefit from your Lordship's guidance, at least in terms of putting a framework in place to deal with any disputes.

MR JUSTICE MILES: Are you seeking to put any more documents in the trial bundle?

MR ROBINS: We have added documents as we have been going along insofar as they relate to each witness. So, for example, when I was about to cross-examine Mr Careless, we added some further documents that I then put to him in cross-examination. But I don't think --

MR JUSTICE MILES: I mean from now on.

MR ROBINS: I don't think from now on, no.

MR JUSTICE MILES: Or at least from the close of the witness evidence?

MR ROBINS: Certainly not without good reason, and I say that to cover, for example, any further bank statements we might get under the Bankers Trust Order. We then say, obviously, we couldn't have put these in before, there is a good reason for doing this now. But it is not so much a question of simply adding a cut-off date of saying, well, anybody can put in everything, it is a free-for-all until next Thursday, because that would still leave us with the issue, in my hypothetical example, of Mr Careless trying to run lots of new points which we were given no advance notice of and which we, therefore, can't cross-examine him on, which would be profoundly unsatisfactory.

Your Lordship said at the PTR the default position should be that, if it hasn't been referred to in opening submissions or in the course of evidence, it can't be referred to in closing submissions. Your Lordship made clear that's only a default position. If there is a good reason, then there may be exceptions. But it certainly wouldn't be right to add 3,000-plus documents at this point. A fortiori when, in the case of Mr Thomson, over 750 of them weren't disclosed at the correct time.

The principle on the undisclosed documents is, of course, the separate one in the Practice Direction 57AD, paragraph 12.5:

"A party may not without the permission of the court or agreement of the parties rely on any document in its control that it has not disclosed at the time required for Extended Disclosure ..."

In respect of those 750 or so, we have asked why they weren't disclosed at the right time, where they have been found, how it is that they were found so late, is there a good reason, and we have been told that Mr Thomson's legal representation isn't prepared to answer those questions. They say we are not entitled to the answers, we are not gatekeepers to the bundle, we should just do their bidding. But I'm afraid, given they didn't disclose these documents at the right time, they are not entitled to rely on them at all.

MR JUSTICE MILES: That's a different point. There are two levels, aren't there: there's whether something has been disclosed and whether it is in the trial bundle, essentially.

MR ROBINS: Yes.

MR JUSTICE MILES: As I understand it, the point about relying on documents was really to do with -- sorry, which documents could be relied on, and the default position I set out was really to do with which documents are in the trial bundle. Is that right?

MR ROBINS: Well, it is which documents can be relied on in closing. Your Lordship was -- I had raised with your Lordship the Commercial Court practice, that if it is not being raised in written openings or put to witnesses, then it can't be referred to in closing, which I raised with your Lordship because it's the approach your Lordship adopted in the Force India trial a number of years ago. Your Lordship said that would be the default position. Obviously, there will be exceptions to it. But part of the concern on our side at the moment is, there doesn't seem to have been any real careful selection of documents. There can't have been, when you're talking about a total of 3,000. It seems to be more of a document dump without any sufficient thought or analysis. So identifying the propositions for which they are advanced is the first stage. We will then at least know what we are dealing with. We may feel, now we know the proposition, we have enough time to deal with it, we will deal with it in closing and won't make any objection. But if it is, as I say, a brand new point which should have been raised earlier, which I have now lost the opportunity to put to Mr Careless, in my hypothetical example, we might stick to our guns and continue to oppose it. But we can't even begin to engage when they have just given us with a list of documents at the last minute without any further explanation.

MR JUSTICE MILES: Then there's a separate point, you say, in relation to late disclosure, which is that, essentially, permission is required to rely on late disclosure.

MR ROBINS: Or agreement. Again, if there is a good reason, then we might agree. We have asked for the reason and we have just been met with a lot of, frankly, unnecessary invective, which hasn't advanced the debate. We do need to know what's the reason for this late disclosure. If there is a perfectly good reason, then there may be no objection.

MR JUSTICE MILES: Right. Okay. I will hear what people have to say about those two points and then we might come back to the question of the content of written closings, which is something I wanted to discuss also.

MS DWARKA: My Lord, I didn't expect to deal with this, so I'm just going to think on my feet right now. In respect of the first point, I received, and I think all parties received, an email on Friday, at

about 12.10, in respect of the legal proposition, to ask us to get reply by Monday 4.00 pm, and the reply that I originally sent was, "I won't be able to do it within that time", and on Monday, I just made sure at 3 o'clock I wrote to MDR to let them know that I will need some time.

Now, my Lord is fully aware of the circumstances of my position. I am one of the senior lawyers on the matter who is working on it, and then I was brought in to become the sole advocate, so I'm playing catch-up at the moment. So I didn't have any time to be able to look at the legal propositions and that is the reason why I had said ideally -- I wasn't imposing anything on anybody -- I'd like to have time to be able to look at it -- work on my closing and then I will be able to provide a list of disagreement by that time. The whole reason I replied to MDR with that is because they had put a deadline of 4.00 pm on Monday, when I was preparing for the cross-examination. So that is the reason I did so.

But if your Lordship would like me to provide this any time soon, if I get given at least two days after cross-examination has finished for this week, I will try and do my best, my Lord.

MR JUSTICE MILES: You have identified one point, of course --

MS DWARKA: Yes, which I have mentioned.

MR JUSTICE MILES: -- which is the point about the proprietary claims.

MS DWARKA: Exactly, yes. I don't expect the list to be long because we --

MR JUSTICE MILES: You have articulated that --

MS DWARKA: In my opening.

MR JUSTICE MILES: And in the strike-out application.

MS DWARKA: Exactly. Now, the position is, my Lord --

MR JUSTICE MILES: But I think it would be helpful -- I will hear what Mr Ledgister has to say about this as well in a moment, but I have already given a direction, so it is not as though this is a new point, and it is something that was done at the PTR, where your client was represented by Slade & Co. As with all case management directions intended to narrow the issues, it is something that would be helpful because it would also then mean that the claimants would know what target they're firing at in their closing submissions.

MS DWARKA: I appreciate that, my Lord. I think the problem was, I thought I could give a quicker answer when, on Friday, I had explained that I wouldn't be able to do it by the Monday. But when I had a look at the document, it was 64 pages and it was quite dense, so I thought I would probably need a little bit more time. But if your Lordship would like us to be able to provide a list of disagreement sooner, I will work on that.

MR JUSTICE MILES: I think it would be helpful.

MS DWARKA: So, now, in respect of the second point, which is about the documents, the documents itself, the disclosure, the set of documents was provided in March, on 25 March, I think, to MDR, and the whole reason we had provided it at that time, we had said that we wanted the documents to be ready for us to be able to use it for cross-examination of our witnesses -- well, one witness -- the witnesses, and re-examination potentially of Mr Thomson.

From that point, there was quite a lot of correspondence between Richard Slade & Partners and Mishcon de Reya, some toing and froing as to why we needed to add them to the trial bundle, and then I think there was some correspondence in respect of some of the documents existed in a different format and could have just been added. They don't form part of the disclosure.

So, there's quite a lot of discussion from March up until now. I'm not really privy to all these discussions, I wasn't really involved, but, as far as I had understood it, whilst we were preparing for the case, for the trial, certain documents came to light, which is the reason why we then provided supplemental disclosure, and that is the reason why we did that, no other reason, and I can get instructions on that. Now, it would have been relevant to the issues that we had put forward. There are no new issues that we are putting forward. I think we have made ourselves clear -- even from the very beginning, when we are questioning the pleadings, we have made it clear what we will be questioning, in that sense. So there are no new points for us. It just supports the previous points made.

MR JUSTICE MILES: I made a direction at the PTR which Mr Robins has just referred to about relying on documents in closing which have not been referred to by the end of the evidence, so either in the opening written submissions or in the opening oral submissions or in the course of the evidence, and it wasn't, as that quote showed, a complete bar to relying on further documents, but that was the default position, that nothing could be relied upon which had not already been referred to in that way.

Now, I think that is a helpful discipline because the danger, otherwise, is that points come up in written closings and then oral closings which the other party has not been able to -- has never had its attention drawn to, as it were, as a relevant document in the case, and then it can lead to all sorts of practical problems about, for example, whether witnesses then should be recalled for further cross-examination, and so on, and that's a very unsatisfactory state of affairs. So, it's generally now, in large litigation, done in this way.

I think what's being said is that you should explain what it is that the documents are being relied on for, so to prove what. It is not going to be of great assistance just to be told, for example, "Well, it is part of the story" or "It is part of the background", or something like that; it is more -- I think any explanation of why the documents are now being sought to be included in the trial bundle should explain, in rather more detail than that, what it is they're being relied on for. Are they being relied on, for example -- I'm only thinking because it's been the subject of some fairly recent evidence -- to show that it was common practice to charge 20 or 25 per cent of the sums raised by fundraisers, for example.

I think that it would be helpful to explain those -- the reason why it's now sought to include further documents, but I haven't yet heard from Mr Ledgister on that. But, in principle, it seems to me that that would be a sensible direction.

MS DWARKA: The only thing I would like to say, my Lord, is, we did try to introduce it in the evidence and in the trial bundle before cross-examination from March, but were not able to because there was some toing and froing between the parties. Obviously, I didn't get a chance to re-examine on that and Mr Robins obviously didn't get a chance, so there is just the fact that was --

MR JUSTICE MILES: Did you seek to put all -- he said there were --

MS DWARKA: We did seek to actually add them -- provide supplemental disclosure and add them in the trial bundle from March, but there was quite a lot of correspondence between the two parties

arguing about, why do we want them in. So, I wasn't involved in that part of it because I was focusing on the advocacy and then the trial itself, but that was the whole reason we wanted them in. That was made clear to Mishcon de Reya. But the fact that it is a little bit unfair that I didn't manage to get them in, we didn't manage to get to cross-examine on them, and now, obviously, if the position is that we cannot use any of them in closing to support --

MR JUSTICE MILES: I'm not saying that's necessarily the position, because it may be that if that's -- in the light of the history, it may be that I will allow them to be included. But I think it would be helpful to understand what it is that they're being relied on for, and I wouldn't expect the claimants to take an unrealistic approach to the inclusion of documents unless they were able to show, for example, that it's something they would have wished to cross-examine about. But you would say, on the example you have just given me, well, this was sought to be included before the cross-examination was completed, for example.

MS DWARKA: Yes, that was the --

MR JUSTICE MILES: So that's the kind of point there could be an argument about. But I think it would be helpful to inform that argument to know what it is that the documents are sought to be included for.

MS DWARKA: I will take instructions on that.

MR JUSTICE MILES: I will hear from Mr Ledgister on that point before I rule on it.

MR LEDGISTER: My Lord, Mr Curry has greater visibility on this, so if I may refer to him on this.

MR JUSTICE MILES: On both points?

MR LEDGISTER: Yes.

MR CURRY: My Lord, the shortest way to deal with this is to say that we have no objection to setting out agreement and disagreement in respect of the legal position say by the end of the week, or over the next few days, and we have no objection to explaining why we want to include the extra documents on the same timescale. So far as the law goes, I anticipate that what we will do is say that, with the exception of the dispute about knowing receipt and proprietary claims, which the Surge defendants didn't wish to pursue by way of a strike-out application, but certainly by way of -- it is not a legal point that we won't be taking in closing, but the claimants know about that point already.

MR JUSTICE MILES: Yes.

MR CURRY: With the exception of that, we are certainly not going to be closing the case on a -- on the suggestion that there is a radical misstatement of the law in respect of fraudulent trading or breach of fiduciary duty or anything like that, so there shouldn't be any surprises to trouble either your Lordship or my learned friend on that.

So far as the documents go, the additional documents mainly concern the involvement of Mr Huisamen, who was mentioned a few times in cross-examination, in preparing scripts and other materials for the use of the Surge employees who worked with LCF.

Again, this isn't a new point. It is perhaps one that the claimants don't think much of. Had they wished to cross-examine on that point more than they did already, they certainly could have done.

They are not being taken by surprise by anything here. But, as I say, we have got no objection to setting that out in more detail towards the end of the week.

MR JUSTICE MILES: Mr Robins?

MR ROBINS: Well, I don't think there is much to add to that. The only point that I would mention, although I think we have covered it, in respect of the first defendant's documents, is it is not simply a question of saying what the proposition is at court because, if he seeks to rely on documents disclosed later, he will also need to give a good explanation for that and, again, we will consider it, but saying, "We found some more documents while preparing", doesn't really shed any light on it.

MR JUSTICE MILES: All right. Do you want to say anything more about that point? It sounds as though there's been a bit of correspondence about that, but it hasn't -- I think it should be explained because of the rule that Mr Robins referred to, which is that, where documents are disclosed late, they can only be relied on with the permission of the court.

Now, it may be that, in the light of the explanation you give, the claimants will take a pragmatic view on that. But I think your response should also cover that question, an explanation of why the documents were disclosed late.

So, I think what I'm going to do is say that, in relation to both points -- that is to say, identifying the points of agreement or disagreement in relation to the claimants' schedule of legal propositions; and an explanation, first, of the points for which documents now sought to be included in the trial bundles are relied upon and, second, the explanation for any late disclosure by the first defendant should be provided by 4.30 pm on Friday.

MR ROBINS: I'm grateful. That covers the things on my agenda. So I think it is simply a question of your Lordship telling the parties what your Lordship would find of most assistance in terms of the structure and content of closing written submissions.

MR JUSTICE MILES: Yes. It seems to me this is partly a matter of discussion between the court and counsel. I think I mentioned last week that it would be helpful to me to know what findings of fact the parties are seeking in relation to the controversial points of fact. It also seems to me that it would be helpful for the facts and the factual findings that are sought to be dealt with, so far as possible, in a chronological format. That's not to say that one needs slavishly to deal with everything in date order, but I think, broadly speaking, a chronological approach to the facts will be most helpful to me when understanding the differences between the parties and the different factual findings that they invite the court to make.

It then seems to me that it would be helpful for the written submissions, so far as relevant to each party, to go through the various legal claims and set out the parties' positions in relation to the various elements of those claims, explaining, obviously, the important points that they rely upon.

I think it would also be helpful to have a section explaining who everybody is in the case, and it would also be helpful for the parties to seek now, at this stage, to identify the important issues -- there is a very long list of issues, which I'm not sure is going to be all that helpful to the court -- identify the main issues which are still in play in the case. So those are the thoughts I had. I don't need -- I have said this before, and I will repeat it, that I am not really interested in rhetorical flourishes. Plain English is what's wanted.

Another point which arose in relation to the openings is that, when documents are referred to -- emails and text messages, and so on -- in every case, can I please have the date of the document in

the text so that it is not necessary, in all cases, to track down the reference in order to determine the date. So, those are my main thoughts at the moment. Are there other observations or questions from counsel?

MR ROBINS: I didn't hear anything that struck me as being in any way controversial, save, perhaps, as to the description of "who everyone is". The claimants prepared a dramatis personae. No-one has referred to it at any point in the course of this trial, so it may be that your Lordship hasn't had cause to look at it.

MR JUSTICE MILES: I have looked at it. I don't know to what extent there is any real debate about the contents of that. No-one has said that's wrong, have they?

MR ROBINS: I don't think so. I was just wondering if it might be more efficient to simply see if the parties can agree that, and maybe add to it if it is thought there are any missing names.

MR JUSTICE MILES: That might be a more helpful way of doing it, if that is something the parties can look at and see whether they can agree.

MR ROBINS: Obviously, that may not be by this Friday --

MR JUSTICE MILES: No.

MR ROBINS: -- there are other things to be done, but we will propose a sensible deadline for agreement of that.

MR JUSTICE MILES: Yes. Right. Does anyone have any views about how long their documents are likely to be?

MR ROBINS: Mr Judd and Mr Shaw have suggested that we may come in at around 250 pages.

MR JUSTICE MILES: Right. I would prefer not to have to go back to the openings.

MR ROBINS: Ah, okay. In which case --

MR JUSTICE MILES: So, I would prefer to have, as it were, comprehensive documents.

MR ROBINS: 250 was premised on the fact there would be a lot of cross-referencing back to the openings, in which -- if it is combined, if it is essentially an updated version of the opening --

MR JUSTICE MILES: I won't hold you to that, but it seems to me that it's -- you can decide what is the best structure now that would be of most assistance to the court.

MR ROBINS: As my Lord knows, that was sort of 300 pages. If we are adding to that and refining it and so on, then the final document is probably going to be more like 500 or 600 pages, which is not the approach I had envisaged, but if that is what would most assist --

MR JUSTICE MILES: I think it would be most helpful to have combined documents, or, rather, a better way of putting it is a document that supersedes the openings, so that it is not necessary to go between the two. One thing I did notice from your written opening is that, for example, there were, at times -- and this isn't a criticism -- quite long lists of payments being made, for example, where each one was set out in a separate paragraph, and you might think about whether it's really necessary to do that, or whether, at least part of the time -- it may be it is relevant to say, "Well, a payment was made here and then there was this next event, and then some more payments were made", but it may be possible to combine quite a lot of those into a shorter summary --

MR ROBINS: Yes.

MR JUSTICE MILES: -- and say then, "Between September and the following March, 19 million was paid", for example, rather than setting out each separate payment, because I don't think there was any real controversy about those.

But if it does -- I mean, I think it may be a situation where it will just take as many pages as it takes, but the parties are aware that I'm -- you know, I would be happy to have things expressed quite concisely at this stage in the case, because I have got a fairly good idea of most of it and, obviously, keeping things as short as possible is the target.

MR ROBINS: Yes.

MR JUSTICE MILES: But I don't think, at this stage, I'm going to place a page limit on it.

Another point that you might like to think about, and this is, again, to all parties, is that, to the extent that there are references to the various agreements, the SPAs and so on, it would be, I think, helpful to me to have -- when those agreements are being introduced into the chronological section, to have a brief, as it were, neutral description of what those documents on their face are doing, so that -- and including an explanation of who the relevant parties and/or parties who stand to obtain benefits under those agreements are at each stage.

MR ROBINS: Yes.

MR JUSTICE MILES: That can be done in a way which I think is, as it were, a neutral description, if one of the parties -- well, it will be your party in this case, Mr Robins -- then wishes to say, "This is how it was presented but, for various reasons, it was" -- I think the word you use is something like "a facade", then go on and say it, but it's helpful to have that neutrally described just as a matter of narrative.

MR ROBINS: Yes.

MR JUSTICE MILES: But I do emphasise the point I started with, which is that it is helpful to the court for the parties to identify the main -- the really important points on which they seek findings and a brief statement of why the court should reach a finding that they are seeking.

MR ROBINS: Is it helpful if that is a separate section at the beginning or if it is interspersed throughout --

MR JUSTICE MILES: I think if it is interspersed. I think it can be, for example, introduced by saying that the claimant or the defendant, as the case may be, "seeks a finding that ...". If you use some formula of that kind on the main points of principle -- sorry, the main points of dispute, sorry.

Obviously, there is a lot of stuff which isn't controversial, but I think, at this stage in the trial, the parties will know which points are really controversial and it is a useful signpost to have some formulation like that, that "The party seeks a finding that ... for the following reasons".

Are there any other observations that anyone would like to make at this stage?

MS DWARKA: No, my Lord.

MR LEDGISTER: No, thank you, my Lord.

MR JUSTICE MILES: Do you have any observations about the length of your document?

MR LEDGISTER: Mr Curry tells me he thinks it is going to be in the region of 50 to 60 pages. Certainly nowhere near as long as the claimants.

MS DWARKA: No, my Lord, I don't know the answer.

MR JUSTICE MILES: Okay. So, we will adjourn now, and there is quite a long gap before the final bit of evidence.

MR ROBINS: Yes, that is next Thursday, at 2.00 pm, due to the time difference.

MR JUSTICE MILES: I think my clerk may have sent an email to the parties about a technical issue to do with the use of the Teams link and the way that documents might be presented.

MR ROBINS: I'm told it is fine. I don't know what the issue is --

MR JUSTICE MILES: I think the point is, in simple terms, if you try to use the Teams link and then a document is brought up on the screen on this system, then it would take up most of the screen, so then one wouldn't be able to see the witness.

MR ROBINS: Right. I'm told it is going to be a separate link.

MR JUSTICE MILES: Well that's the answer. So the way it will work is the witness will have a separate system for looking at documents?

MR ROBINS: Yes, he will have two screens.

MR JUSTICE MILES: That's good.

MR LEDGISTER: My Lord, in respect of that hearing, would my Lord be good enough to excuse the Surge team's attendance? It doesn't affect us at all.

MR JUSTICE MILES: Yes.

MR LEDGISTER: I'm grateful.

MR JUSTICE MILES: Is there anything else at this stage?

MS DWARKA: No.

MR ROBINS: Nothing from me, my Lord.

MR JUSTICE MILES: Thank you all for your help. (11.45 am)

(The hearing was adjourned to Thursday, 23 May 2024 at 2.00 pm)

Transcript originally produced by:

Epiq Europe Ltd www.epiqglobal.com Lower Ground Floor, 46 Chancery Lane London, WC2A 1JE

And converted to a more readable format using an automated process by:

Daniel Cloake www.mouseinthecourt.co.uk

Investor names and contact information have been redacted