

Neutral Citation Number: 2017] EWHC 2897 (Comm)

Claim No: CL-2016-000049

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)**

Thursday 9 November 2017

Before: MR JUSTICE ROBIN KNOWLES CBE

BETWEEN:

(1) PCP CAPITAL PARTNERS LLP

(2) PCP INTERNATIONAL FINANCE LIMITED

Claimants/Applicants

- and -

BARCLAYS BANK PLC

**Defendant/Second
Respondent**

- and -

JOHN VARLEY

Applicant

SERIOUS FRAUD OFFICE

Interested Party

**Mr Laurence Rabinowitz QC, Mr Richard Lissack QC, Mr Alex Polley and Mr
Max Schlote for Barclays Bank plc**

Mr Javan Herberg QC, Ms Clare Sibson QC and Mr Shane Sibbel for Mr Varley

**Mr Andrew Onslow QC, Mr Edward Brown QC and Mr Theodore van Sante for the
Serious Fraud Office**

**Mr John Wardell QC, Mr Jonathan Laidlaw QC, Mr Robert Weekes and Mr David
Lowe for PCP Capital Partners LLP and PCP International Finance Ltd**

Hearing: 8 and 9 November 2017

Thursday, 9th November 2017

J U D G M E N T

MR JUSTICE ROBIN KNOWLES:

1. Part of this hearing has taken place in private, and I am very grateful for the understanding and cooperation in that course that has been shown by all. This judgment is in public. An approved transcript of it will be available in due course, but what I say now may be acted upon and reported from now.
2. I think it is important that the outcome is known now rather than at a later point, and the reasons for the outcome. The stakes are very high for many people. A trial is very near and there is appreciable wider interest.
3. The defendant in these Commercial Court proceedings requests a stay or adjournment of the proceedings and specifically of the trial, not for all time or indefinitely, but in order to allow a Crown Court trial to take place first. A co-defendant in those Crown Court proceedings makes the same request. The request is supported by the Serious Fraud Office, which has brought the criminal charges before the Crown Court.
4. The claimants in the Commercial Court proceedings note that the SFO does not actually make the application before this court, rather it supports the application made by others. The suggestion is that this in itself tells against the application. I do not accept that that is the consequence, or that it provides a short answer. The SFO has its responsibilities but the responsibility here is of course one that is for me to shoulder.

5. The sums claimed in the Commercial Court proceedings are large and the allegations serious in nature. Those proceedings were commenced on 25 January 2016. The SFO publicly announced criminal charges on 20 June 2017. The allegations in the Crown Court proceedings are again serious in nature. The events at issue in the Commercial Court proceedings and in the Crown Court proceedings go back to 2008 and to the global financial crisis.
6. The Commercial Court trial is due to commence in January 2018 with an estimated length of eight weeks before a judge alone. The pre-trial review is next month. The Crown Court trial is due to commence in January 2019, with an estimate of 12 to 16 weeks before a judge and jury.
7. The question of a stay or an adjournment of the Commercial Court trial has been examined at this hearing from a range of perspectives, and meticulously, by teams of counsel, solicitors and chartered legal executives of great standing and experience from both commercial and criminal practice. It has been a privilege to read and hear the submissions made.
8. I shall not need to refer to every point, but I have done my level best to consider every point. Ultimately, the considerations which have weighed most with me in reaching a conclusion in the present matter are those to which I will now briefly refer. I will do so in a way that allows me to keep this judgment entirely in open court.
9. Looking at their substance, there is overlap between the two sets of proceedings. The claimants in the Commercial Court proceedings accept as much, and that is realistic. Overlap is the term used in some of the authorities. The term is useful but it is not a term of precise meaning. It allows an examination from different

perspectives, which can be valuable. I reject any argument that the term is confined to the situation where the same witnesses are involved in two sets of proceedings.

10. In my assessment, the overlap in the present matter is very significant. Focusing on the trials, both trials will traverse in detail events and statements at a time of great consequence for all institutions and individuals involved. Both trials will examine the reasons for and the purpose of statements and actions, where made or undertaken. Both trials will examine responsibilities for what was or was not said or done, and levels of information and states of mind.
11. I appreciate that it is the submission of the claimants in the Commercial Court proceedings that I should analyse the overlap at a more granular level. I have looked at the detail, but in my judgment on this particular application it is the wood rather than the trees that matters more, together with the importance of giving margin for the reality of the eventual compass of evidence over trials of 8 weeks and up to 16 weeks in length.
12. There is every likelihood of heavy reporting, in print, on screen and online, of the Commercial Court trial and the judgment that would follow. It is a trial of allegations of deceit at the time of the financial crisis, and in which £700 million is claimed. As things stand, less than 12 months later in the Crown Court - no less likely to attract heavy reporting - a jury will sit down to hear proceedings with, as I have concluded, a very substantial overlap.
13. A jury can and no doubt will be directed to leave out of consideration what they have read or heard in the press about the Commercial Court proceedings, trial and judgment. The need for such a direction is probably already engaged, given

publicity to date. Jury questions may take out of the pool from which the jury is finally drawn those who are too close to events or commentary. The Crown Court is often able to take the view that the jury that results is one that can be trusted to comply with the directions that it is given.

14. But in the present matter there is a risk, which I find to be a real risk, that the jury's already complex task in the Crown Court trial - against a background that includes the global financial crisis which has affected so many people - would have been made more difficult still by the fact of an earlier Commercial Court trial and judgment.
15. I add that it is in the nature of a trial that the degree of greater difficulty might not be fully appreciated at the start of that trial; it might reveal itself some weeks into a Crown Court trial as the jury continues its involvement. The present applications to stay or adjourn the Commercial Court trial allow consideration of how to manage that risk rather than consideration of what the consequences are of the risk once run.
16. Given that real risk if the Commercial Court trial goes first, safeguards may well have to be imposed in the form of limits to public access and perhaps to witness access to part of that trial or materials at that trial, or to the judgment after that trial, until the Crown Court trial is complete the following year. We have seen the need for some safeguards already in interlocutory hearings in these proceedings in the Commercial Court over the last two weeks. There have also been agreed arrangements for witness handling at stages in the Commercial Court proceedings to date. The trial, however, will be of a different order of magnitude.
17. And these types of safeguard have their own price. One is a price in terms of open

justice. Another may be in terms of compromises in witness handling and the contribution witnesses make at both trials. Yet another is in terms of speculation, where or to the extent that a trial or judgment is retained in private, about what happened or what was decided in any part of that trial that was private or in the judgment.

18. Again the jury would be directed against speculation, but that does not affect the desirability of managing or minimising the risk. Nor does it affect what potential witnesses might speculate, and the risk of deterioration in their evidence as a result. And then there is the risk of market speculation, where there is no public judgment. That may engage difficult issues over regulatory reporting requirements which are there to protect the public.
19. In addition, there is the point that the nature and circumstances of this matter are such that at whichever trial goes second there will likely be some use of or reference to material from the trial that went first. Already, defendants and witnesses in this matter have given earlier accounts, or had the opportunity to do so, and already much time has passed. But the trial that goes first will add materially to the accounts that defendants and witnesses have given or may give and, as was put in the course of submissions on behalf of the defendant in the Commercial Court proceedings, at a different level. The resultant challenge is more complex if it is asked of the Crown Court with a jury than of the Commercial Court without.
20. The authorities understandably speak of the care with which the power to intervene to order a stay has to be exercised. The objective is to prevent injustice. The search is for risks that are real of prejudice that is serious. I do not however read

the authorities as inviting consideration other than with reference to the degree of intervention sought. In one matter the degree of intervention sought may be substantial and of large consequence to many. In other matters it may be closer to a question of case management across two cases within one legal system.

21. I add that the points are rarely absolute ones. This matter has illustrated that well. It would not be the case that holding a Commercial Court trial on the current schedule would mean that one could not then have a Crown Court trial, because of the possibility of a form of contamination for example. Rather it is about taking the course that best serves the interests of justice. I do not consider that approach to be different in principle from the phrasing seen in some of the authorities which is in the form "risk of real injustice".
22. Of course delay is not lightly to be contemplated. Achieving justice includes timely justice. Today in 2017 perhaps we appreciate this more than even we did in the past.
23. It is pointed out that all proceedings in this matter were started many years after the events in question. However it is also the case that almost all of the pre-trial steps for the Commercial Court proceedings have been completed so that those proceedings are close to ready for trial when the question of its trial date is resolved as a result of this hearing. Indeed, if necessary the Commercial Court proceedings can be made readier still.
24. But there is still the risk with delay that witness evidence will reduce in quality with the passage of further time, or that witness evidence available today becomes unavailable or available only with greater difficulty. I weigh that seriously and respectfully.

25. Ultimately there is a balance to be struck in the interests of justice and I arrive at the same answer if I apply the overriding objective to be found in the Civil Procedure Rules and the overriding objective to be found in the Criminal Procedure Rules.
26. The balance is to be struck in my judgment as follows: (1) the opportunity should be given to the SFO to complete the trial in the Crown Court, but on the current schedule for that Crown Court trial, that is, starting in January 2019 with an estimate of 12 to 16 weeks; (2) the start of the trial in the Commercial Court should be postponed to the beginning of October 2019 with an eight week estimate; (3) I will consider with counsel the completion of directions at this point so as where possible to ensure that the Commercial Court trial is as ready as it can be by early next year, so that there is as little left to do ahead of the trial in October 2019 as possible.
27. I wish to emphasise that the range of possibilities in that connection is very large. The court could even, where there is good reason and where a witness would not be a witness in the Crown Court, consider taking early the evidence (or some part or stage of the evidence) of any witness for the purpose of the Commercial Court proceedings. Video recording is an option for consideration and the taking of evidence early could be before a nominated trial judge. Consideration would be given to evidence taken being kept in private until the full trial. In this connection, experience may be drawn from the procedures for ABE interviews or in those cases where evidence has had to be taken from overseas in advance of a trial in commercial cases or otherwise on deposition. And there are other examples. The balance of justice can allow suitable progress or preparation in this way before the

full balance of the Commercial Court trial.

28. So I do not halt the progress of the Commercial Court proceedings entirely. What I do is to address the scheduling of the Commercial Court trial. In my judgment there is no question that this will provide the claimants in the Commercial Court proceedings with a trial and judgment within a reasonable time, even if it is not a trial and judgment at a time that was as early as they had expected.
29. I appreciate that there cannot be certainties, but if the SFO and the applicants wish the sequence of Crown Court trial followed by Commercial Court trial to be assured, they will need to do all they can towards ensuring that the trial in the Crown Court keeps to the current schedule. An application for a further postponement of the Commercial Court trial would face an altogether greater hurdle where the opportunity to complete the trial in the Crown Court first has been given but not made the most of. The interests of justice will not lightly allow any further postponement of the entitlement of a claimant to have the Commercial Court decide its claims, perhaps especially where the claims involve issues of the seriousness and commercial significance of those in this matter.
30. With particular reference to the overriding objective in each of the Civil Procedure Rules and Criminal Procedure Rules, I add that I do not consider that the needs of other cases waiting for their time to be heard will be unduly affected by the rescheduling that I order for this Commercial Court trial.