IN THE HIGH COURT OF JUSTICE **Claim No. FL-2019-000017**
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
FINANCIAL LIST (Ch D)
Neutral Citation Number: [2021] EWHC 570 (Ch)

9 March 2021

Before

MR JUSTICE MILES

BETWEEN:

THE PERSONS IDENTIFIED IN SCHEDULE 1 TO THE PARTICULARS OF CLAIM

Claimant

-v-

RSA INSURANCE GROUP PLC

Defendant

PETER DE VERNEUIL SMITH QC AND SHAIL PATEL (Instructed by **Brown Rudnick LLP**) appeared on behalf of the Claimants

TOM ADAM QC, SIMON HATTAN AND JACOB RABINOWITZ (Instructed by **Herbert Smith Freehills LLP)** appeared on behalf of the Defendant

Tuesday, 9 March 2021

JUDGMENT (as approved)

MR JUSTICE MILES:

1. This is the first case management conference in this case. The claimants bring an action under section 90A of the Financial Services and Markets Act 2000 and schedule 10A to that Act.

2. There are some 60-odd institutional investors, which manage some 140 different funds. The claimants claim to have suffered loss and damage as a result of acquiring or continuing to hold interests in shares in the defendant in reasonable reliance on allegedly misleading or untrue statements and/or omissions made by the defendant in relevant published information under paragraph 3 of schedule 10A and/or as a result of alleged dishonest delay by the defendant in publishing relevant information under paragraph 5 of schedule 10A. The defendant denies all liability.

4. There is no dispute that, between 2009 and 2013, the defendant's Irish trading subsidiary ("RSA Ireland") engaged in inappropriate accounting practices and the deliberate manipulation of insurance claim reserves through under-reserving. There is a dispute as to whether the under-reserving of other claims (by some £128 million) was a result of any misconduct or inadequate corporate governance.

5. The defendant, which is a listed UK company and whose shares are listed on the LSE, disclosed the misconduct within RSA Ireland in announcements to the market in November 2013, following which its share price dropped significantly.

6. The claimants contend that the defendant published statements that were rendered untrue or misleading by the fact that the financial misconduct within RSA Ireland had occurred, or was occurring, and that inadequate corporate governance and controls existed within RSA Ireland and the defendant. They say, alternatively, that the defendant omitted to disclose such matters, or again alternatively, that it delayed publishing information in respect of them. The claimants contend that senior executives within the defendant knew or were reckless as to the falsity of the published statements and/or knew the omissions to be a dishonest concealment of the material fact and/or acted dishonestly in delaying the publication of relevant information.

8. The first question I have to resolve is an important one about the shape of the trial process. It is common ground that there should be a split trial but there is a difference between the parties as to where the split should lie.

9. The debate has been conducted by reference to an agreed list of issues. To summarise: Issue 1 concerns the standing of each of the claimants to bring claims under section 90A of FSMA; issues 2 and 3 concern the extent of wrongdoing of RSA Ireland; issues 4 and 5 are concerned with whether the published information

was untrue, misleading or incomplete; issues 6 to 8 concern the knowledge of alleged PDMRs (i.e. persons discharging management responsibility, a term used in the statute); issue 9 is concerned with the allegation of dishonest delay; issue 10 is whether the claimants reasonably relied upon the published information in acquiring or continuing to hold shares in the defendant; issues 11 and 12 concern causation of loss; and issues 13 and 14 concern the quantum of the claims.

16. It will be seen that issues 2 to 9 concern the conduct and knowledge of the defendant and its directors or officers. Issue 1 concerns the claimant's standing, and issues 10 to 14 concern other elements necessary for the claimant's claims to succeed. I shall call issues 2 to 9 "the RSA issues".

19. The claimants submit that at the first trial the court should consider and resolve the RSA issues and nothing more. The defendant's position is that there should be a split trial at which the court should determine the RSA issues, but that in addition the court should determine issue 10, namely the issues concerning the claimant's reasonable reliance on the statements or omissions. As a fallback made in the course of oral submissions, counsel for the defendants suggested that the court might also determine issues 11 and 12, concerning causation. I will come back to that in due course.

25. I shall summarise the submissions of the parties, but I have taken into account all they have said, both in their helpful skeleton arguments and orally, in reaching my decision.

26. The claimants say there is a real advantage in determining the RSA issues first. There is a neat and clean separation between these issues and the issues which concern the claimant's knowledge, conduct and actions. They point out that there is overlap between issue 10, which concerns reliance, and issues 11 and 12, which concern causation. The claimants say it is likely that the same witnesses will be required to give evidence twice if the defendant's proposal is accepted, and that, if they have to do that, there is a possibility of tensions arising in relation to the evidence they give and the findings the court might make. They say that, if possible, the court should avoid that kind of duplicative process.

28. They also say, at least in relation to one of the categories of claimants (which has been called “category 3”) expert evidence will be required. That category consists of cases where the relevant claimants did not read or see the published information, whether directly or indirectly, but exclusively or primarily relied on the price or the market capitalisation of the defendant's shares. What is said is that the price of shares was influenced by published information, that the claimants made their decisions based at least in part on price, and that that is sufficient to constitute reliance for the purposes of schedule 10A. The claimants say that they would wish to adduce expert evidence from an economist on the extent to which the market in shares traded on the LSE is an efficient one.

31. The claimants say next that their proposal would lead to a shorter first trial. They

have given a provisional estimate suggesting that it should be possible to deal with the first trial in about 15 court days. They say that if issue 10 is added into the first trial, it is likely to lead to something like a doubling of the trial length.

32. Leading on from that, they also say that, on their proposal, the first trial should be possible in early to mid-2022, whereas on the defendant's proposal the trial will probably not take place until 2023.

33. The claimants say that there is the potential for complications on the defendant's proposal, arising from possible appeals. They say that it is far more likely, if there is an appeal, that it will be about the reliance issues rather than on the RSA issues, which are mainly factual. They say that some of the reliance issues, in particular in relation to the third category of claimants, are ripe for appeal, including to the Supreme Court. The claimants say, therefore, that if questions of reliance are included in the first trial and there is an appeal, there could then be a messy and complicated process of seeking to work out what should then happen to the second trial - and this could itself lead to substantial delays.

36. They also say that splitting the trial in the way that they suggest would be likely to assist the parties in reaching a settlement of the case. It will provide guidance on key parts of the case and, looking at things realistically, if they win on the first trial, as they propose, they say it is likely that the defendant will then seek to settle the case. And if they lose on the first part of the case, then, subject to appeals, the case will go no further.

37. Turning to the defendant's position, its counsel submits that the issue of reliance is an important or key part of the statutory cause of action. If the claimants are unable to show reliance they have no right to bring the claim.

38. The defendants agree that the resolution of issues at an early stage will assist the parties to settle the case: but they say this points to the inclusion of another important issue, namely issue 10.

40. The defendant says that its proposal would lead to a more balanced allocation of resources and effort. It is fairer that the claimants should be undertaking work now, towards an overall resolution, just as the defendant will be in relation to the RSA issues.

41. It says that, on its proposal, there is likely to be an earlier resolution of the reliance issues than on the claimant's suggested split. Counsel gave a provisional estimate of how long it would take to get to trial, suggesting, on the defendant's proposal, it could be in autumn 2022 or early 2023.

42. The defendant says that if the trial is split in the way that the claimants suggest it is likely that the trial of the reliance issues would not take place at least until a date in mid-2024. They also argue that the claimants took their time before bringing these claims, and that it is important, if possible, for the issues of reliance (which include factual disputes) to be decided sooner rather than later.

43. The defendant accepts that the trial length would be increased by the inclusion of issue 10 and suggests that the trial length might be increased by some 6 or 7 days or so.

44. It says that the claimant's argument that it would be necessary to call substantial expert evidence is exaggerated. Counsel suggests that there may be no need for expert evidence on the efficiency or otherwise of the markets once the point is properly spelt out. But that, in any event, it is unlikely that any such evidence would occupy the time of the court for very long.

45. As to the possibility of appeals, the defendant says this factor actually points the other way. It says that it would be preferable for any appeals to be part of a unified process with any appeals on the RSA issues to be heard at the same time as any appeals on issue 10. It says that it is realistic to suppose that there may be appeals on at least some of the RSA issues, including those concerning the question whether it is arguable in law that the overall impression given by the information is relevant, and the construction issues concerning the meaning of the published information.

47. The defendant says that the risks arising from the potential overlap between the reliance and causation issues that there may be muddle or duplication is overstated. It says that the issues are different: the question of reliance concerns what actually happened while the question of causation concerns a counter-factual, hypothetical, questions about what would have happened. It argues that in some respects, the questions of causation would actually be better focused once the parties were armed with a ruling on the questions, first, of what information or omissions were inaccurate or misleading, and, secondly, which parts of the information had been relied on by the claimants in making their decisions.

51. I have carefully considered these various submissions. I have concluded that overall the defendant's position is to be preferred. As I have summarised the parties' positions I can provide my reasons briefly.

52. First, it is preferable on balance that more rather than fewer issues should be tried at the first trial. It seems to me that including issue 10 as well as the RSA issues is more likely to bring about a settlement of the remaining issues.

53. Second, it seems to me that the defendant's proposal is likely, overall, to lead to a faster determination of the factual issues concerning reliance than the claimant's proposal. On the claimant's proposal, there would be a first trial some time in mid-2022. There would then no doubt be further directions in order to prepare for a trial in some point in 2023. Indeed, it seems likely that, given what has been suggested so far, one would be well into 2023 before there could be a trial of the reliance issues. By contrast, in my view there could realistically be a trial of issues 2 to 9 and 10 starting in the autumn of 2022. So there could be a saving of up about a year (leaving aside appeals).

55. I do not accept the claimants' submission that this difference is marginal. I agree with the defendant that the claimants have chosen to bring this case late in the limitation period, and the more time that passes the more difficult it will be for the parties and the court to determine what happened on a true factual basis. Another year or so of delay is, if possible, to be avoided.

56. Third, while there is some force in the claimants' point that their division of the issues would lead to a shorter first trial, I do not think, in a case of this scale and importance, this is a particularly telling factor. The claimants have brought this claim and must be ready to take part in it fully, even if that means a somewhat longer first round trial. I do not think that a trial of say 25 days to 30 court days would be excessively onerous for parties as well funded as these (particularly where, as I understand it, the claimants have arranged litigation funding).

58. The fourth point concerns the overlap between the issues of reliance and causation. There is again some force in the claimants' points, and in an ideal world I can see that it would be preferable to have a clean and tidy division of the claimant's issues from the RSA issues. However, decisions of this kind are pragmatic and not based entirely merely on bright lines of principle. I do not think that the potential of overlapping evidence (on reliance and causation) is likely to lead to a serious risk of inconsistences in the evidence or the court's findings. While it is somewhat unsatisfactory for there to be an element of duplication with the same witnesses possibly coming back to court twice, once they witnesses have given their evidence at the first trial, I would expect the evidence about causation to be fairly short and self-contained.

61. As to the claimant's argument that expert evidence would be required for issue 10, I agree with the submission of counsel for the defendants that it is quite possible that no such evidence will be needed. The proposition advanced by the claimants appears to be that the prices of securities listed on the LSE are at least influenced by published information, which at the moment strikes me as more or less self-evident. But if there is to be such evidence, then I would not expect it to occupy the time of the court for very long.

62. The possibility of appeals seems to me a point that points in both directions. I can see that it might be considered better to hold back the reliance issues and for there then to be appeals after the second trial. On the other hand, I think, overall, there is some force in the defendant's point that if there are to be appeals it would be better if as many issues as possible are dealt with at once. There is a real risk that if the question of reliance is put off to a second trial and there is an appeal after the first trial, the reliance questions (which are essentially factual ones) would be pushed further off into the distance and, for reasons already given, I regard that as unsatisfactory.

64. The next point concerns the allocation of the litigation burden as between the parties. The defendants are entitled to examine and scrutinise the claimants' case, just as the claimant is entitled to examine the defendant's conduct. The claimants'

proposal would effectively mean postponing their burden until a later stage, while placing almost all the work on the defendant. Sometimes, by its nature, litigation is lopsided in that way: the claimant has no evidence to give and the case entirely concerns the conduct of a defendant. But, here, the imbalance would be created by the proposed order splitting the trial. It seems to me that the claimants, having brought the action, should be prepared to undertake substantial work in ensuring the expeditious progress of the proceedings to resolution. That includes giving disclosure, preparing witness statements, and being prepared to provide evidence at trial. It seems to me that the defendant's proposal represents a fairer allocation of the litigation burden on the parties. This would not be a determinative factor on its own, but it does seem to me that it has some bearing.

65. For these reasons I have concluded that it is appropriate to include issue 10 in the first trial. I would not have been attracted by the defendant’s fallback position of including questions of causation of loss. It seems to me that those issues are likely to involve substantial expert evidence and there is a real attraction in those issues being hived off together with quantum to a second trial.