Neutral Citation Number: [2023] EWHC 1413 (Comm)

Case Nos. (Consolidated): CL-2018-000297, CL-2018-000404, CL-2018-000590, CL-2019-000487, and CL-2020-000360

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Dates: 7, 9 June 2023

Before :

Mr Justice Andrew Baker

- -

Between :

SKATTEFORVALTNINGEN (THE DANISH CUSTOMS AND TAX ADMINISTRATION) ("SKAT")	**Claimant**
- and -	
SOLO CAPITAL PARTNERS LLP (IN SPECIAL ADMINISTRATION) & OTHERS	**Defendants**

- -

Charles Graham KC, Abra Bompas, KV Krishnaprasad, Sam O'Leary, Matthew Hoyle and Constantine Fraser (instructed by **Pinsent Masons LLP**) for the **Claimant**
Nigel Jones KC, Lisa Freeman, Laurence Page (instructed by **Meaby & Co Solicitors LLP**) for the **Sanjay Shah Defendants**
Kier Howie (instructed by **PCB Byrne LLP**) for the **Lui Defendants**
David Head KC, Hannah Glover and Sophia Dzwig (instructed by **DWF Law LLP**) for the **DWF Defendants**
Linos Choo (instructed by **DLA Piper**) on behalf of **Mr Jas Bains**
Mr Mankash Jain (in person)

Hearing dates: 7-9 June 2023

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CMC RULINGS
(Approved Transcript)

Mr Justice Andrew Baker **Wednesday, 7 June 2023**
(3:02 pm)

1. I am grateful to all counsel for their consideration in their written skeletons, and in the oral argument today so far, of the important question of identifying sample trades that can be treated, for the purposes of the Main Trial, as representative of the trading structures or series of transactions used by those participating in the various trading models that generated, ultimately, the several thousand WHT refund applications that are the ultimate subject matter of SKAT's various claims.
2. I am satisfied from the descriptions that have been given and the explanations that have been provided of the pleaded cases as they stand, and the process that has been undertaken on SKAT's side of the selection of candidates, that we now have a list of 25 sample trades that are, in the sense that will matter for the Main Trial, representative of the trading models. That includes in certain instances variants or sub-variants, as identified by SKAT in the run-up to the hearing this week in their amended version of what was originally Schedule 1A to the Particulars of Claim. In that version there are added columns M and N attributing, to adopt a word that has been used, each of the 4,000 or so individual claims to one or other of the pleaded trading models.
3. In principle – not so as to shut defendants out from coming back and saying, on a particularised basis, that there is more they could and would wish to say – but in principle, on the way in which the case has always been pleaded, were there, on any defendant's side, a case intended to be explored at trial that some other feature not present across the whole of one of the trading models, or a further sub-variant within one of the models, was material to be considered, because either it did, or could in an alternative case, make a difference to questions of ultimate validity of the refund claim, or for other reasons relevant to disputed issues, that ought by now to have been pleaded.
4. Against all of that background, as it seems to me, it is appropriate and I am in a position to direct that the sample trades identified by SKAT will be taken at the Main Trial to be representative of the

trading structures and/or series of transactions underlying the relevant trading models, including their sub-variants where applicable.

5. On that same basis of never saying never in advance, that is to say not shutting out the making of an application that I would then consider, if it was not agreed, for that list to be altered, either by the addition of what one would hope would be only a few additional samples (but, again, I do not preclude any particular type of application), or by way of adjustment or correction to the attribution on the more detailed spreadsheet, or so as even to identify so that it can be included in a revised version of that spreadsheet some further variant, I am not persuaded that there is shown to be a sufficient likelihood that any such application will need to be made or will prove to be well founded as to build in some further process to be gone through now before directing that, at least as regards the 25 sample trades that have been identified, they will be taken as representative.
6. The direction will be along these lines, namely that "*the issues in dispute in these proceedings shall be determined at the Main Trial on the basis that the sample trades identified in the sample trades list spreadsheet appended to the order are representative of the trading structures and/or series of transactions underlying each of [...] as indicated in columns M and N of the full trades list spreadsheet also appended to this order.*"
7. So that will be a direction that, as regards the trial generally, we are treating the sample trades identified in a first small spreadsheet as -- and here I am picking up the terminology Mr O'Leary had used in his draft order -- representative of the trading structures and/or series of transactions underlying each of a series of defined terms that will marry up with the revised schedule 1A, which will be terms that can have been defined in recitals within the order. We have made a bit of a habit in this case of lengthy sets of recitals but, in a situation such as this, as it seems to me, that will be a useful way to ensure a clarity and brevity of the primary direction. If you need then to understand the specific content of any part of it, you can go back and pick up the defined term.

8. The first spreadsheet I have in mind for the purposes of my order, which can be called "the sample trades list spreadsheet", will be the spreadsheet we have been using at the hearing, listing 25 sample trades, completed in two respects. One is that the additional tabs for Solo 14 and Solo 15 that counsel in their skeleton had anticipated were going to be there but are not yet there need to be added, and the second, at my suggestion, is that the WHT application number for each of the sample trades that will match the numbers they are respectively given in the much longer spreadsheet should be added in as a first column on the left. Then the second, much larger spreadsheet which completes the attribution of the sample trades to their respective populations or sub-populations of the entire WHT refund application cohort, that I have proposed to call in the order "the full trades list spreadsheet", can be the current draft re-amended schedule 1A, but, at my suggestion with the rows for the 25 sample trades picked out visually by a yellow highlighting fill or the like, so that if anybody is actually using that document, either on a screen or even in a coloured printout, they will jump off the page to the eye.
9. As I said, that does not in terms preclude an application for all of that to be improved upon, but it is the order I regard as appropriate to make at this stage on the basis that I am sufficiently satisfied by the process that has been undertaken that those 25 are representative to at least an extent that is sufficient to make that a proper order, and I apprehend that will remain so even if one or more of the defendant groups hereafter find that there are either a number (again, I would hope, if it happens at all, a small number) of additional samples, or even some additional subdivision of the models, that would make a future revised version of that spreadsheet even more fit for purpose than it will already have been by the direction that I have now made.
10. All of that also allows -- and in relation to this I am grateful in particular to Mr Jones KC's clarifications that nothing that he was suggesting was intended to cause SKAT a difficulty in relation to asking their expert, Mr Wade, to get on with the job on the current timetable of considering at least the 25 samples -- but what I have ordered also has the benefit that that list of 25

becomes a fixed set of sample trades that we will definitely be using, whether or not in due course we also find that we add a few more. If happens at all but happens only at a point when it then becomes necessary for Mr Wade, for example, to deal with them in a supplemental report rather than in his first report, ultimately so be it. If that is what happens, the fact that that would be needed would no doubt go into the discretionary scales as to whether I should allow any such change. But all things being equal, we will all be working on the basis that our preference is to make the set of samples as fit for purpose as we possibly can, and if I am shown that, by the introduction of a few additional samples, or, as I have indicated a couple of times already, even a further sub-categorisation or additional categorisation within the models, then we can have an even better degree of representativeness, well, I am likely to want to approve that change if we can find a way of accommodating it.

11. However, to repeat, I am not going to provide a set of directions anticipating any such process. The defendants must take their own course as to that knowing, as they will, that notwithstanding everything I have just said about my likely attitude in principle, at the same time the rule is the sooner the better, and the longer any such application is left before being made, the more they risk the possibility that it will have been left sufficiently late as to be unfair to allow it. That is in the normal way for any type of application that would introduce a change to the preparatory work that would be needed for a lengthy trial.

Mr Justice Andrew Baker **Friday 9 June 2023**
(10:09 am)

12. In relation to the length of and listing for the Main Trial, I do not want to take up everybody's time by giving a lengthy *ex tempore* judgment. I regarded the list of factors identified by Mr Jones KC as helpful and almost complete, and I summarise my views about that very briefly as follows:

    a. Firstly, I agree with him that it is of great importance to ensure, in the case management directions as to the length and listing of the main trial, that the court will be providing for all parties to get, as Mr Jones put it, a fair crack of the whip at trial.

    b. Secondly, I also agree -- taking what he identified, if I numbered them correctly, as his second and fifth points together -- that an aspect of there being a fair crack of the whip for all is not only a sufficient length of time in court with me, presenting evidence and argument, that everybody has a fair opportunity to put forward their cases and respond to the cases of others, but it is also a matter of stamina and endurance for all concerned; not only the professional litigators involved, where there are represented parties, but also and particularly those who are litigating in person, at all events those who are litigating in person and who may, as at least some of them may well, choose to be relatively active participants or at least regular attenders. Therefore, one has to have an eye on the need not only for there to be enough sitting days, but for the pattern of the trial as a whole not to become oppressive.

    c. Thirdly, I agree with Mr Jones that one needs to be aware of the potential for mishaps or delays and not, therefore, provide for a length and approximate probable timetable that appears to have no slack or room for overrun at all, which was his third factor.

    d. Fourthly, however, and on the opposite side of any balance, as Mr Jones rightly recognised, any more than a very small increase in the length of the proposed main trial,

certainly as regards sitting days but also even as regards overall length, including slack time or non-sitting days, will have a significant impact on costs, the allocation of court resources to this case, and is a strong factor pointing in favour, all other things being equal, of confining the main trial so far as one reasonably can to a period that the court is confident should be sufficient for all to have a fair trial hearing, even if that might mean providing for less time than some would prefer to have or feel that, if there were no other limits, they could potentially take up through trial.

13. So, thus far, on five of the six factors mentioned by Mr Jones KC, I agree with them as relevant factors, and the direction in which they respectively point as he indicated. However, I am not sure, in the particular circumstances of the present case, that I agree in quite the way Mr Jones intended it that his sixth factor is particularly relevant. His sixth factor was -- and it is often said in the context of the listing at a case management conference of a trial some way off in the future -- that it may be better to err on the side of a longer trial rather than potentially too short a trial estimate, because it is easier later to shorten than to lengthen and find additional time.
14. As we all found ourselves discussing in the dialogue in court yesterday, the practical reality of this case at this moment in time, now less than a year from the start of the main trial, whatever I say about its listing, is that there is at least some level of risk that we shall not be able to complete the trial, including closing argument, by Christmas 2024. That practical reality means that both as far as I am concerned as the trial judge and the court is concerned in terms of the availability of Court 26 and its resources generally, and as far as all of the parties and their legal teams, to the extent they have legal teams, are concerned, nobody can be committing themselves now to being elsewhere or doing other things for what in the court calendar is the Hilary Term 2025 (January to Easter 2025).
15. Were I today insisting that we stick with the listing that we previously fixed of a completed trial by Christmas 2024, it would certainly be on the basis that I would not expect to be told in

December, at the first pre-trial review, for example, were it then the case that I felt I had to make a decision to extend the trial into the Hilary Term 2025, that, oh dear, that was no longer possible, because such-and-such a legal team or such-and-such a litigant in person or such-and-such a set of witnesses had committed themselves in such a way that they would not be available and, therefore, if the trial had to be longer than we had previously envisaged, we would be faced with applications to adjourn. On no view would that be acceptable.

16. I also put into the balance, because I agree with them as relevant factors, the observations of Mr Howie on behalf of the Lui defendants, echoed by Mr Jain on his own behalf, and consistent with observations made also by Mr Head KC for the DWF defendants. In particular, as Mr Howie submitted, there is, in a case of this kind, a real value in reducing as far as reasonably possible the level of uncertainty for the purposes of forward planning, both calendar planning and budgeting and other resource planning, in relation to the Main Trial.

17. Of course, the process in which we are all engaged is not one in respect of which there can be guaranteed or absolute certainty about anything very much in terms of exactly how long different stages will take, but there is some real value, if the court cannot feel confident that the existing trial estimate should still be sufficient, in grasping that nettle now and making directions that reduce, as far as reasonably possible, the room for whatever is then said today about the trial listing to have to be significantly revisited later; albeit that if a significant revisiting later, whatever the trial estimate fixed today, was a realisation that substantially less time was required after all, no doubt that would be welcome and shortening the trial again would likely be preferred to keeping with the existing pattern of the trial simply for the sake of not moving the dates when different defendants' cases were going to be considered. In other words, if there were a real prospect hereafter that significant aspects of the case could be moved forwards substantially, then that is an opportunity I am likely still to take.

18. So where does that leave us? That leaves us with that difficult task of not measuring, because it is not capable of mathematical or precise measurement, but assessing the level of the risk I have said exists and was acknowledged on all sides that completion of the trial by Christmas 2024 is not going to prove possible. With a significant degree of reluctance or disappointment, I find myself persuaded that, ultimately, the maximum time that realistically that current listing would allow for the calling and cross-examination of the defendants' factual witnesses is just too tight for me to have the degree of confidence I would wish to have that we could complete the trial, including closing arguments, by Christmas 2024.
19. I take on board and endorse, again, an observation of Mr Howie's, but it was also mentioned by others, that one can identify, even now, areas within the case -- the time required for live expert evidence being the most obvious -- where we might be contemplating today a little more time than will prove to be required. Without meaning to suggest I need to show the parties all of my homework, I have played at some length overnight with various different permutations and possibilities and, doing the best I can, I do not find a shortening of other parts of the trial, such as the expert witness time required, that I can presently think of as a realistic possibility, that would give me sufficient time to add to other stages, in particular the defendants' evidence, to create the confidence I would wish to have that we would complete the trial by Christmas 2024 so as to stick to the current trial listing.
20. Against that, I am confident that there is no good reason why this trial should detain anybody beyond Christmas 2024 so as to complete the evidence. I am not willing to contemplate, therefore, simply an open-ended relisting of the trial for the whole of the Hilary Term 2025, albeit that what I am about to say as to the direction that will be made in one sense comes to a similar endpoint, namely that unless something changes between now and the start of trial so as to enable us to shorten things substantially, it will be the case that we only get to the end of everything shortly before the Easter holiday 2025.

21. That is to say -- and the parties, I suspect, who have been participating in the hearing now know what is coming -- that I do propose to adopt what in the course of argument we found ourselves referring to as an option 4 that I identified, namely that the Main Trial listing will be varied so that it is listed to commence on 9 April instead of 15 April -- the small adjustment I made at the start of the hearing on Wednesday -- and it will include the second half of Hilary Term 2025, for closing argument, meaning the week commencing 3 March to the week commencing 7 April 2025, inclusive.

22. Now, I do propose, in light of the various submissions that were made to the extent we were able to descend into a little more particularity, to say now, in the order that will be made, how the Main Trial is to be structured, unless otherwise ordered at a pre-trial review, and on the basis that a more detailed provisional trial timetable is to be settled at the December pre-trial review. Whilst I have not drafted a precise wording for this yet, the language of the provision that this will be the structure of the trial unless otherwise ordered at the pre-trial review, and the general order in relation to the extension of the listing, should make it clear that the only significant variation that I am contemplating is if we find it possible to shorten things substantially after all.

23. The structure direction I propose to make at this stage, subject to review at the pre-trial review, is as follows:

    a. there will be reading time in the first week of trial, 9-11 April 2024;

    b. there will then be two weeks of non-contentious documentary openings. At this stage, that is all I will say about that. We can discuss in December how much of those two weeks will be taken up by the claimants and how much time we allow, at the stage of a detailed provisional trial timetable, for any brief documentary openings by defendants or defendant teams;

    c. then claimant's factual evidence will be the weeks of 29 April, 6 May and 13 May 2024, which amounts, I think, to 11 sitting days, unless nearer the time we decide we need to

take the Friday of the shortened working week, because the week of 6 May will be after a bank holiday Monday;

d. then from the week of 20 May, moving into defendants' factual evidence, the week of 20 May and the weeks of 4 and 10 June will be what we have been calling defendants' factual evidence chapter 1. Those who are following this in a calendar will note that I omitted the week of 28 May and Monday, 3 June; that is because that is a court vacation and it will be the first natural break point to allow everybody at least some downtime, even if it is in the middle of factual evidence. I am not pretending that the parties will simply take the entire week off, but I say now I would certainly encourage all teams to find a way to ensure that, even at that early-ish stage of the trial, they do not allow the trial to take up every day of that week, but they actually do give themselves a long and possibly even an extended long weekend and revert to working on, say, the Wednesday of the Whitsun week or the like. It will be important;

e. I am proposing to say not the full week of 10 June, but 10 and 11 June only, for chapter 1, which makes 10 sitting days in all, because I am proposing that we say now that we would sit on Friday, 7 June. That is the first week for the court after the Whitsun vacation, so normally is reduced to being a three-day Commercial Court week; we will simply say we are taking the Friday;

f. that allows us to move into chapter 2 from 12 June, giving 10 days for chapter 2, which will take us through also the weeks of 17 and 24 June 2024;

g. there would then be non-sitting (reading) time on 1 and 2 July 2024, followed by three and a half sitting weeks – 3-4 July, and then the weeks of 8, 15 and 22 July -- in which to take chapters 3, 4 and 5, with the short three-day week at the very end of term, 29 July to 31 July, marked as not sitting time, but overrun time if required;

h. there will then not be sitting, in the normal way, during the long vacation. We can resume on Wednesday, 2 October 2024, which again, to make that a better working week, I would propose we make a three-day week so that we use that Friday, and then the weeks of 7, 14 and 21 October, to accommodate chapters 6 and 7. One of the aspects to review at the pre-trial review is whether, in relation to chapter 5 in particular, as we have been calling it, once we have the trial witness statements to hand, there is too much material there and we need to find some not too inconvenient way of splitting chapter 5 across the long vacation;

i. the week of 28 October will be a non-sitting mid-term break week, the intention of which is for the parties and their legal teams to take a break. As it happens -- I do regard this as of relevance and it was mentioned by Mr Jones KC -- that is likely to be an educational half-term break, to the extent that that affects anybody involved. That is an additional reason to take a trial break then, although I found it to be a natural point, in mapping out how the trial might go, by which to expect that we should have completed the defendants' factual evidence, i.e. I did not go about the exercise of scheduling artificially to try to make sure that happened;

j. taking that, then, as a mid-term break in the trial, the weeks of 4 and 11 November will be marked as not sitting time, but time for reading and, for the parties, preparation time, in relation to expert evidence, which would be scheduled then for the weeks of 18 and 25 November, 2 and 9 December, with the final week of the Michaelmas Term 2024, 16 to 19 December, marked as not sitting (overrun if required).

24. The parties will perhaps now immediately see why I found myself looking at that, and immediately envisaging the possibility that, after that mid-term break, what I have just said could possibly prove to be more time than we need for the final stage of evidence, namely expert evidence, but I was not able to find myself contemplating taking enough time out of that to leave

sufficient time for a break after expert evidence for sensible closing submissions to be prepared and for probably at least four weeks of closing submissions, all before Christmas 2024. That ultimately became, for me, the tiebreaker, as it were, between saying that I was going to insist we stick to the current listing and saying that the nettle should be grasped and we need to allow for closings to go into the Hilary Term.

25. What I will then be saying is that the weeks of 3, 10, 17, 24 March and 31 March to 3 April -- so that is five sitting weeks, amounting to 20 days -- will be scheduled for closing argument, reserving the week of 7 April to be not sitting time as a final overrun safety-valve in case it turns out -- which I do not think is impossible, but I will try to avoid it if I can -- that even 20 days is not quite enough for closing arguments. This is a case in which, even though the parties will I am sure take the care that the case deserves to open the documents to the court carefully during the non-contentious documentary openings, and will then explore with care and sufficiency the factual evidence that needs to be tested, closing argument will be a very significant stage for which -- I was about to say "above all", but perhaps that is going too far -- on any view at least equally with the allowances for dealing with the factual evidence in the case, must be allowed not to be rushed.

26. An aspect of that I will say now, so that parties take that on board in general, is that I dislike relatively intensely a closing argument that involves an assumption that a submission can be made over five or ten minutes, the substance of which really requires an hour to be spent looking through authorities or half an hour or 40 minutes or so to be spent going back over transcript evidence or particular aspects of the documents to remind the court of why, so counsel says or so the litigant says, the submission they have just made in five or ten minutes might be a good submission, and the submission ends with, "*And your Lordship, in his own time, can please go back and read the following*". That is not how closing arguments will work in my court if I can possibly avoid it, but particularly on such a long trial as this. We need to allow enough time for

closing arguments to be the closing arguments that all the parties wish, within reason of time, to have put before me, and explained to me and shown me, so that once the last person sits down on the SKAT side at the end of any reply submissions at the end of closing, I am simply in a position to go away, consider my judgment and start writing, rather than having, in effect, some week or so's worth -- or it might even be more -- of additional reading still to be doing so that I have finally understood everybody's closing arguments, if that makes sense.

27. So I do think it is important, even having allowed the larger 20 days that was built in to the rival potential draft timetables, to contemplate the possibility that that might not be enough, and therefore have that overrun week.

Mr Justice Andrew Baker **Friday 9 June 2023**
(11:32 am)

28. With the helpful benefit the dialogue that parties not participating at this hearing can follow by reading the general transcript, I am satisfied that, firstly and generally, along the same lines as what I said in the *Iranian Offshore* case, even if it is not quite as stark a case as that was -- where parties had simply put someone to proof and, as I remember were the facts there, purported to reserve a right at some future point to plead the content of a foreign law which they never pleaded -- even if it is not quite as stark a case as that, the substance of my case management concerns in that case apply equally here.
29. Secondly, at the more specific level of an analysis of this case, how this case is going to work between now and trial and then at trial, and particularly the very important roles *de facto* that Mr Head KC's clients and Mr Jones KC's clients and their legal teams have been performing, in my view it is right and it is only fair to all concerned, particularly on the one hand SKAT, to know exactly what they are facing from which defendant, but also for all those defendants that are less actively participating, that they be as clear as they can be over who is pursuing what point that they might potentially be trying to adopt.
30. I think therefore it is appropriate to make the direction SKAT has sought, slightly tightened or tidied in the way that I indicated before we started the discussion. So the direction will be that: "*Save insofar as a Defendant has pleaded, or seeks and obtains permission to plead, a positive case that the claims against it are governed by a system of law other than English law (as opposed to, for example, a non-admission as to governing law or on averment that the Claimant is put to proof as to governing law), the claims against that Defendant will be determined by reference solely to English law.*"
31. I consider that is a matter within my case management powers to direct for the purpose of making everybody clear as to what is and is not in issue, and who is running what case or not

running a case, albeit it is against the background of the substantive analysis of mine in *Iranian Offshore*, as to some extent adopted and to some extent no doubt improved upon or varied by the Supreme Court in *Brownlie (No 2)*. Though that substance lies behind it, I am still ultimately making a case management direction within my procedural powers, rather than prejudicing what might have been any substantive rights.