Case No: FL-2015-0000015

[2016] EWHC 1958 (CH)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
FINANCIAL LIST

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 14 July 2016

BEFORE:

MR JUSTICE NEWEY

BETWEEN:

BARCLAYS BANK PLC

Claimant

- and -

TABERNA EUROPE CDO I PLC AND ORS

Defendants

MR D WOLFSON QC and **MS P BURNS** (instructed by Boies, Schiller & Flexner (UK) LLP) appeared on behalf of the Claimant

MR J GOLDRING QC and **MR D BAYFIELD QC** (instructed by Travers Smith LLP) appeared on behalf of the First Defendant

MR A DE MESTRE (instructed by RPC) appeared on behalf of the Second Defendant

MR A ZACAROLI QC and **MR R AMEY** (instructed by Travers Smith LLP) appeared on behalf of the Third Defendant

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JUDGMENT
(As Approved)

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MR JUSTICE NEWEY:

1. The one point on which I need to give a ruling this morning relates to disclosure by the now claimant, Barclays Bank plc.

2. What is proposed by Barclays is essentially that it should give disclosure on an issues basis and that, more specifically, it should give disclosure in relation to two particular issues: whether Class A1 Noteholders' Consent was given in respect of the Disputed Swap Agreement, and whether Barclays was aware of or consented to the Cash Injection. However, the issuer, Taberna Europe CDO I plc, and collateral manager, Taberna European Capital Management LLC, do not agree to that approach. They maintain that Barclays should be required to give standard disclosure.

3. In support of his submissions on behalf of Barclays, Mr David Wolfson QC drew my attention to CPR 31.5(7), which refers to the court deciding, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of certain orders to make in relation to disclosure. One of the listed orders is an order for standard disclosure, but another is for disclosure to be given on an issue by issue basis. Mr Wolfson argues that standard disclosure is no longer to be regarded as the default option, and in that he is supported by the judgment of Birss J in **Positec Power Tools (Europe) Ltd v Husqvarna AB** [2016] EWHC 1061 (Pat). In paragraph 21 of his judgment, Birss J observed of CPR 31.5(7):

> "Two things emerge from this. First is the reference to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly. This helps to focus the court's mind on the task to be undertaken. Second, and critically, is that the effect of this provision is that standard disclosure is one of six options. Counsel for Husqvarna submitted that this meant that standard disclosure was not the default option any more. I agree. The Chancery Guide (paragraph 17.35) makes the same point. As the Guide states, careful consideration should be given to the alternatives to standard disclosure."

4. In the present case, Mr Wolfson suggests that an issues-based disclosure order would focus the parties' minds and indeed that of the court, and he says there is no call for a more general order. In this connection, I was taken to the agreed list of issues. It is in effect, I think, common ground that that discloses only four real factual issues, those specified in paragraphs 1.12, 1.13, 1.14 and 2.15 of the list. Mr Wolfson argues that Barclays cannot be expected to have materials requiring disclosure except in relation to issues 1.14 and 2.15. So far as those issues are concerned, he accepts that Barclays should be ordered to give standard disclosure, but he submits that an order for disclosure would otherwise be inappropriate.

5. Mr Antony Zacaroli QC, who advanced the oral arguments in opposition to what Barclays proposes, draws a distinction between two matters: first, the question whether there should be an order for standard disclosure or issue-based disclosure and, secondly, how that might work out in practice in terms of what search terms, periods and custodians might be used for searches. So far as the former aspect is concerned, Mr Zacaroli argues that Barclays could be expected to have materials bearing on issues 1.12 and 1.13, as well as 1.14. As regards issue 2.15, he also suggests that there might

prove to be a need for revision of the issue once Barclays' reply is served. It seems however, Mr Zacaroli says, that an issue as to the scope of Assured's authority may well be revealed.

6. In one respect, Mr Wolfson came close to accepting that Barclays might have materials relevant to issue 1.12. He accepted that it would be appropriate for Barclays to give disclosure in relation to whether certain earlier swaps had received A1 Noteholders' Consent. He was inclined to see such disclosure as an extension of issue 1.14, but I think Mr Zacaroli is probably correct that such materials are properly to be regarded as relating to issue 1.12. Of course, taking an issues-based approach, it would be possible to add to the issues in respect of which Barclays was originally proposing to give disclosure a new issue carved out of issue 1.12, but the point illustrates that limiting Barclays' disclosure just to issues 1.14 and 2.15 might not prove satisfactory.

7. As regards issue 1.13, there is again I think, as Mr Zacaroli submitted, reason to think that Barclays might have relevant materials and that it is not inconceivable that those materials might not otherwise come to light.

8. The upshot, as I see it, is that it could not be right to limit Barclays' disclosure simply to the existing issues 1.14 and 2.15. Revisions would be appropriate as regards issues 1.12 and 1.13, and potentially also 2.15.

9. At that point, there seems to me to be nothing much to be gained by attempting an issues-based order as opposed to standard disclosure. In reality, an order for standard disclosure will require Barclays to give disclosure only in relation to points on which there are significant issues of fact, which as matters stand at least are only issues 1.12, 1.13, 1.14 and 2.15. Standard disclosure will in practice be tied to those specific issues. There is, however, something to be said for framing the order in terms of standard disclosure rather than seeking to define precisely what the relevant issues are, particularly in circumstances where the reply has not yet been received.

10. That is not to say at all that steps should not be taken to limit the searches that Barclays has to undertake in pursuit of its disclosure obligations. Given that Barclays cannot be expected to have useful materials except in relation to the particular issues to which I have referred, and that in reality the timeframes within which such materials might be found are likely to be very limited, I would expect the parties in the course of their discussions as to how disclosure should be undertaken to confine very significantly indeed what Barclays should be required to do.

11. The same is true, albeit to differing extents, as regards the other parties. This claim involves a very large amount of money, but, even so, it must be very important to seek to contain so far as possible the amounts spent on disclosure, and I have noted from the materials that the parties have already filed that disclosure could, if not carefully confined, prove to be a very expensive exercise.

12. In short, the upshot is that I do not think it could be satisfactory to restrict Barclays' disclosure simply to the two issues that it was originally proposed disclosure should be limited to, and, rather than trying to come up with an expanded list of issues, the preferable course, in my view, is simply to order Barclays to give standard disclosure, while recognising that in practice that disclosure will relate only to issues 1.12, 1.13,

1.14 and 2.15, potentially in a revised form following the service of a reply. I would expect, however, that, as the parties seek to work out how disclosure is going to be undertaken in practice, they will take all sensible steps to limit timeframes, custodians and other matters with a view to keeping the disclosure exercise and its costs within reasonable bounds.