Claim No. FL-2016-000008

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION, FINANCIAL LIST

Neutral Citation Number: 2017 EWHC 135 (CH)

BETWEEN:

(1) BILTA (UK) LIMITED (IN LIQUIDATION)

(2) NATHANAEL EURL LIMITED (IN LIQUIDATION)

(3) WESTON TRADING UK LIMITED (IN LIQUIDATION)

(4) VEHEMENT SOLUTIONS LIMITED (IN LIQUIDATION)

(5) INLINE TRADING LIMITED (IN LIQUIDATION)

(6) KEVIN JOHN HELLARD

(AS JOINT LIQUIDATOR OF BILTA (UK) LIMITED (IN LIQUIDATION))

(7) DAVID ANTHONY INGRAM

(AS JOINT LIQUIDATOR OF BILTA (UK) LIMITED (IN LIQUIDATION))

(8) KEVIN JOHN HELLARD

(AS LIQUIDATOR OF NATHANAEL EURL LIMITED (IN LIQUIDATION))

(9) DAVID ANTHONY INGRAM

(AS JOINT LIQUIDATOR OF NATHANAEL EURL LIMITED (IN LIQUIDATION))

(10) KEVIN JOHN HELLARD

(AS JOINT LIQUIDATOR OF WESTON TRADING UK LIMITED (IN LIQUIDATION))

(11) DAVID ANTHONY INGRAM

(AS JOINT LIQUIDATOR OF WESTON TRADING UK LIMITED (IN LIQUIDATION))

(12) KEVIN JOHN HELLARD

(AS JOINT LIQUIDATOR OF VEHEMENT SOLUTIONS LIMITED (IN LIQUIDATION))

(13) IAN RICHARDSON

(AS JOINT LIQUIDATOR OF VEHEMENT SOLUTIONS LIMITED (IN LIQUIDATION))

(14) KEVIN JOHN HELLARD

(AS JOINT LIQUIDATOR OF INLINE TRADING LIMITED (IN LIQUIDATION))

(15) DAVID ANTHONY INGRAM

(AS JOINT LIQUIDATOR OF INLINE TRADING LIMITED (IN LIQUIDATION))

Claimants/ Applicants

-and-

(1) SVS SECURITIES PLC

(2) KULVIR SINGH VIRK

(3) SIMON FOX

(4) DEUTSCHE BANK AG

Defendants/ Respondents

BEFORE:

MR JUSTICE NEWEY

Monday, 30 January 2017

(3.25 pm)

Approved Judgment

1. **MR JUSTICE NEWEY:** I have before me applications by the claimants for, first, permission to amend the particulars of claim and, secondly, an order for disclosure.

2. The proceedings relate to trading in European Union Emissions Trading Scheme Allowances (or "EUAs") in which the first defendant, SVS Securities plc (which I shall call "SVS"), and the fourth defendant, Deutsche Bank AG, participated in 2009. According to the claimants, the relevant transactions formed part of a Missing Trader Intra-Community (or "MTIC") fraud. The EUAs in question are said to have been imported into the United Kingdom and then sold on to "buffers" before being exported. SVS is alleged to have acted as a "buffer" and Deutsche Bank as an exporter. The claimants are alleged to have failed to account to HM Revenue and Customs for the VAT for which they became liable on the sales of the EUAs to "buffers".

3. The claimants' case proceeds on the basis that their directors acted in breach of their fiduciary duties and caused the companies to carry on trading with intent to defraud creditors or for a fraudulent purpose. SVS and Deutsche Bank are said to have dishonestly assisted in such breaches of fiduciary duty and to have been knowingly party to the businesses being carried on with intent to defraud creditors or for a fraudulent purpose. The

second and third defendants, Mr Kulvir Virk and Mr Simon Fox, respectively a director and employee of SVS, are alleged to be liable on the same grounds.

4. The claim against SVS relates to trading between 29 May and 30 July 2009. The claimants maintain that they have suffered losses totalling more than £70 million as a result of this trading.

5. Deutsche Bank is not said to have been involved at the start of the trading. It is not in dispute, however, that it purchased EUAs from SVS during the period between 23 June 2009 and 30 July 2009. In all, Deutsche Bank had bought more than 23 million EUAs from SVS by 30 July 2009. The claimants claim to have suffered losses of more than £40 million in consequence of the relevant deal chains.

6. From 31 July 2009, the supply of EUAs was zero-rated by the United Kingdom. At that stage, sales of EUAs by SVS to Deutsche Bank declined very sharply. Instead, it seems, Deutsche Bank London began to sell to SVS EUAs which it had acquired from Deutsche Bank in Germany, where supplies of EUAs continued to be subject to VAT. According to the claimants, SVS bought more than 46 million EUAs from Deutsche Bank London between August 2009 and April 2010, and Deutsche Bank London had obtained most of these from Deutsche Bank Frankfurt. One of the documents to which I was taken during the hearing suggests that SVS made three relatively small purchases during August 2009 before trading increased in the September, when there were 29 such transactions. SVS was apparently buying more than a million EUAs a week by late September.

7. Criminal proceedings have been brought in Germany in relation to Deutsche Bank Frankfurt's trading in EUAs in 2009-2010. A number of officers or employees of companies that supplied Deutsche Bank Frankfurt with EUAs have, it appears, been convicted of tax offences. Some individuals who had worked for Deutsche Bank in Germany have also been convicted of tax evasion or aiding and abetting tax evasion in connection with the Bank's trading in EUAs.

8. The applications before me relate principally to the German trading in EUAs. As framed, the disclosure application notice asked for disclosure of documents relating to Deutsche Bank's trading with SVS in the period from 1 August 2009 and 30 April 2010 and to the corresponding trading in that period between the London and Frankfurt offices of the Bank. The amendments for which permission is sought also concern in large part the trading that took place between August 2009 and April 2010.

9. The draft amended particulars of claim have gone through a number of iterations. At the beginning of the hearing, the claimants were seeking permission to make the amendments shown in a version of the particulars of claim served on 17 January. As the hearing proceeded, the proposed amendments were revised further. I shall focus on the draft with which I was supplied on Friday morning, as slightly refined in the course of submissions that day.

10. Certain of the proposed amendments have not been opposed by any of the defendants. No difficulty arises as to these. In the case of a relatively small number of further draft amendments, Deutsche Bank has not raised any concerns but the solicitors then acting for the other defendants have said in correspondence that they object. In the event, however,

Deutsche Bank was the only defendant to appear or be represented before me. I can therefore concentrate on the objections put forward on its behalf. These essentially relate to amendments which, if allowed, would refer to the German trading and/or convictions.

11. The claimants contend that the German trading is highly relevant to their claims in the present proceedings. More specifically, they argue that matters relating to the trading support their allegation that individuals at Deutsche Bank London were dishonest.

12. Much of the debate before me revolved around paragraphs 61 and 58A of the draft amended particulars of claim. Taking these in that order, paragraph 61 opens with these words:

> "Further, the Claimants refer to and rely upon the trading in EUAs between SVS and DB [i.e. Deutsche Bank] in the period between August 2009 and September 2009 as evidence of the dishonesty of SVS, Mr Virk, Mr Fox and the Desk [i.e. Deutsche Bank's emissions sales and trading desks] (whose dishonesty is to be attributed to DB) in respect of their EUA trading in the Deal Chains [i.e. the May to July deal chains]. The trading in the Deal Chains in some cases is known to have involved recycling of EUAs with sales between SVS and DB forming part of the recycling chain."

13. There then follow sub-paragraphs, the third of which is in these terms:

> "The coincidence of the cessation of SVS supplies to [Deutsche Bank] London with the introduction of zero-rating would have caused any honest person on the Desk to realise (had they not done so already) that the trade in EUAs with SVS had in all probability been linked to a VAT fraud. Any honest person would have refused to trade in EUAs with SVS without firs conducting inquiries as to the extent of SVS's complicity in such fraud and ensuring that [Deutsche Bank] did not again become involved in trades of EUAs with SVS linked to VAT fraud. However [Deutsche Bank] recommenced trading large volumes of EUAs with SVS without any such inquiry. It should be inferred from this that personnel on the Desk had known at the time that SVS trades in the Deal Chains were linked or probably linked to VAT fraud or had not cared that they were."

Deutsche Bank does not object to that plea being introduced into the particulars of claim, nor to most of paragraph 62, which includes a similar point.

14. Deutsche Bank has distinguished the relatively narrow allegation made in paragraph 61(3) from a wider allegation, to the effect that (in words of Mr Andrew Hart of Freshfields, who made several witness statements on behalf of the Bank) "(i) another MTIC fraud took place in Germany from August 2009 to April 2010 involving trading by [Deutsche Bank] and SVS; (ii) [Deutsche Bank] was aware of the fraud but nevertheless continued the trading; and (iii) the Court should infer that because [Deutsche Bank] was willing to carry out this *other* trading which it knew was linked to VAT fraud, [Deutsche Bank] must also have been similarly willing to carry out the previous trading with SVS from 23 June 2009 to 31 July 2009 with knowledge that it was linked to a UK MTIC fraud". The claimants have pruned the amendments for which they seek permission since Mr Hart so described their wider allegation, notably by limiting the period of German trading relied on to August and September of 2009 and excising references to the German convictions, but paragraph 61 still includes allegations along the lines mentioned by Mr Hart. Among other things, paragraph 61 contains allegations that the German trading was devoid of commercial logic; that SVS, Mr Virk, Mr Fox and the Desk could not have believed that there was a legitimate commercial rationale for the change in Deutsche Bank's role or for the transfer of EUAs from Deutsche Bank Frankfurt to Deutsche Bank London; that Mr Hector Freitas, one of the individuals on the Desk, was instrumental in the change in the pattern of trading; and that he and the Desk more generally played a part in it. It is to be inferred, it is said, that at least two individuals on the Desk, Mr Freitas and Mr Martin Lawless, knew that the purchases from SVS during the United Kingdom trading were linked to VAT fraud and had Deutsche Bank

participate in such trades in such knowledge. The allegation that Deutsche Bank knew the German trading to have no commercial logic also features in paragraph 62.

15. Turning to paragraph 58A, this starts with these words:

> "Further, as against Mr Freitas the Claimants rely on his conduct and involvement when EUAs were purchased by [Deutsche Bank] from German suppliers who were or included Losungen 360, New Energy Markets GmbH, Vektor Energie GmbH, Roter Stern GmbH and Garant Bank GmbH which were then sold on by [Deutsche Bank] London to SVS during the period August 2009 to April 2010 as evidencing that Mr Freitas knew, or did not care, that the [Deutsche Bank] Sales were connected to VAT fraud."

16. Sub-paragraphs (1) to (11) deal principally with matters relating to Lösungen 360 and, in particular, an incident in late September 2009 when (according to the pleading) Mr Freitas ordered trading with the company to be suspended because matching trades had come to light but subsequently recommended that trading be resumed. It is to be inferred, the pleading states, that Mr Freitas suspended trading with Lösungen 360 "to give the false impression that [Deutsche Bank] London was concerned to avoid any involvement in transactions that might be linked to fraud".

17. Sub-paragraphs (11) to (15) focus on Mr Freitas' dealings with Deutsche Bank's "Centre of Competence for EUA trading". Mr Freitas is said to have given the Centre of Competence "the false impression of a strict check on Lösungen 360 and even stated that it was allegedly above suspicion" on 23 October 2009 and, on the same occasion, to have falsely said that "everything had been done to eliminate fraud". On 6 November, according to the pleading, Mr Freitas expressed some concern about Lösungen 360's business model and trading. In further conversations on 18 December 2009 and 15 January 2010, Mr Freitas is alleged to

have misled his colleagues about the identities of the counterparties with whom Deutsche Bank London was trading.

18. Paragraph 58A concludes by stating, in sub-paragraph (16), that Mr Freitas failed to inform his colleagues in Deutsche Bank Frankfurt that HMRC were investigating companies which had traded with Deutsche Bank London before supplies of EUAs were zero-rated.

19. Mr Freitas is not the only individual working for Deutsche Bank to be mentioned in paragraph 58A. For example, a Mr Andreas Dreier is said to have been "well aware that [Deutsche Bank] was trading as part of a carousel" and to have been "unconcerned by it" and a Mr Hohnholz is alleged to have made a statement that was misleading.

20. The contents of paragraph 58A are, at least for the most part, based on information that the claimants have gleaned from the German criminal proceedings.

21. I should also mention several other passages in the draft amended pleading to which Deutsche Bank has taken exception. In the first place, there is more than one reference in the draft to the judgment given in the German criminal proceedings. Thus, paragraphs 54(5)(b), 56A and 61(10)(c) contain allegations that the German judgment records certain things as having happened. Secondly, Deutsche Bank has resisted permission to amend being given in respect of paragraph 46A, which reads:

> "Further, the Claimants rely upon SVS's conduct and involvement when EUAs were purchased by [Deutsche Bank] from German suppliers who were or included Losungen 360, New Energy Markets GmbH, Vektor Energie GmbH, Roter Stern GmbH and Garant Bank GmbH which were then sold on by [Deutsche Bank] London to SVS during the period August 2009 to September 2009 as evidencing that Mr Virk and Mr Fox knew, or did not care, that the SVS Sales were connected to VAT fraud."

22. In so far as Deutsche Bank is objecting to amendments referring to the German trading, its case is that the matters alleged are, at most, of peripheral relevance but would occasion very considerable work, expense and delay. The claims against Deutsche Bank, it is pointed out, relate to trading in June and July of 2009. According to Mr Daniel Toledano QC, who appears with Mr Nicholas Sloboda and Mr Henry Hoskins for Deutsche Bank, any alleged involvement of the Desk in any subsequent German fraud could, at most, be no more than a factor in the assessment of the personal credibility of members of the Desk or their propensity to carry out transactions which they knew to be fraudulent. Matters relating to the later German trading, Mr Toledano submitted, could not assist the Court in assessing the position in the relevant period, June and July 2009, yet introducing them into this litigation would make it far more complex and costly. On the basis of the existing particulars of claim, Deutsche Bank is retrieving (so Mr Hart has explained) more than 5 million electronic documents and some 98,000 audio files, at an estimated cost of between £1 million and £1.5 million. If, it is said, the claimants are permitted to introduce the German trading into the particulars of claim, the scope and burden of disclosure will be substantially increased. Before the claimants pruned the proposed amendments, Mr Hart spoke of a vast exercise, noting that the date range would be extended from some seven weeks to about nine months and that the number of custodians whose documents would need to be reviewed would also increase significantly.

23. Among other things, Mr Toledano stressed that, when exercising case management powers, the Court must seek to give effect to the overriding objective; that matters relating to credit should neither be the subject of orders for disclosure (see *Thorpe v Chief Constable of Greater Manchester Police* [1989] 1 WLR 665) nor pleaded (since statements of case

should contain only facts necessary for the purpose of formulating a cause of action or defence – see *Tchenguiz v Grant Thornton* [2015] EWHC 405 (Comm), at paragraph 1); and, quoting Lord Bingham in *O'Brien v Chief Constable of South Wales* [2005] 2 AC 534, that "Any evidence, to be admissible, must be relevant". Mr Toledano also referred me to the principles governing the admissibility of similar fact evidence established in the *O'Brien* case and summarised in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2005] EWCA Civ 1602. The Court of Appeal explained these principles in these terms in the *Springwell* case (in paragraphs 67-69):

> "There is a two-stage test: (i) Is the proposed evidence potentially probative of one or more issues in the current litigation? If it is, it will be legally admissible. (ii) If it is legally admissible, are there good grounds why a court should decline to admit it in the exercise of its case management powers? Lord Bingham suggested [in *O'Brien*] at para 6 three matters that might affect the way in which a judge exercised his/her discretion in this regard:
>
> (i) That the new evidence will distort the trial and distract the attention of the decision-maker by focussing attention on issues that are collateral to the issues to be decided;
>
> (ii) That it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice;
>
> (iii) That consideration must be given to the burden which its admission would lay on the resisting party.
>
> The first two of these considerations were said to be particularly potent when trial was to be by jury. In relation to the third of these matters, Lord Bingham referred at para 6 to:
>
> 'the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections.'
>
> He ended by saying:
>
> 'In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be

> given but also that it be achieved by a trial process which is fair to all parties.'
>
> Lord Phillips identified a relevant consideration at para 56:
>
> '… [W]hen considering whether to admit evidence, or permit cross-examination, on matters that are collateral to the central issues, the judge will have regard to the need for proportionality and expedition. *He will consider whether the evidence in question is likely to be relatively uncontroversial*, or whether its admission is likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees.' (Emphasis added)"

24. Mr Toledano argued that, to the limited extent that the German trading might be thought to be of potential relevance to the claims in these proceedings as regards anything other than the narrow allegation I mentioned earlier, the Court should adopt the sort of approach seen in the *Springwell* case and conclude that there are good reasons for declining to allow the claimants to bring the trading into the proceedings. The probative value of the evidence would, he said, be very limited indeed, especially when there is anyway an abundance of evidence from the period of the United Kingdom trading, yet introducing the German trading would impose a heavy burden on both the parties and the Court. The allegations that the claimants wish to make about the German trading would, Mr Toledano submitted, require expensive and time-consuming disclosure and lengthen and distort the trial itself.

25. For his part, Mr Christopher Parker QC, who appears with Mr Andrew Westwood for the claimants, contended that the claimants should be allowed to pursue all the matters raised in the (already pruned) draft amended particulars of claim. They are, he said, of real probative weight in relation to the key issue of whether Deutsche Bank was dishonest in June and July of 2009. They bear not only on what people on the Desk *knew*, but on whether they *cared* about whether the trading in which they were engaged was part of a VAT fraud. Mr Freitas' willingness to resume trading with Lösungen 360 at the end of September 2009, for

example, is capable (so it is argued) of casting light on why Deutsche Bank resumed trading with SVS in early July of 2009.

26. Mr Parker suggested that, in practice, the burden that the amendments would place on Deutsche Bank would be reduced by the fact that Clifford Chance prepared a report on the German trading for the Bank. The Bank would not, therefore, have to investigate matters from scratch.

27. On balance, I have concluded that I should grant the claimants permission to amend along the lines of the paragraph 61 that is now proposed. While the paragraph originally referred to trading between August 2009 and April 2010, it is now confined to August and September of 2009. That, as it seems to me, must greatly reduce the burden of disclosure and the risk of the trial being distorted by matters of little or no importance to the claims made in these proceedings, the more so since there appears to have been relatively little trading until the second half of September. I consider, moreover, that the points pleaded in the current paragraph 61 are potentially capable of being significant in the context of the claimants' claims. The narrow allegation that Deutsche Bank accepts that the claimants should be able to make is not necessarily the only way in which the allegations made in paragraph 61 could be of importance. In fact, the narrow allegation, if well-founded, might mean no more than that Deutsche Bank became aware of VAT fraud *after* the United Kingdom trading had finished, establishing which would not seem to help the claimants. It is, I think, open to argument that Deutsche Bank's willingness to participate in restructured trading when the supply of EUAs in the United Kingdom was zero-rated casts light on its honesty in June and July 2009, and the claimants should be allowed to pursue that possibility.

28. Subject, therefore, to one point, I shall give the claimants permission to amend in the terms of the now-proposed paragraph 61 and paragraph 62. The only caveat relates to the reference to the German judgment in paragraph 61(10)(c). That, it seems to me, is inappropriate. The German judgment can at most be a source of *evidence* for a point. That being so, the references to it in paragraph 61(10)(c) and elsewhere in the pleading (specifically, paragraphs 54(5)(b) and 56A) should be excised.

29. Turning to paragraph 58A, the various sub-paragraphs seek to provide, in effect, further particulars in support of the allegation of dishonesty. The opening words of the paragraph, though, go far beyond the matters mentioned in the sub-paragraphs. The wording is doubtless designed to require Deutsche Bank to give disclosure in relation to all the German suppliers, not just Lösungen 360. It seems to me, however, that I should not allow the claimants to enlarge on their allegations and, hence, the scope of disclosure in this way. The claimants have identified the matters for which they have any supporting evidence in the sub-paragraphs, and the opening words of the paragraph should be limited correspondingly. If I am to grant permission for any of paragraph 58A to be introduced into the particulars of claim, the opening words will need to be revised to state, say, that the claimants rely on the further matters set out below in support of their allegation of dishonesty. It would not be right for me to give the claimants a basis for a fishing expedition that could much increase the burden of disclosure and, potentially, extend and distort the trial.

30. With regard to the various sub-paragraphs of paragraph 58A, it seems to me that little difficulty arises with sub-paragraphs (1) to (8). The suspension and resumption of trading with Lösungen 360 to which those sub-paragraphs refer could potentially be of significance. Mr Freitas and Deutsche Bank might wish to contend that Mr Freitas' alleged decision to

suspend trading confirmed his honesty, the claimants that the resumption of trading in the circumstances showed the opposite. Sub-paragraphs (1) to (8) should not, moreover, require much, if any, additional disclosure beyond that implied by my ruling on paragraph 61.

31. I have found it much more difficult to decide whether I should give permission for the remaining sub-paragraphs of paragraph 58A. In the end, I have concluded that I should not. Whether or not it could be appropriate to allow the claimants to rely on such materials in cross-examination, it seems to me that they can be of no more than very limited evidential significance to the claimants' claims, yet potentially, since they date from October 2009 and later, much enlarge the scope of disclosure and distract the trial from the real issues. Supposing it to be the case that the incidents referred to in sub-paragraphs (9) onwards suggested that Mr Freitas was aware of fraudulent trading by, say, October 2009, it would by no means necessarily follow that he was so aware in the relevant period, June and July of 2009, a point borne out by the fact that certain of the defendants to the German proceedings were held to have been aware of the risk of VAT fraud by December 2009, but not before. The honesty of Mr Freitas (and other people on the Desk) can and should, in my view, be assessed by reference to the (evidently abundant) evidential material from those months and, in so far as it may prove to help, evidence from August and September of 2009, when the German trading was established.

32. I have borne in mind Mr Parker's submission that the existence of the Clifford Chance report would mitigate the burden on Deutsche Bank. As, however, was pointed out to me by Mr Toledano, the claimants could not insist on Deutsche Bank adopting such a short cut. To the contrary, the Bank would be entitled to subject the claimants' allegations to proper

scrutiny. A paragraph from the *Springwell* case is relevant here. There, the Court of Appeal observed (in paragraph 81):

> "All this threatens either to overburden the trial or, if steps are taken that are directed simply to avoiding that burden, to deprive Chase of effective scrutiny of the case put against it. Neither outcome is acceptable. There is in the end an unavoidable choice to be made between trying one case — the present one — and trying three."

33. I ought also to deal specifically with paragraph 46A of the draft amended particulars of claim. That seeks to rely on German trading between August and September of 2009 as evidence of fraud against Mr Virk and Mr Fox. I have already said that I shall allow the claimants to make a comparable allegation against Deutsche Bank. It is similarly appropriate, in my view, for me to permit the claimants to advance the case put forward in paragraph 46A.

34. In all the circumstances, I shall grant the claimants permission to amend in the pruned form now proposed, except that, first, the references to the German judgment should be excised; secondly, I shall not grant permission for sub-paragraphs (9) onwards of paragraph 58A; and, thirdly, if the remainder of paragraph 58A is to be allowed, the opening words must be revised along the lines that I have indicated.

35. What, finally, should I do as regards the disclosure application? Mr Toledano submitted that I should simply dismiss it: it is, he argued, both of unbelievably wide scope and premature. In contrast, Mr Parker said that, if the claimants were allowed to amend as proposed, the concerns underlying the disclosure application would have been adequately addressed and the right course would be to adjourn the application pending standard disclosure.

36. On balance, it seems to me that (aside perhaps from any question as to costs, as to which I shall hear argument in due course) I should simply make no order on the disclosure application. Standard disclosure will now follow on the basis of the amended pleadings. What, if any, issues may remain as to disclosure should, in my view, be raised and addressed once standard disclosure has taken place.

(3.58 pm)