

Failure To Comply With Court Orders Regarding Disclosure

27 Apr 2020 Syedur Rahman.

Syedur Rahman considers the significance of the April 2020 judgment in *Byers & Ors V Samba*

The latest hearing in the case of the US \$300 million claim of *Byers & Ors v Samba Financial Bank* took place over three days at the end of February 2020. The Court handed down its judgment on 8th April 2020.

This judgment is a significant one on several points:

- It sets out important principles relating to the striking out or debarment of parties in breach of court orders.
- It details the circumstances in which a court will permit foreign law to override its disclosure process.
- It establishes when a letter of request may be sent.

Background

The defendant (Samba) is one of the largest banks in Saudi Arabia, with branches around the world. At the time of the global financial crisis in 2008, one of Samba's larger debtors was a man named Al Sanea and his Saad group of companies, including Saad Investments Company Limited (SICL), which were incorporated in the Cayman Islands.

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Al Sanae offered to reduce his indebtedness to Samba by transferring substantial shareholdings registered in his name into five Saudi banks, including Samba. Samba accepted and the transfer took place in September 2009. Several years previously, Al Sanae had declared trusts of the shares that he held in the five banks in favour of SICL.

SICL entered liquidation in July 2009. In 2013, its liquidators, Byers, commenced insolvency proceedings against Samba in the Chancery Division. Those proceedings came to a premature end by reason of a decision in the Supreme Court (in 2017), and then the Court of Appeal (in 2019).

In 2017, in light of the Supreme Court's decision, the claimants commenced the present proceedings, a large and complex claim in knowing receipt. It was claimed that Samba received over US \$300 million worth of shares in circumstances where Samba knew or was sufficiently aware of the fact that SICL was their beneficial owner (or otherwise interested in the shares). The claim was put primarily under Cayman or English law, with an alternative Saudi law claim.

At the first case management conference, an order for standard disclosure was made. A lengthy time for compliance was set (just short of a year) to enable Samba to obtain permission from its Saudi regulator (SAMA) that it had no objection to disclosure being given, as so asserted.

This gave rise to a number of last-minute applications by Samba to further extend the time for compliance with the disclosure order. The last of which was rejected by Fancourt J (*see [2019] EWCH 3690*). The claimants had by then also issued an application for an "unless order" for Samba to be debarred from defending.

In those circumstances, Samba applied to be relieved of its standard disclosure obligations and further, or alternatively, that a letter of request be sent by the English Court to the Saudi Ministry of Foreign Affairs instructing SAMA to consent to Samba giving disclosure.

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The Judgment

In its judgment handed down on 8th

April 2020, the Court dismissed all of Samba's applications. The Court instead acceded to the claimant's application that Samba's defence be struck out and Samba be debarred from defending the claims, save as regards five discrete points which adjudged are not adversely affected by Samba's lack of disclosure. Additionally, the court considered that there was no good evidence that the letter of request was likely to work in practice, and it was too late for it to be attempted given the looming trial.

The decision highlights the importance of complying with disclosure deadlines and the stance the Court will take for any last-ditch applications sent to vary the orders. The judgment is a significant one on several points, not least because – by upholding the order for disclosure - it demonstrates that English courts will not allow foreign regulators to impact on the proper course of justice.

But, perhaps most important, is the apparent flexibility of the English courts to debar applications.

It is an unusual stance taken by the court to pick and choose amongst the issues to go to trial, especially where there has been a serious failure to comply with one of its orders. There are many cases, in particular in the freezing order context, where failure to give adequate disclosure (e.g. of assets) has resulted in a complete debarment, even when arguably the trial on its merits is not adversely affected in any way by the absence of the disclosure.

The ruling in *Byers & Ors v Samba Financial Bank* therefore makes it clear that in cases where a party was clearly failed to comply with the Court's orders regarding disclosure, as Samba was here, the Court will not hesitate to use the tools it has at its disposal – to strike out and debar the party from defending its case.

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Syedur Rahman is a Legal Director at Rahman Ravelli with a great depth of experience in top-level global investigations and corporate crime. Legal guides have highlighted his achievements in the fields of worldwide asset tracing and recovery, high-stakes commercial and financial disputes and cross-border investigations.

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