

Neutral Citation Number: [2021] EWHC 1318 (QB)

Case No: QB-2018-001043

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 15 April 2021

Before :

Mr Justice Freedman

Between :

Vadim Don Benyatov	<u>Claimant</u>
- and -	
Credit Suisse Securities (Europe) Limited	<u>Defendant</u>

Charles Ciumei QC and Andrew Legg QC (instructed by **Scott+Scott UK LLP**) for the
Claimant

Paul Goulding QC, Paul Skinner and Emma Foubister (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendant**

Hearing date: **15th April 2021**

APPROVED JUDGMENT

Mr Justice Freedman
(2.07 pm)

Thursday, 15 April 2021

Judgment by **MR JUSTICE FREEDMAN**

I Introduction

1. The application comes before the court in the following circumstances. It is the claimant's application dated 15 March 2021 for permission to serve and rely on witness summaries for the following witnesses: Mr Gaël de Boissard, Mr Simon Munir and Ms Joy Soloman, and to call the witnesses at trial. There is an additional application for relief from sanctions if required.
2. On 22 March 2021, in the context of a consideration for this matter to be allocated time before the end of term for a discrete application, I made an order that the matter be prepared as if the matter were to be dealt with solely in writing. Paragraph 4 of the order stated that the application would be considered at the PTR on 15 April 2021 and that supplemental oral submissions could be heard of the advocates, to be curtailed to a maximum of 30 minutes for each party. It is to the credit of the parties that they have prepared thorough skeleton arguments and presented the material before the court in a very user-friendly manner so that a significant part of the preparation could be done in advance of the hearing. Both advocates have also been economical and efficient in their submissions and I thank all counsel.
3. There is witness statement evidence in support of the application, a witness statement of Mr Tom Southwell dated 15 March 2021, the fifth witness statement of Maria Banks dated 23 March 2021 in response, and a fourth witness statement of Tom Philip Southwell dated 26 March 2021 in reply.
4. Since then, skeleton arguments were exchanged, in accordance with my direction, on 1 April 2021, which gave the court time to consider the evidence, the arguments and the law in advance of the hearing.

5. I first heard an application in this action on 19 February 2021, namely the application of the defendant for an adjournment of the matter. I gave judgment on 22 April 2021. The application was to adjourn the trial from a five-day window commencing on 26 April 2021 to a five-day window commencing on 28 June 2021. In the event, the court adjourned the trial to commence on 7 June 2021.
6. In my judgment given on 22 February 2021, I set out at [3]-[12] a short summary of the background in relation to this case, and I incorporate that into this judgment. I referred, from [13] onwards, to aspects of the procedural history of the action. At [27]-[30], I referred to the procedural history, in particular in January and February 2021. I referred to service of a draft amended defence on 13 January 2021 and an application to amend, insofar as it was required.
7. In connection with the application to amend, there is a judgment of Mr Roger ter Haar QC, sitting as a Deputy Judge of the High Court. At [19] of that judgment, he referred to correspondence from the claimant's solicitors to the defendant's solicitors in relation to the character of the amendments. The defendant accepted that, in three respects, there were amendments which were not consequential on the amended particulars of claim. The claimant solicitors said that they had identified many paragraphs which were not consequential on the amended particulars of claim and in particular, and I quote from the first two subjects of those which were identified:

"(a) Contributory negligence: paragraphs 8.1, 8.2, 8.3, 19.6, 21 (last sentence only), 62.2, 62.3, 62.4, 62.5, 62.9, 62.10, 70 and 71.

"(b) Breach of contract of employment: paragraphs 6, 8.4, 13.2, 13.3.4, 18.4, 19.4 (the part in brackets only), 19.11.2, 19.7.2 (second sentence), 19.20 (second sentence), 30, 52, 53.3, 57 and 61.7."

8. In the letter of 21 January 2021 of the claimant's solicitors, at paragraph 4.2(d), the claimant said the following:

"The new case of contributory fault: we are concerned that this case opens a completely new area of factual enquiry focused on what our client did and did not do in the period before his arrest. This is all the more difficult given that, for example, no disclosure has been given of his emails to date in the relevant

period or other internal correspondence. Even if such disclosure were given on 15 February 2021, that would only give our client one week to prepare to deal with an entirely new case that could have been brought forward in 2018 ..."

9. The defendant did not accept the contention of the claimant that these were non-consequential amendments. However, at [45] of the judgment of the deputy judge, he said:

"In my judgment, the amendment application was necessary: I have not received submissions on, nor considered every paragraph in the amended defence to assess whether it is consequential on the amended particulars of claim or not. However, my consideration of the paragraphs in respect of which there were arguments as to particularisation has shown me that the 'new' non-consequential amendments go beyond the three paragraphs referred to in Mr Kelly's third witness statement. Accordingly, the amendment application was necessary because the draft pleading went beyond that for which I granted permission on 8 December 2020."

10. In the event, the claimant did not oppose the amendments, but the court formed the view that the claimant had acted reasonably in its approach to the amendments in taking the stance that it did and to have argued about the amendments being extremely time-consuming and expensive: see [47] of the judgment.
11. At [48], the judge took the view that in those circumstances, it was appropriate that the defendant should pay the claimant's costs of the amendment application, including that part of the costs of the hearing on 28 January relating thereto.

II The legal framework of the application for permission for witness summaries

12. The CPR sets out the position at CPR 32.9, which reads as follows:

"(1) A party who -

"(a) is required to serve a witness statement for use at trial; but

"(b) is unable to obtain one, may apply, without notice, for permission to serve a witness summary instead.

"(2) A witness summary is a summary of -

"(a) the evidence, if known, which would otherwise be included in a witness statement; or

"(b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.

"(3) Unless the court orders otherwise, a witness summary must include the name and address of the intended witness.

"(4) Unless the court orders otherwise, a witness summary must be served within the period in which a witness statement would have had to be served.

"(5) Where a party serves a witness summary, so far as practicable rules 32.4 (requirement to serve witness statements for use at trial), 32.5(3) (amplifying witness statements), and 32.8 (form of witness statement) shall apply to the summary."

13. CPR 32.10 is headed, "Consequence of failure to serve witness statement or summary":

"32.10. If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission."

14. In this case, by agreement of the parties, the time for service of witness statements had been extended to 15 March 2021 at 6.00 pm. On that afternoon, apparently about 20 minutes after 6.00 pm, there were served seven witness statements for the defendant and one witness statement for the claimant and three witness summaries. There was also served a with notice application for permission to serve the three witness summaries.

15. There was a point that was made that the service may have been 20 minutes after 6.00 pm. That point does not appear to be of any significance. The claimant says that there was an agreement by the parties to extend the matter by the extra 20 minutes. If there was not such agreement, then everybody would require permission. It seems to me in the circumstances of this case, given that it involved all the parties, that those 20 minutes amounts to a de minimis position and nothing of significance arises in relation to it.

16. However, there is a point of significance, namely that the claimant served its three witness summaries without having obtained the permission of the court required under CPR 32.9(1)(b).

The claimant submits that it can seek retrospective permission without the need for an application for relief from sanctions. It contends that the witness summaries were served in time. The claimant accepts that permission is still required, but if permission is granted retrospectively, it then has fulfilled its obligation. The defendant submits that the witness summaries could not be served without permission and that, therefore, permission is required not just under CPR 32.9(1)(b), but that relief from sanctions is required in that the witness may not be called without the permission of the Court if the witness statement or summary has not been served within the time specified by the Court. Therefore, in order to make a late application, not only is permission required, but relief from sanctions is required under CPR 32.10.

17. In the event, it is not necessary for the court to determine this point. The court will assume that the defendant is correct and that both the permission and relief from sanctions is required.

18. The parties helpfully addressed the court in relation to the principles which are applied in an application for permission in relation to witness summaries. In the case of *Otu v Watch Tower Bible and Tract Society of Britain* [2019] EWHC 346 (QB), Warby J (as he then was) considered at [20]-[23] the factors relevant to an application under CPR 32.9, which can be summarised as follows:

(1) Whether the claimant had been unable to obtain a witness statement. This would normally require proof in respect of each witness. Reference was made by Warby J to the judgment of Phillips J (as he then was) in *Scarlett v Grace* [2014] EWHC 2307 (QB), where the court said the following:

"The crucial question, in my judgment, is whether or not the defendant has satisfied the test as to whether or not the defendant was unable to obtain a witness statement from each of these witnesses. It is therefore necessary to look at the position of each witness in turn."

(2) The reason why an applicant has to show that he has been unable to obtain a witness statement is because the norm is to have a witness statement where the other side knows what the witness will

say. Without a witness statement, there is the potential of vagueness and uncertainty, which is liable to cause unfairness: see [17] of *Otu*.

(3) The court will consider whether the content of the witness summary satisfies the requirements of CPR 32.9(2), namely:

"(a) the evidence, if known, which would otherwise be included in a witness statement; or

"(b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness."

(4) The court will consider the extent to which the witness's evidence is relevant.

(5) The court will consider whether granting the permission is compatible with the overriding objective.

(6) The court will consider whether it is fair for the respondent to the application to be confronted with the witness summary.

19. Other parts of the judgment of the court in *Scarlett v Grace* were referred to by the parties. In particular, at [10], Phillips J said the following:

"I am satisfied, however, that the position still remains despite those matters that a party is entitled to call [a] witness to give relevant and admissible evidence if they either serve a witness statement for use at trial or, exceptionally, demonstrate that they are unable to obtain a statement in which circumstance they are entitled to serve a witness summary instead. It is plainly not ideal that a witness's evidence will not be known prior to a trial but that is why a witness summary is only permitted when a party is unable to obtain a statement; but it is necessary for the party to show that they are indeed unable to do so and that test must be, in my judgment, applied with a degree of rigour. Nevertheless, if a party is able to demonstrate on the evidence that they are unable to obtain a witness statement, then that party is, at least *prima facie*, entitled to serve a witness summary and call the witness as their witness at trial and take the risk as to what evidence will be given."

20. At [15] of the judgment, Phillips J said:

"In my judgment, if a party wishes to submit to the court that they are unable to obtain a witness statement then it is necessary to show that they have taken the matter to a point where there is a clear refusal, express or implied, to assist in that regard. In my judgment, the defendant had not reached that point with this

witness ... in my judgment, one cannot take lightly the requirement to show an inability to obtain a witness statement. A mere suspicion that a party is unlikely to be cooperative at the end of the day is not sufficient ..."

21. In *Morley (Trading as Morley Estates) v Royal Bank of Scotland* [2019] 4 WLR 152, Kerr J considered a late application, made less than two weeks prior to the trial, for permission to serve two witness summaries and for relief from sanction. The circumstances, unlike the present case, were where the witnesses had not been asked to produce a witness statement. As to the inability to obtain statements, the court said, among other things, the following.

(1) at [107]:

"I also agree with Phillips J ... in *Scarlett v Grace* that the requirement to show inability should be applied with a degree of rigour. Normally that will, of course, require the party seeking to rely on a summary to have asked the witness whether she or he is prepared to provide a statement."

(2) at [108]:

"... the requirement to show inability to obtain a statement should not be used to allow the parties to play games with each other, the witnesses concerned or the court. A degree of reality as well as a degree of rigour is called for."

(3) at [109]:

"The wording of the rule does not refer to a 'refusal' to provide a statement. Inability to obtain one can arise for other reasons, such as illness, ignorance of the witness's whereabouts, absence from the jurisdiction, confidentiality obligations, and so forth."

(4) at [110]:

"On the plain wording of the rule, CPR 32.9(1)(a), and applying ordinary principles of causation, a person is, in my judgment, 'unable to obtain' a statement if the court is satisfied on the balance of probabilities that had a request been made to the witnesses to provide a statement the request would have been turned down."

III Inability to provide a witness statement

22. The inability to provide the witness statements in respect of the three witnesses where witness summaries have been served is stated expressly at paragraph 2 of each of the witness summaries. Mr Southwell, in his third witness statement, addresses this at paragraph 21(a) in the following terms:

"The claimant was unable to obtain a witness statement from any of the three proposed witnesses because they are each party to a non-disclosure agreement ('NDA') with the defendant. I have personally spoken to each of them and, without waiving privilege in those communications, they have each confirmed to me that the NDA that they are party to prevents them from providing a witness statement to the claimant. I do not have copies of the relevant NDAs but respect the witness's concern not to put themselves in a situation in which the defendant may allege that they had breached the same without a court order."

23. Mr Goulding QC on behalf of the defendant says that this evidence is not good enough to establish an inability to provide a witness statement. First, he says, it lacks any form of specificity. It does not refer to any specified occasion or to any specified time. There is no supporting documentation. There is no separation of what was said to or by the respective prospective witnesses.

24. He also says that the position in respect of Mr Munir shows that the position has been wrongly summarised by Mr Southwell. He says that if the position has been wrongly summarised in respect of one witness, then, he asks rhetorically, what confidence can the court have that the position will be accurate in respect of the others?

25. In that regard, he draws to the attention of the court the emails of Mr Simon Munir to the defendant. On Friday, 12 March 2021 at 11.58 am, Mr Munir wrote to Maria Banks of the defendant in the following terms:

"Thank you, Maria, for responding so quickly to my request for a call.

"Just want to confirm the conversation which we had a short while ago:

"1. I have been approached by the lawyers for Vadim Benyatov.

"2. They have asked me whether I would be able to talk about the processes in place when energy bankers were sent to emerging markets in EMEA. I said that

I would be able to but had to check the terms of my 2005 NDA first - of which I no longer have a copy.

"3. They are due to call me at noon this coming Monday to take a witness statement, unless I heard from you in the interim that the terms of my NDA preclude me from so doing. Thank you."

26. The next email was on Monday, 15 March 2021 at 12.16 pm. Mr Munir wrote again to Ms Banks and wrote in the following terms:

"Good afternoon Maria,

"I have decided not to give a witness statement as I do not know the precise terms of my NDA. I have informed Tom Southwell that such is the case. He has informed me that he will be requesting that I be called as a witness at the trial when it takes place. Thank you."

27. Mr Goulding draws attention to the fact that the communications between Mr Southwell and Mr Munir were therefore more nuanced because there was a first conversation and a second conversation and the details of those conversations are not set out. Further, it was not that the terms of the NDA prevented Mr Munir from providing a witness statement; it was the fact that he did not know the precise terms of the NDA and therefore decided that he would not give a witness statement.

28. Mr Goulding goes on to say that it is striking from the evidence that Credit Suisse, the defendant, did not respond to Mr Munir saying that they objected to his giving evidence when they had the opportunity between the communication on the Friday and the communication on the Monday.

29. On this basis, it is submitted that in the event that a request had been made by the claimant to the defendant, the defendant might have agreed to the waiving of the non-disclosure agreement. The fact that that did not occur was because, first of all, there had not been a realistic opportunity for that, given the lateness of the issue by reference to the last day for the service of the witness statements on 15 March, and because no request was ever made.

30. In the evidence of Ms Banks, she said at paragraph 37:

"If such an approach had been made in a proper and timely way, it would have been considered carefully and on its merits. But the claimant made no such contact."

31. The submission is made that this evidence does not satisfy the rigorous test referred to in the authorities. It is submitted by the defendant that the court is left with a picture that had there been greater effort and diligence, a witness statement might have been capable of being produced. The fact that now the defendant opposes the application at this late stage does not mean that it would have objected at the time to the release of the witnesses from the non-disclosure agreements.
32. From the evidence as a whole, in my judgment, the claimant has satisfied the requirement of proving that there was an inability to obtain a witness statement from each of the three witnesses. First, it is not challenged that there are non-disclosure agreements. I reach that conclusion for the following reasons.
33. First, it is not challenged that there are non-disclosure agreements in respect of those employees. The terms of the non-disclosure agreements have not been provided, but it is not suggested that, without a release on the part of the defendant, those witnesses would have been able to have entered into a dialogue with the claimant's solicitors with a view to providing witness statements on behalf of the claimant.
34. Second, I am satisfied that there were conversations between Mr Southwell and the three witnesses, the effect of which was that they would not provide witness statements because of their non-disclosure agreements. The communications could have been set out in greater detail, but the substance is the same. Each of the witnesses had non-disclosure agreements, Mr Southwell made a request to each of them and in each case the answer was no. In respect of Mr Munir, although the summary could have been fuller, it comes to the same: that, ultimately, the reason why Mr Munir did not agree to provide a witness statement was because he was concerned about the terms of the non-disclosure agreement.

35. Third, the defendant has not said that if there had been a request, it would have given the consent. Ms Banks is deliberate in her language to say that it would have been considered carefully and on its merits. Mr Goulding QC says that it would have been regarded as self-serving if they had said that they would have given permission.
36. In my judgment, if that is what would have occurred, the defendant would have said it, and it is significant that it is not said that permission would have given. Although it is the case that the defendant did not go back to Mr Munir between the two emails, there is no evidence to explain why that occurred. It is equally significant that after Mr Munir said on 15 March that he would not give evidence because he was concerned about the terms of the NDA, the defendant did not at any stage say to him that it would waive the requirements in relation to the non-disclosure agreement.
37. Fourth, I have had the opportunity to consider the matter in the context of the action as a whole, and particularly having dealt with the adjournment application and having seen the attritional nature of the litigation. The word "attritional" is not mine. It is that of Stuart-Smith LJ when he refused permission to the defendant to appeal against the order made by the deputy judge refusing an adjournment in late 2020. The words that he used on that occasion were as follows:
- "... there are strong reasons for holding the trial date, not least being that delay will lead to further interim disputes and a further increase in costs that are already excessive. Echoing the observations of the judge, it is time for a degree of cooperation to replace the attritional approach that has prevailed thus far ..."
38. I do not use that term in a pejorative sense against either the claimant or the defendant; rather to emphasise that this has been a very heavily fought dispute. Matters have not been agreed easily, and that has been apparent as I have listened this morning to matters within the pre-trial review.
39. In my judgment, against that background, it seems unlikely, if the defendant had been asked to consider the matter, that they would have agreed to release the witnesses from the NDA and to give express permission for them to provide witness statements for the claimant.

40. Fifth, the fact that the defendant has a practice of seeking NDAs from its employees does lead to an inference that prima facie it would not wish parties to disclose to third parties matters relating to their employment, let alone to assist somebody to sue them. There is no evidence provided by the defendant to indicate a practice of waiving this requirement.
41. Sixth, the defendant has had a root and branch opposition to this application. In particular, it has indicated that the witnesses are irrelevant to the case. In those circumstances of opposition to the application, it seems unlikely for that reason also that it would have provided its consent.
42. In my judgment, applying ordinary causation principles, as Kerr J said that the court ought to do, one has to ask the question whether it would have made any difference if the claimant had asked the defendant for permission to call the witnesses or to take witness statements from the witnesses. In my judgment, it would not have made a difference. In the words of Kerr J in the *Morley* case, whilst approving the requirements of rigour, he said that in addition to that, "a degree of reality is required". There is nothing in the history of this "attritional" litigation which indicates that such cooperation would have been forthcoming, and if there had been any likelihood of such consent being provided, it is to be inferred that Ms Banks' witness statement would have said so in clear and unequivocal terms.
43. For these reasons, I take the view that the claimant has proven an inability to obtain witness statements from the three witnesses.

IV Is the evidence of the witnesses relevant?

44. Attention was drawn to cases where the court had found that some of the witness statements were not relevant. In the case of *Otuo v Watch Tower* referred to above, a question was whether the witness statements were "clearly pointless or self-defeating". In that case, the judge allowed evidence where the relevance was not certain.

45. In this case, I am satisfied on the basis of the evidence, and in particular from the third witness statement of Mr Southwell at paragraph 21(c)(i) and (iii) and from his responsive evidence at paragraphs 14 to 23 in the fourth witness statement, that, contrary to the evidence of Ms Banks, the evidence is relevant.

(i) The witness summary of Mr Munir

46. In respect of Mr Munir, he worked with the claimant prior to his departure in 2005 and thus at a highly relevant time when the claimant was working in Romania. In Mr Southwell's third statement at paragraph 21(c)(i), he refers to the fact that Mr Munir was the Head of Energy (Europe) from February 2000 to January 2003 and Chief Operating Officer (European Investment Banking) from September 2002 until February 2005, in which role he was responsible for day-to-day management of European corporate and investment banking, including compliance and reputational risk. The claimant reported to Mr Munir in his capacity as Head of Energy, after which the claimant reported to Mr Matthew Harris. Mr Munir sat on the investment banking committee which was charged with, among other things, assessing the risks of projects.

47. The claimant therefore believes that Mr Munir is able to give direct evidence about the defendant's risk assessment process and the extent to which it considered risk to employees' personal safety and security, who within the defendant was responsible for carrying out any such risk assessment and the tools that were available to investment bankers to assess risk in the course of their work.

48. The defendant submits that the evidence of Mr Munir will not be relevant. He was not one of the potential document custodians that were identified in relation to disclosure and therefore, prima facie would not be somebody who would be put forward as having something relevant to say in relation to the case.

49. However, the defendant does not say that he was irrelevant. He preceded Mr Horne in the role at the investment banking division and Mr Horne is being called for the defendant. He is, therefore,

able to give evidence in the period prior to the time when Mr Horne took over. It is not an answer, in my judgment, to say that the court will hear from Mr Horne about risk management.

50. Further, insofar as it is said that he was not in the relevant position immediately prior to the arrest of the claimant, in my judgment, there is reason to believe that he is able to give evidence in relation to the risks to the personal safety and security of the claimant in Romania.

(ii) The witness summary of Mr De Boissard

51. In respect of Mr De Boissard, he is said to be likely to be able to give relevant and material evidence of the matters referred to in his witness summary at paragraph 3(a) relating to the matters of risk management and the processes about risk of the defendant in respect of their employees. It is not necessary to set that out, but there are seven items in relation to the risk assessment process which are set out in paragraph 3(a) of the witness summary. They appear to be of relevance to the case on the existence of an indemnity and a duty of care. Given his seniority and experience at the relevant time on the defendant's board of directors in 2005 to 2006, he is likely to have knowledge of the defendant's risk assessment processes at the time of the claimant's arrest.

52. He was also involved in relation to the investigation of the allegations made against the claimant in the Romanian criminal proceedings. That is referred to in paragraph 3(b) of the witness summary in respect of Mr De Boissard. That has relevance to the amended allegation of breach of contract, which may be contrary to the bank's earlier and public position that the claimant had no case to answer in Romania in respect of the allegations against him. That is not a matter that is addressed by the defendant's witnesses and may be a matter on which Mr De Boissard is able to provide useful evidence to the court.

53. In Mr Southwell's third witness statement at paragraph 21(c)(ii), he refers to the involvement of Mr De Boissard as co-head of the defendant's investment banking division from 2001 to 2007. He refers to the fact that Mr De Boissard was closely involved in the lobbying effort after the claimant's conviction and being a signatory to letters stating that the Romanian authorities had "fundamentally

misunderstood or misrepresented commercial conduct that is inherent and normal for privatisations".

54. It may be that the breach of contract case is founded on the basis that subsequent research has provided a different position, but that is not a reason for the information that led to Mr De Boissard being party to the submission that the claimant had no case to answer in relation to the allegations against him in Romania not being presented as evidence to the court so that the court may understand the inter-relationship between that which was said to assist the claimant after his arrest and the case as it now comes before the court in relation to breach of contract.
55. The defendant says that Mr De Boissard was only a member of the defendant's executive board in 2012 and that being co-head of the European fund income and global head FX would not mean that he was in a position where he was able to provide useful evidence. In my judgment, he was clearly a very senior executive. He appears to have been aware of risk assessment processes at the time of the claimant's arrest.
56. The defendant also submits that the documents are post-arrest and therefore they relate to the post-arrest case. Whilst that is the case, that does not mean that the matters put forward by way of no case to answer do not relate to the breach of contract claim. It may be that the matters of breach of contract have come forward because of further investigations that have been made that invalidate that which was said at the time. However, the fact that those matters were said to the Romanian prosecuting authorities and government at the time are matters that are relevant to and test the new allegations of breach of contract and contributory negligence.
57. In my judgment, it is plainly relevant that Mr De Boissard was kept apprised of developments in Romania and was a signatory to the letters that he did. The defendant makes the point that Mr De Boissard was only identified as a custodian in respect of the position between 2012 to 2015. Whilst that is a point, that occurred prior to the subsequent amendments in relation to breach of contract and contributory negligence and in any event is a point to be borne in mind rather than

a conclusive point. In those circumstances, I regard the evidence that he will be invited to give as relevant or potentially relevant.

(iii) The witness summary of Ms Soloman

58. The third witness summary is that of Ms Soloman. She is said to be likely to have relevant and material evidence, as set out in her witness summary. It is suggested that since she visited Romania in the weeks after the claimant was arrested and her evidence as to risk assessments is irrelevant because it post-dates the arrest.

59. In my judgment, that is not necessarily an answer, because the assessments post the arrest might be relevant to the system before the arrest. It would only be the case where everything had changed after the arrest that it would be irrelevant. There is no evidence as to what had changed and all of that can be explored in evidence.

60. Ms Soloman was an employee of the defendant who visited Romania to see the claimant in the aftermath of his arrest and thus her evidence as to the risk assessments, referred to in paragraph 3 of her witness statement, are relevant and potentially important. The defendant says that she also was not identified as a custodian, but whilst that is a point that is proper to make, it is only a point to be put into the balance. In my judgment, the claimant has shown that her evidence is relevant or potentially relevant.

61. The defendant, through Ms Banks, says that the matters in relation to Ms Soloman can be explored through the evidence of the defendant's witness Mr Mazzucchelli. That may be the case, but that does not explain why Ms Soloman is irrelevant as a witness. The evidence can be explored with her as well as with Mr Mazzucchelli. In any event, there are questions that are not yet resolved as to whether Mr Mazzucchelli will give evidence or how he will give evidence. The judgment that the witness summary relates to relevant evidence for Ms Soloman is, for the avoidance of doubt, given on the basis that Mr Mazzucchelli is going to be giving evidence.

62. For all those reasons, I regard the evidence of the three witnesses as relevant or potentially relevant.

V Overriding objective

63. A matter of concern that has been advanced on behalf of the defendant are matters relating to the timing of the approaches to the witnesses. It is in this context that I refer again to the amendments to the pleaded case to plead breach of contract and contributory negligence. This caused the claimant to revisit the scope of the witnesses that it required in relation to this case. The defendant says that these issues were already in issue.
64. It appears to the court that given that the deputy judge took the view that many of the matters said to be non-consequential amendments by the claimant were indeed non-consequential, these matters at lowest had a greater emphasis after the amendments. I refer in particular to the allegations about breach of contract and contributory negligence, to which reference has been made above.
65. In my judgment, even if there was lateness, the position of the claimant in having to consider these matters at that stage is an important counterbalance to the point about lateness made by the defendant. The defendant has been allowed at this late stage to have introduced this case and in fairness and in justice, the claimant ought to be able to mitigate its position by exploring these positions with witnesses.
66. The defendant says that the claimant has delayed because he had over two months from the time when the draft amended defence was intimated. In my judgment, the claimant has made efforts in order to deal with these matters.
67. Reference is made in Mr Southwell's fourth witness statement at paragraph 24(d) to contact made with various witnesses in early 2021, in particular with Mr Studd, with Mr De Vecchi, with Mr Mazzucchelli and with Mr Raoul(?). The point is also made on behalf of the claimant that during these two months, the claimant had other distractions of dealing with the heavy amendment application and the adjournment application. Even if it is the case that the claimant could have moved with greater alacrity and did not need to end up in the position it did over the period between

12 and 15 March, these are matters which the court is entitled to take into account when it is said that the claimant was guilty of some delay.

68. In the end, the timing ought not to have made any difference. Had the claimant acted with a greater alacrity, it could have made a without notice application before 15 March on the assumption, given the court's view that the matter was well merited, it would have been granted. What then would have happened would have been that the witness summaries would have been served and the defendant would then, in all likelihood, have applied, as it would have been entitled to do, to set aside the order. There would then have followed a hearing covering the same ground in relation to matters such as inability to obtain the witness statements and relevance. Accordingly, it is difficult to see that there has been any substantial prejudice caused by any delay on the part of the claimant.
69. In considering the overriding objective, the court also has regard to the fact that it is difficult for a person in the position of the claimant as an individual to bring a claim against an organisation as large as the defendant, to take on a large institution. It is particularly difficult to go to former employees and to seek to embroil them in a dispute where their commercial interests might be better served by avoiding it.
70. Some of this is evidenced by the difficulties to which I referred of Mr Southwell in his fourth witness statement at paragraph 24(d) in his attempts to obtain evidence. Three of the witnesses that he approached have in fact elected to give evidence for the claimant. This is not in any way a criticism of the defendant. These difficulties are not unfamiliar in these disputes, but they do inform in relation to the exercise of the court's discretion to allow a claimant to call witnesses by witness summary in circumstances where such evidence could not be obtained by the claimant.

VI Other factors

71. In my judgment, the witness summaries satisfy the requirements of CPR 32.9(2); that is that they do set out the matters on which the claimant proposes to question the witnesses and the relevant topics. The format follows that approved by Kerr J in the case of *Morley v RBS* at [93]-[95].
72. This is not a case where the claimant knows what the witnesses are going to say. Interviews have not taken place and therefore the summaries are limited to what the claimant will be asking the witness. It is a sign of the root and branch opposition of the defendant that the defendant did object to this in paragraph 53 of the witness statement of Ms Banks, albeit that, in fairness to Mr Goulding, he has not pressed this in his submissions before this court.

VII Is it fair to rely on witness summaries?

73. It is said by Ms Banks at paragraph 54 that it is "grossly unfair" to allow the claimant to rely upon such witness summaries. In my judgment, it is not. It is contemplated by the CPR and for the reasons given, the defendant is in no worse position by the failure to obtain permission in advance.
74. As regards the timing point, there is adequate time to prepare on the basis of the witness summaries. The witness summaries were served without permission on 15 March. Now, as at 15 April, there is still about seven weeks to go until trial. It will be recalled that in my judgment in relation to the adjournment, I formed the view that an adjournment was required until about 10 or 17 May. In the event, I allowed the adjournment until the new term so that the matters would be dealt with within one term. That shows that additional weeks were allowed, and I am satisfied that having to have these witnesses does not cause the unfairness contended for by Ms Banks.

VIII Relief from sanction

75. I said earlier in this judgment that I will approach the matter as if relief from sanctions is required. The claimant submits that relief from sanction should be granted and addresses the three *Denton* criteria.

76. The first question is whether the breach was significant or serious. The witness summaries were served at the time of full service of the witness evidence and the application was made for permission at the same time. The claimant says that if the application had been made without notice a few short days before, it is likely to have been granted, subject to the defendant being able to seek to set it aside. It is therefore submitted on behalf of the claimant that the breach was not serious or significant. It also refers to the case of *Scarlett*, where no question of relief from sanctions had arisen.
77. In my judgment, if relief from sanctions is required, then the breach is a serious or significant breach. That is because it is required that in order to serve a witness summary, the permission of the court ought to be sought. On the premise that the relief from sanctions is required, it would follow that the permission has to be sought in advance of serving the witness summaries. However, in the scale of seriousness of the breach, that is on the low side because the impact of the lateness is small, for the reasons which I have given.
78. The defendant then says that there was a good reason for the breach and relies on the evidence in the third witness statement of Mr Southwell at paragraph 23(a), where he sets out the difficulties that were besetting the claimant in relation to this matter, gathering evidence in relation to the new case in the amended defence and encountering difficulties with witnesses and the like. In my judgment, that does amount to a mitigation, but it is not a good answer to the breach. It does not excuse the fact that the application had not been made.
79. Turning to the third *Denton* matter, what, in all the circumstances of the case, would best enable the court to deal justly with the application, including the need for litigation to be conducted effectively and at proportionate cost and to enforce compliance with rules, practice directions and orders? In my judgment, the granting of this application would accord with the purpose of the CPR to enable the witness evidence to be heard where it was not possible to obtain the statements and to ensure that the court has the relevant evidence before it. In my judgment, there is no real difficulty for the

defendant in being able to deal with this matter. The summaries came at the same time as Mr Benyatov's statement. There is no substantial prejudice arising out of the fact that the permission had not been sought prior to the applications.

80. Further, the matters to which I drew attention in relation to the nature of the amendment did bring about a focus on the risk assessment process of the defendant and the evidence of the defendant's employees or former employees who might be able to give relevant evidence in relation to this.

81. I refer to the description of what occurred in the two months prior to the time of the witness summaries and to the pressure that the claimant was put under during that period of time. None of that amounts to an excuse, but it is all relevant to the degree of fault on the part of the claimant which, in my judgment, is low.

82. Above all, I bear in mind that the evidence of these witnesses, particularly in relation to the new matters which have arisen as a result of the amendments, but also in relation to the risk assessment process generally of the defendant, are matters which would be or are potentially valuable to the court in order to assess the issues in this case.

83. In my judgment, the words of Kerr J at [117] of his judgment in *Morley* ring particularly loudly:

"Justice is served by relevant evidence being called, not by preventing it from being called."

84. As to the fairness of the process, Kerr J said at [119], in relation to a case against the defendant bank where the lateness of the application was much greater and different from this case:

"The situation is quite normal. A witness has relevant evidence to give. The party who most naturally would call the witness declines to do so. The other party wishes to do so. I see nothing unfair to the defendant about evidence on the topics set out in the summaries being called at trial, provided that the witnesses and the defendant have adequate time to prepare, provided the trial is not thereby disrupted and provided the Denton exercise shows that it is right to grant the necessary relief from sanction."

IX Conclusion

85. In my judgment, in this case, I am clearly of the view that the witness summaries are proper and that the evidence can and should be accommodated at the trial. The defendant has adequate time to prepare. The defendant has demonstrated, in its ability to deal with procedural issues and to get things done efficiently, that it will be able to deal with these matters. There is, in my judgment, no fear of disruption of the trial or its fairness. There is concern, if that evidence is not admitted, that justice will not be done.

86. For all those reasons, I take the view that the witness summaries are appropriate and that, in the exercise of the court's discretion, the court allows each of the witnesses and gives, insofar as it is required, relief from sanctions.

Approved

Mr Justice Freedman

9.5.2021