TRANSCRIPT OF PROCEEDINGS

Ref. HC-2017-002318

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

[2019] EWHC 2865 (Ch)

Rolls Building
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE KERR

IN THE MATTER OF

OLIVER MORLEY T/A MORLEY ESTATES (Claimant)

-v-

THE ROYAL BANK OF SCOTLAND PLC (Defendant)

MR H SIMS QC & MR J VIRGO, instructed by Cooke Young and Keidan, appeared on behalf of the Claimant
MR P SINCLAIR QC & MS N BENNETT, instructed by Addleshaw Goddard LLP, appeared on behalf of the Defendant

JUDGMENT
22nd OCTOBER 2019
(APPROVED)

MR JUSTICE KERR:

Introduction

1. There are three applications before the court; an application dated 26 September 2019 by the claimant, asking that the defendant give specific disclosure; an application by the claimant, made on 15 October 2019, for permission to rely on witness summaries in relation to two witnesses, Mr Derek Sach, and Mr John Workman, former employees of the defendant; and an application by the defendant, made on 14 October 2019, to set aside witness summonses compelling the attendance of Messrs Sach and Workman at the trial.

2. The trial of this case is listed for 12 days, including two days of pre reading, in a window starting next Monday, 28 October 2019. Draft trial timetables are already in existence.

Outline of the claim

3. The following outline is largely an amalgam of the accounts given in the parties' respective skeleton arguments, on which I draw gratefully. The claimant is and was a businessman, operating as a sole trader in the property development and investment business in the north-west of England. The defendant is his former bank.

4. An agreement between the parties was entered into on 18 December 2006 (the facility agreement). The defendant made available to the claimant a loan facility of up to £75m. That was secured by various mortgages and charges over the claimant's properties, in favour of the defendant. The facility agreement expired on 19 December 2009. Before and after that date, the parties were in discussions in connection with renegotiation or repayment of the loan monies. An agreement was eventually entered into between the parties, pursuant to which the claimant's outstanding debt of about £75m would be resolved in the following way.

5. First, on 3 August 2010 the claimant entered into an agreement with West Register, a subsidiary of the defendant, and a supplemental agreement with the defendant. The effect of those transactions was that the claimant agreed to sell to West Register, which agreed to acquire, certain of the properties, called "List A" properties in the claimant's portfolio, for a sum of just short of £45m.

6. Second, the claimant, under the terms of the deal, retained certain other properties in the portfolio, called "List B" properties, subject to satisfying certain conditions, including a payment by the claimant of £20.5m, plus VAT, if any, to the defendant. If the claimant should fail to satisfy the conditions, including that one, West Register would acquire the List B properties at an agreed price.

7. Thirdly, the defendant agreed to release its security over the List B properties, and release the claimant from his obligations under the facility agreement.

8. On 31 August 2010 the claimant assigned to West Register the benefit of unpaid rent on the List A properties. The various agreements entered into in August 2010, which I have just described, are known in these proceedings as the "disputed agreements".

9. In these proceedings, the claimant seeks to set aside the disputed agreements, and claims damages, which he quantifies at about £37m. He complains that he was unlawfully pressurised and intimidated by the defendant into transferring a significant part of his property portfolio to West Register, the defendant's subsidiary. His case is that he entered into the disputed agreements having been induced to do so by "wrongful, and/or unlawful, and/or illegitimate, and/or unconscionable threats to … [his] property, and/or his economic interests" (paragraph 34 of the re-re-amended particulars of claim (RRAPOC)).

10. The claimant's case is that had the threats not been made he would still own the whole of his portfolio, and would have benefited from increases in the capital value of certain properties forming part of it, and from the rental income from those properties.

11. The defendant denies the claims, and in particular denies that statements made by one of its employees, at a particular meeting in July 2010, attended by employees or agents or associates of both parties, constituted threats or were otherwise unlawful, illegitimate or unconscionable.

12. As re-amended, in February 2019, the claim is now (RRAPOC paragraph 5) for "(i) rescission of the disputed agreements on grounds of economic duress, and/or (ii) damages or compensation, or a sum representing the value of the benefit received by [the defendant] at [the claimant's] expense for economic duress, and/or the tort of intimidation, and/or (iii) damages for breach of contract, and/or … other breaches of duty … and/or (iii) [which should be (iv)] compensation and/or restitution on the grounds of economic duress".

13. In particular, the claim includes allegations as follows. The claimant complains that the defendant was directed and influenced to execute the disputed agreements by the Asset Protection Agency (APA), a former agency of HM Treasury. Those allegations are called the "APA allegations". The APA, in 2010, had the responsibility for administering the Asset Protection Scheme (APS).

14. The APA was a government sponsored initiative to rescue the defendant, which was at the time ailing. The APA allegations were given flesh in the re-amended claim, which was amended once more by consent on 7 October 2019. It now includes the following APA related allegations: an acknowledgement by Mr Sach, the head of the defendant's Global Restructuring Group (GRG), that it might be in the interests of the defendant to destroy a customer so as to strengthen the defendant's balance sheet; and that the defendant was encouraged to do so by the APA.

15. There is now a plea that the defendant acted in accordance with the direction and/or influence of the APA with the objective of securing acquisition by West Register of the claimant's property portfolio.

16. The allegations also include the promotion of commercially unviable and unacceptably harsh terms; and the defendant's confirmation of willingness to use the threat of a transfer to West Register to pressurise the claimant to provide a full tenancy schedule, which he was not contractually obliged to do.

17. The claim also asserts the promotion of terms inconsistent with "reasonable turnaround practices"; an unlawful threat of a pre-pack sale to West Register, which was

inconsistent with the defendant's duties; and conduct on the part of the defendant constituting "morally or socially unacceptable pressure", on the claimant. And, by paragraph 51B.4(5) "wrongly allowing APA's view to override its own policies and good industry practice in breach of the bank's duties".

18. The defendant denies these allegations and says that they are, to quote from its skeleton argument, "incoherent and fly in the face of the facts". They are of course only allegations and none has yet been proved. They will be for consideration during the forthcoming trial.

19. The context in which the allegations are made is that, according to the claimant, the APS ensured 90% of the defendant's losses above £60bn and transfers of charged assets to West Register did not count as a "recovery" for the purposes of computing the uninsured initial component of £60bn. The claimant asks the court to infer that it was for that reason that APA exerted pressure on the defendant to take supposedly distressed security into West Register to limit APS's own exposure under the APS, and that incentives were proffered to encourage this result.

20. The claimant's case is that he fell victim to this process, which saw APA direct the defendant to reject his offer to "buy back" the security for a sum of £70m, and instead to engineer the transfer of the major part of his portfolio to West Register.

21. That case will no doubt be developed at trial. If I have understood it correctly, the claimant is saying that the arrangements between APA and the defendant, embodied in the APS, were such that it was in the APA's (and incidentally UK taxpayers') financial interest for West Register to acquire the claimant's property portfolio, rather than for the defendant to reach agreement with the claimant on terms that would enable him to redeem the defendant's security over the properties in the portfolio.

Brief procedural history

22. The claim was brought in 2017. I omit much of the procedural history and mention only what is relevant for present purposes, relating to disclosure and to witness statements, summaries and summonses.

23. In May 2018 the defendant gave disclosure of documents (the 2018 disclosure) based on the claim as then brought, without the 2019 amendments. That disclosure was made by list on 2 May 2018. The defendant conducted searches in respect of the named custodians, using key words aimed at capturing documents concerning the claimant's portfolio and his treatment by the defendant and/or the APA. About 150 documents relating to APA's role were disclosed.

24. As I have said, the claim was re-amended in February 2019. That was done by permission of his Honour Judge Eyre QC. There was a contested hearing before him on 8 February 2019. Amendments to plead conspiracy and misrepresentation were refused on the ground that they were statute barred. The defendant complained at the time, in a witness statement of its solicitor, that the amendments relating to APA and the APS raised an entirely new issue that would generate extensive further disclosure, that "is likely to be particularly demanding".

25. At the hearing on 8 February 2019 there was an exchange, on which the defendant now relies, between leading counsel for the defendant, Mr Sinclair, and the judge, which did not prompt any intervention by counsel for the claimant. The topic under discussion was whether a trial in October 2019 was viable if permission for the re-amendments were granted.

26. In that passage from the transcript, Mr Sinclair referred to what is now paragraph 51B.4(5), which I have already set out. He observed: "it is a claim that is limited to … investigating the particular facts of the APA's involvement in Morley's case and not any wider case concerning generally the relationship between RBS and the APA, and on the basis that that is the correct reading, we are not going to seek to persuade your Lordship that we cannot do the October dates".

27. The reference to what is now paragraph 51B.4(5) was to the amendment alleging that the defendant wrongly allowed APA's view to override the defendant's own policies and good industry practice, in breach of the defendant's duties.

28. On giving permission to the claimant to make the re-amendments to the claim, as he did, his Honour Judge Eyre QC also made a disclosure order arising from those re-amendments. That order provided that the defendant should give disclosure of documents arising out of the APA allegations, and specific disclosure of the documents of seven additional custodians, including Mr Sach.

29. As a result, the defendant replied in a further disclosure statement, dated 31 May 2019 (the 2019 disclosure). In that disclosure statement, the following was asserted: " … the additional matters included in the re-amended pleadings do not give rise to the need to extend or otherwise amend the search parameters of the bank's original disclosed searches".

30. An explanation for that position was set out in a letter sent later, in August 2019, by the defendant's solicitors in the following terms: "[t]he bank's original disclosure statement was given by list on 2 May 2018 … with reference to the factual issues and narrative contained within the APOC … This factual matrix has not been extended by the amendments permitted by the court to the extent that it necessitated further disclosure searches to be undertaken".

31. However, the 2019 disclosure did include two new documents which were generic in nature and not created specifically to deal with the claimant's position. They were, first, a document called the APS Terms and Conditions and, secondly, a document called the Accesion Agreement dated 26 November 2009. The defendant has said since that those are "documents setting out the primary contractual relationship between the bank and the APA [and] may contain potentially relevant material".

32. On 24 June 2019 the claimant's present solicitors came on the record. They had not previously been acting on the record for the claimant. Just over a month later, on 26 July 2019, witness statements were exchanged. There was no statement from the defendant's side from either Mr Sach or Mr Workman. Both are former senior employees of the defendant and were employed by it in 2009 and 2010 when relevant events occurred. Statements from several employees who reported to Mr Sach were served by the defendant. Statements served on the claimant's side included one from a Mr Craig

Sneddon, who is a former employee of the defendant, who at one time conducted the defendant's banking relationship with the claimant.

33. The claimant describes the role of Mr Sach and Mr Workman thus, to quote from his skeleton argument. They were "former (high level) employees of RBS at the time of the events with which the proceedings are concerned. Mr Sach was head of GRG, Mr Workman was scheme head of the APA. Each was therefore at the fore of the tension between GRG's commercial objectives in accepting Morley's portfolio buy-back proposal and the APA's objective of seeing the bank's subsidiary, West Register, take over the portfolio. Mr Sach was personally involved in the decision making process in relation to the Morley Portfolio".

34. On 2 August 2019 the defendant's solicitors wrote to the claimant's solicitors that a particular contemporary document, entitled "Summary of current position on APS", known in these proceedings as the "Workman memo", undated but said by the claimant to date from 17 June 2010, had been written by Mr Workman, and that that document included the following: that there was a "common theme" of "the APA's wanting to use RBS to use West Register to acquire property assets and by using their power to decline release of security forcing GRG down that route, notwithstanding the commercial judgment in GRG that does not endorse that approach in most instances". That passage appears on the second page of the Workman memo.

35. The claimant sought unsuccessfully to extract further disclosure from the defendant. The latter declined to give any further specific disclosure and the claimant then issued the present application for specific disclosure on 26 September 2019.

36. The next day, the claimant's solicitors gave notice to the defendant's solicitors that the claimant intended to obtain witness summonses in respect of two individuals, at that stage unnamed. On 2 October 2019 their identity was confirmed by the claimant to the defendant as that of Mr Sach and Mr Workman. That appears to have been done by means of a draft timetable. On 3 October 2019 the claimant signposted, in a skeleton argument for the purposes of the pre trial review to be held the next day, that the claimant intended to rely on witness summaries in respect of Messrs Sach and Workman.

37. On 4 October 2019 the pre trial review took place before Mr Justice Trower. Mr Virgo, counsel for the claimant, explained to Mr Justice Trower that the claimant intended to call Messrs Sach and Workman, and that an extra day would be needed for the trial to accommodate their evidence. The judge reminded the claimant about the need to serve witness summaries. None had at that stage been served. Mr Justice Trower indicated or directed that the issue of witness summaries should be dealt with at the same hearing as the claimant's specific disclosure application.

38. On a date unknown to me before 9 October, which is the date of the relevant witness statement, Mr Barnett's seventh, the defendant conducted certain searches in response to the first application for specific disclosure. At first the defendant thought the search revealed 6,136 documents, and declined to review them. It is said by the defendant that that was in error, and that the number of documents is actually only 249 documents. I am not clear when the error was discovered. On 18 October, according to the defendant's skeleton argument, it was said that the defendant "will review" those documents without prejudice to relevance.

39. On 7 October draft witness summaries in respect of Messrs Sach and Workman were served by the claimant's solicitors on the defendant's solicitors. The next day, 8 October, the defendant's solicitors asked the claimant's solicitors to explain when the two men were first approached to give evidence voluntarily, and to provide evidence of their responses.

40. On 9 October Deputy Master Linwood made an order giving the claimant permission to serve one of two witness summonses, the one in respect of Mr Workman, out of the jurisdiction, in Scotland. In the defendant's skeleton argument an issue was raised about what the Deputy Master was told at a hearing before him. It was suggested that there may have been material non-disclosure to the Deputy Master, the procedure being *ex parte*. That was not taken up in oral argument and I do not infer that I can be satisfied that there was any material non-disclosure. I have seen the order of Deputy Master Linwood, which is in the bundle, and records that he had read the fifth witness statement of Mr Elan, the claimant's solicitor.

41. On 10 October 2019 the defendant's solicitors wrote asking for information about service of witness summonses on the two witnesses. On 14 October the defendant applied to set aside the two witness summonses. That is the third of the three applications before me now. The next day, 15 October, the claimant applied for permission to serve the witness summaries. That is the second of the three applications.

42. Last Thursday, 17 October, Mr Sach was served with the summons at his home address in south east England. He did not return a call from the claimant's solicitors. The next day, Friday 18 October, he contacted someone at the defendant bank about the witness summons. Mr Workman was served on Friday, 18 October. In fact he was served, I am told, in England, where he also has a residential address, and not in Scotland.

43. In the covering letter, both men were notified of the hearing fixed for yesterday, Monday, 21 October. I am told by Mr Sinclair that both witnesses contacted someone from the defendant on Friday, 18 October. It has not been disputed that by some point on Friday both were aware that Monday's hearing was to take place. Neither appeared at the hearing before me, either personally or by a representative; and Mr Sinclair QC, Ms Bennett, and Addleshaw Goddard, the defendant's representatives, do not represent Messrs Sach and Workman. So far as I am aware, the court has had no contact from either of them.

44. The defendant's position in relation to the two witnesses is as follows, and I quote from the skeleton argument. "RBS has not had any contact with Mr Workman or Mr Sach in relation to these witness summonses". That was the position until some time on Friday but is no longer the position, as I have said. In Mr Barnett's eighth witness statement he said that without waiving privilege " … I confirm that the bank has not had contact with or from either Mr Sach or Mr Workman … in relation to these developments". I take "these developments" to refer to the issue whether they would be required to give oral evidence at the trial.

45. I do not know how long the defendant has had sight of the 249 documents. I would have expected its solicitors and counsel to know what is in them by now. However, I was told at the hearing that counsel could not help on what is in them, and that they had not yet

been properly reviewed and considered, so the defendant cannot help on whether they are or some of them are, in the defendant's view, disclosable documents.

46. Against that litigious and procedural background I come to the three applications.

The claimant's application for specific disclosure

Category 1: the Sach searches

47. What the claimant seeks is the following: that the defendant search for and disclose documents of Mr Sach in a date range from 1 May 2010 to 31 August 2010, applying APA related search terms, namely APA, APS, influenc*, West Register, credit bidding, and pre w/2 pack.

48. The claimant submits that the bank's willingness to review the 249 documents, welcome though it is, is not sufficient to deal with the matter. The problem remains, says Mr Simms QC, for the claimant, the defendant's refusal to disclose any APA document in which the name Morley does not appear, whether or not the document or its content is otherwise obviously relevant to the claimant's case.

49. In particular, the allegations as to wrongful exertion of influence by APA on the defendant may have a bearing, says Mr Simms, on decisions taken in relation to the claimant's portfolio in 2010. Mr Simms refers me to the "disclosure duties" in CPR 51U, paragraph 3. This is the ordinary disclosure duty which applies to, among other things, "known adverse documents".

50. Mr Simms complains that Mr Barnett's approach to the test of relevance is too narrow. He submits that there is a false dichotomy between generic documents and disclosable documents relevant to the claimant's individual case. A document can be both generic and disclosable, applying the relevance test, even if it does not mention the name Morley, if it is, in truth, likely to have influenced or been applicable, by the setting of criteria or for some other reason, to his case.

51. Mr Simms points in particular to two passages in the written witness evidence of Mr Barnett. "The position remains that on the basis of the claimant's case as pleaded, it is only the documents that evidence how the bank and the APA actually dealt with the claimant's position that will assist the court to determine these issues. That is self evident from the documents themselves that the bank has disclosed, and upon which both parties rely".

52. And a little later in the same statement, he said, not in the context of the Sach searches but in the context of disclosure of committee minutes to which I am coming, the following: " … the minutes from meetings of committees as to the general considerations of the bank in respect of numerous customers and the involvement of the APA are not relevant to the issues pleaded. The only point of relevance is what those committees may have discussed in relation to the claimant. I can confirm that to the extent that those minutes were relevant to the claimant, they would have been captured by the key word searches and disclosed". That was in a witness statement dated 9 October 2019.

53. The claimant, for his part, entirely accepts that it would be inappropriate, both so close to trial and in any event, to require the defendant to disclose generic documents showing how its relationship with other specific customers came to be influenced by the APA. The proceedings, it is accepted, are adversarial and arise only between these parties; they are not in the nature of a public inquiry.

54. Nevertheless, Mr Simms submits that the content of the Workman memo, which he says was copied to Mr Sach, indicates that the bank must have other similar documents which expose the tendency, reasons for and precise nature of APA's interference in the defendant's business, which adversely affected the claimant, and which reinforce and explain why he was subjected to the treatment complained about in the case. Mr Simms points out that the two generic documents that have been disclosed have, correctly, not been redacted so as to exclude material that does not contain a specific reference to the claimant. That, he says, is recognition that there does not have to be a specific reference to the claimant for a document of a generic nature to be disclosable.

55. The defendant, through Mr Sinclair and Ms Bennett, explains its case as follows in relation to APA:

"Since Mr Morley's Portfolio was covered by the APS, RBS was required to obtain the APA's consent before it could agree a deal with Mr Morley in relation to the repayment of his Facility. The APA initially resisted consenting to the discounted settlement offer of around £70 million, despite RBS's recommendation that this should be accepted. The APA did eventually approve the discounted settlement deal in late June 2010 (however by that point in time Mr Morley had said that he was no longer able to proceed with that deal) and in late July the APA also approved that proposal which became the Disputed Agreements."

56. The defendant, while willing to review the 249 documents, as I have mentioned, submitted in written argument that it had already disclosed all relevant APA documents "which relate to interactions with or concerning Mr Morley". The defendant submits that the claim is not generic in nature, but individual to the claimant's position. Mr Sinclair points to the exchange between him and Judge Eyre QC, which did not prompt any intervention from Mr Virgo.

57. In the skeleton argument it is said that the only additional documents which the proposed Sach searches would give rise to, are documents that do not relate to the claimant. Such documents, it is said, are irrelevant to the pleaded case and a search would run contrary to what is described as a "concession" made *sub silentio* at the February 2019 hearing.

58. Explaining the defendant's willingness, nevertheless, to review the 249 documents the defendant in its skeleton argument adds that:

"this is on the basis that it is expressly clear that RBS will only be disclosing from that review those documents which are relevant [underlining in original] to the pleaded issues in the case (i.e non-Morley-specific APA documents will not be disclosed)."

59. I come to my reasoning and conclusions on this part of the first application. As to the relevance test and the point about a "false dichotomy," I accept the claimant's proposition that a document about APA and its relationship with the defendant can satisfy the relevance test without being "Morley-specific" in the sense of referring to him, or his

portfolio, or his relationship with the defendant, personally. I think that the defendant's approach is narrower than the standard disclosure duty, in particular relating to "adverse documents."

60. As to Mr Sinclair's point that a *sub silentio* concession was made at the February 2019 hearing, I do not think that point bears the weight the defendant seeks to put on it. The conversation was about whether the trial dates would be jeopardised. The scope of the claimant's case is determined not by what Mr Sinclair said to the judge in February 2019 and the fact that it was not gainsaid in the time. The scope of the claimant's case is determined by the pleadings, not by a self-serving characterisation of what his case is by the other side.

61. At one stage, the defendant relied on and quoted from an article in the Daily Mail earlier this month, which the defendant attributes to the claimant and his lawyers. In oral argument Mr Sinclair, prompted by me, rowed back from relying on it. It was said in the skeleton argument of the defendant that it was evidence of a motive on the claimant's part to call evidence about wider matters than just his own treatment.

62. I indicated that I did not think the article was relevant. Even lawyers are allowed to talk to journalists and we have, thank goodness, a free press. People litigate for all sorts of reasons and newspapers say all sorts of things. A person's motive for litigating is not relevant to whether documents pass the relevance test. The claimant accepts that this is not a public enquiry. If disputed documents pass the relevance test it does not matter whether the claimant's motive, or one of his motives, is to draw public attention to what he perceives to be wrongs done to him by the defendant or the APA. If the documents do not pass the relevance test the article is irrelevant anyway.

63. In relation to the forthcoming review of the 249 documents the search criteria indicate that it is likely many of them will pass the test of relevance if it is properly applied. I do not know how many as I have not seen them myself, but I am not satisfied that the defendant has been applying the correct test of relevance and the proposition in the defendant's skeleton argument in paragraph 25 that "non-Morley specific APA documents will not be disclosed" is concerning and suggests that the defendant has not hitherto been fully alive to the width of its disclosure obligation. The defendant should bear this point in mind when reviewing the 249 documents.

Category 2: committee minutes

64. What the claimant seeks is the following: that the defendant search for and disclose the minutes of meetings of four committees of the defendant over the same four month date range from 1 May 2010 to 31 August 2010. The four committees are the Senior Oversight Committee, the Provisioning Committee, the Watch Committee, and the Problem Exposure Review Committee.

65. The claimant submits as follows: first, that the defendant accepts that these four committees existed at the time, is apparent from the Workman memo; that the APA was playing an influential role by increased participation in at least one, if not more than one, of those four committees; further, that the role of the Senior Oversight Committee was to ensure compliance with APA scheme documents and it is therefore at least possible, if not likely, that certain minutes of those committees may contain documents applicable to the

situation of the claimant at the time, whether or not also applicable to others' situations and whether or not mentioning the claimant by name.

66. The claimant asserts that the defendant should not be permitted to protest that disclosure of these minutes would be onerous and time consuming. The claimant relies on an obligation under the relevant compliance regime, the Senior Management Arrangements, Systems and Controls (SYSC) rules, at 9.1.1R. That, the claimant says, requires that the defendant should be able to disclose these minutes relatively easily; the date range is narrow. Furthermore, some minutes have already been disclosed via individual custodian searches.

67. The defendant says that it does not have a central repository of all these minutes. The minutes of the four committees would, says the defendant, be kept in four separate locations, not in a single location. While the defendant does not go as far as to say it is ignorant of the whereabouts of those four locations, it does say that the process of extracting the minutes of the four committees in the relevant date range would be onerous and time consuming. Moreover, the defendant says that those documents that are disclosable will have already been picked up via the individual custodian searches and disclosed.

68. Now, turning to my reasoning and conclusions on the second part of this specific disclosure application, I prefer the claimant's submissions. First, I do not accept the defendant's argument that it would be unduly onerous to locate and disclose the relevant minutes. The four month date range from May to August 2010 is narrow. The defendants have long known that this date range is crucial to the claim and must long been aware of the need for relevant documents in that date range to be available.

69. Secondly, I do not accept that the defendant can say with confidence that the documents "would have" already been disclosed if relevant because I do not accept that the correct test of relevance has been applied, as I have already explained.

70. I infer from the defendant's argument that the stunted definition of relevance already discussed may well have been applied. I accept that the defendant will have to search in four places and not one, but it has had plenty of time to do so. It has known about the present application since 26 September 2019 and known of the issue from correspondence before that; and it is required under its compliance regime to have and maintain relevant records of its activities in an orderly fashion.

71. I will order that the minutes be searched for and to the extent relevant applying the proper test of relevance, as already explained earlier in this judgment, disclosed.

Category 3: three individual documents and certain sale contract documents

72. The claimant seeks disclosure of three specific individual documents. The fourth element is a category of documents, certain sale contracts. That fourth element is the subject of agreement that the defendant will search for and disclose them.

73. I turn, then, to what remains in dispute. In general, I proceed from the position that the claimant is right that his unsuccessful attempts to buy back the property portfolio and transfer of the assets in it to West Register has to be judged in its proper context and not in

an abstract vacuum; and I agree with the submission that it is in principle relevant to test what occurred against the defendant's own policy. It seems to me that since policy considerations may have had a part to play in what happened, a document saying what the relevant policy was at the time should be available to the court. The defendant has already rightly disclosed documents that though generic in nature are accepted as being relevant, or potentially relevant, to the treatment by the defendant of the claimant's portfolio.

74. With that introduction I have come to the three individual documents. The first is called the Asset Management Framework Document. The claimant says that this document is of a piece with the generic documents already disclosed and that in the Scheme Conditions document it is described as "a framework, including internal governance arrangements, for the Management and Administration by [RBS]".

75. The claimant makes a simple point that if the contractual documents setting out the relationship between APA and the defendant, two of which are already disclosed, are relevant, then so too must the framework for the management and administration of protected assets be relevant.

76. The defendant submits that at the most this document could be relevant to the relationship between APA and the defendant more generally. That relationship is not the issue in the case and the document is not relevant to any issue for determination by the court. Mr Sinclair showed me a redacted copy, which subject to the redactions is publicly available.

77. I think that the claimant is right in principle to submit that if the other generic documents already disclosed are properly disclosable then so is this one by parity of reasoning. However, the pragmatic answer to this part of the application is that much of the document has already been disclosed. Those parts that have not must be reviewed by the defendant's solicitors in the performance of their duties and any that pass the test of relevance, as explained in this judgment, must be disclosed.

78. I also direct as a matter of case management that the defendant must have an unredacted copy available at trial in case the evidence develops in a direction that makes further disclosure of unredacted parts appropriate during the trial.

79. The next document is called the Conflicts Management Policy. The claimant makes, essentially, the same submissions in relation to this document as in relation to the previous one. Mr Simms takes issue with what Mr Barnett has said in witness statements about the document, which was this:

"The … policy setting out the way the bank was to deal with conflicts has no relevance to how the bank actually dealt with any of the alleged conflict in respect of the claimant."

80. The defendants submit, again, that at the most this document could be relevant to the generic relationship between APA and the defendant and that that is not in issue. So, the submissions are essentially similar to those applying to the previous document.

81. In oral argument, Mr Sinclair submitted that the document is publicly available already save for redacted parts and, again, he showed me a copy of the redacted version

which is in the public domain. He pointed out that those parts of it that are in the public domain comprise machinery for resolving conflicts. It is a process document and not one setting out the substance of how to resolve conflict. That appears to me to be correct in relation to the unredacted parts.

82. I do not know if the redacted parts are disclosable. The defendant needs to review them, applying the correct test and relevance as set out in this judgment. In particular, but without limiting the scope of the review that is needed, the redacted out Appendix 2 of the document recites, according to paragraph 5.5(A)2:

"The businesses and operations listed in appendix 2 as representing actual or potential conflicts that currently being monitored and managed …"

Those businesses and operations could include Morley or, if not, could include material that is disclosable applying the proper relevance test because it bears on the treatment of the claimant's portfolio without mentioning it by name.

83. Again, I will direct as a matter of case management that the defendant must have an unredacted copy available at trail in case the evidence develops in the direction that makes further disclosure of unredacted parts appropriate during the trial.

84. The third document is called the AMO/NPV Guidance Note. I understand that AMO stands for Asset Management Objective and NPV stands for Net Present Value.

85. The claimant submits, again in reliance on contents of the Workman memo, that this document summarised "in detail [the] actions and requirements re AMO adherence to bridge differences" between meeting the competing demands of the APA and the bank's duties to its customers.

86. On that basis, says Mr Simms, it must be directly relevant in particular to the allegation in the RRAPOC paragraph 51B.4(5) that the defendant wrongly allowed the APA's view to override the defendant's own policies within industry practice in breach of the defendant's duties.

87. The defendant submits once again that at the most this document could be relevant to the relationship between APA and the defendant more generally and that that is not in issue in the case.

88. I do not accept the defendant's contention that the document is at most relevant to the generic relationship between it and the APA. The same proposition as before holds good, namely that a document such as this one may be both generic in the sense that it does not expressly deal with the claimant's case, yet pass the test of relevance for disclosure purposes because it throws light on whether a particular allegation of wrongdoing is made out.

89. I will not order disclosure on document at this stage, but I will order that the claimant's solicitors should review it now and disclose it with or without redactions to the extent that it meets the more broadly expressed test of relevance explained in this judgment and not the over narrow "Morley-specific" test of relevance applied by the defendant's solicitors earlier in these proceedings.

90. I will direct that the defendant must have an unredacted copy of the document available at trial for the same reasons as I have already given, as a matter of case management. Mr Sinclair suggested that there could be difficulty locating it. I was surprised to hear that. The defendant had been aware since 26 September 2019 and, indeed, earlier that it was being sought. I am confident that it will be located and my direction complied with.

91. The fourth element of this part of the application I mention only for completeness as no dispute arises in relation to it. It is a category of documents, the West Register 2014 sale contracts, which throw light on the resale price of certain properties formerly in the claimant's portfolio. As this is now the subject of agreement, I need say no more about it, but for the sake of the order I propose to include in my order a provision giving effect to the agreed position so that the issue does not become the subject of any further dispute.

The claimant's application for permission to rely on the two witness summaries

92. The claimant applies to rely on the witness summaries provided in respect of Messrs Sach and Workman. I have seen the draft summaries themselves in the course of dealing with this application.

93. The summary relating to Mr Sach says that the evidence he would have included in a witness statement is not known to the claimant. Accordingly, the summary sets out topics upon which the claimant wishes to question him.

94. With respect to the loan facility the claimant proposes to ask him the following questions:

"4.1. Did the Asset Protection Agency ("APA") direct or influence the Defendant, and if so how, in relation to the Defendant's approach to enforcing the Facility?

4.2. What did the Defendant's own objectives, policies and industry practice indicate or dictate as to the approach it would normally expect to take to enforcing the Facility; did the APA's view and desired course of action conflict with the Defendant's view and desired course of action as informed by its own objectives, policies and industry practice; did the Defendant allow the views of the APA to override its own objectives, policies and industry practice and if so in what respect(s)?

4.3. Was it the APA's desired course of action for the Defendant to use West Register to acquire property [in] the Morley portfolio rather than release security against repayment offers by the Claimant to discharge the Facility, and if so did this conflict with GRG's commercial judgment; and

4.4. In what circumstances would GRG's commercial judgment typically favour the use of West Register to purchase property assets via a 'pre-pack' sale?"

There is then an explanation as to why Mr Sach would be expected to have knowledge of those matters, in the remaining part of the summary.

95. In the case of Mr Workman, again, the draft summary says that the evidence that would be included in a witness statement, if one could be obtained, is not known to the claimant. The topics on which it wishes to question him are set out in the draft summary thus:

"4.1. Mr Workman's recollection and understanding is to the direction or influence of the Asset Protection Agency ("APA") upon the Defendant in respect of the Claimant's lending; and

4.2. The approach of the Defendant in the circumstances where the APA's view and desired course of action, based upon what the Asset Management Objective ("AMO") required, conflicted with the Defendant's view and desired course of action, and the circumstances in which RBS allowed the views of the APA to override its own objectives, policies and industry practice."

And the remaining parts of the summary explain why, in the claimant's view, Mr Workman could be expected to have knowledge of those matters.

96. Mr Simms submits that the requirements of CPR 32.9, relating to the use of witness summaries, are met in this case. He submits, in particular, that inability to obtain a statement from either of Messrs Sach and Workman can be inferred as it would be wholly unrealistic to suppose that they would provide statements voluntarily. It is very likely that they are under post-contractual confidentiality obligations, he says. He points to the fact that the defendant has applied to set aside the witness summonses compelling them to give evidence, which shows that any voluntary testimony would be provided against clear opposition from their former employer.

97. He submits that their evidence on the topics set out in the summaries would be relevant and that relief from the sanction imposed by CPR 32.10 should be granted on the basis that, while accepting the lateness of the application, not made until 15 October, applying the well-known *Denton* tests, the lateness should not be fatal to the application since this is a proper case for relief from sanctions.

98. The defendant points to the requirements of CPR Rule 32.9(1)-(4), considered by Warby J in *Otuo v. Watch Tower Bible and Tract Society of Britain* [2019] EWHC 346 (QB) at paragraphs [20]-[23]. Mr Sinclair submits that the claimant cannot show he is unable to obtain the statements from the two witnesses because he has not approached them to ask whether they would give evidence voluntarily. He argues that it would be wrong to assume that they would refuse.

99. He points to the observations of Phillips J in *Scarlett v. Grace* [2014] EWHC 2307 (QB) at [10]ff but, in particular, the observation that the requirement to show inability to obtain a voluntary statement must be "applied with a degree of rigour." That means, submits Mr Sinclair, that a "clear refusal, express or implied, to assist" must be shown and that a mere suspicion that a party is unlikely to be cooperative is insufficient.

100. Mr Sinclair also points to the voluntary cooperation of Mr Sneddon who, for his part, is prepared to give evidence for the claimant and a statement has been obtained from him. He submits that the court should enforce the requirements in the rules strictly and not condone what he effectively says is the claimant's deficient and lax approach in this case.

101. Mr Sinclair went on to make quite lengthy submissions disputing the proposition that the evidence that would be given by these two witnesses would have relevance to the issues in the case, notwithstanding a number of emails to which they were party concerning the claimant's portfolio and the defendant's treatment of it.

102. He submitted that even if their evidence were relevant, to allow the summaries would not be compatible with the overriding objective as the witnesses would have little time to prepare and would effectively be giving their evidence "cold" on matters that occurred a long time ago.

103. He says that would be unfair on the defendant, which does not know what they would say about the topics in the witness summaries. He criticises the content of the summaries as inadequate and suggests that the claimant, by contrast to the defendant, was unjustified in professing ignorance of what the witnesses would say, even though he also said that the defendant does not know what they would say.

104. Finally, he submitted vigorously that relief from sanctions ought not to be granted. He says that the application was made inexcusably late and that applying the three stage *Denton* test the default was plainly serious and significant, comparable, he said, to a case such as *Clearway Drainage Systems v. Miles Smith* [2016] EWCA Civ 1258 where late witness statements less than a month before trial were disallowed.

105. At the second stage of the *Denton* three stage test, Mr Sinclair submits that no good reason for the default had been shown since the application could have been made in late July 2019, or even before exchange of witness statements. He submitted that the claimant must have known that on its case the evidence of the two witnesses was of potential relevance even before exchange of witness statements, which did not produce any from the two witnesses. Mr Sach, he pointed out, has been a disclosure custodian since February 2019 and it was as long ago as December 2018 that the claimant sought to add him as one.

106. At the third stage of the *Denton* exercise, Mr Sinclair submitted that the lateness of the application was already having an impact on the efficient conduct of the proceedings, impairing preparation for trial and adding to costs. He said that it would be "unfair for RBS to be ambushed in this way" and that the additional day that needs to be or has been allocated for these two witnesses to give evidence might not suffice.

107. My reasoning in conclusions on this second application are as follows. I consider, first, the issue of inability to obtain statements from the witnesses. I bear in mind the useful guidance in Warby J's judgment in the *Otuo* case. I also agree with Phillips J, as he still is (just), who said 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.

108. I find it very surprising that the claimant's lawyers took the risk of not asking the witnesses for statements, but 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.

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.

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.

111. In the present case, I am so satisfied for the following reasons:

(1) The two witnesses were in senior positions at the material time from May to August 2010. They were in a position to influence what happened in the case of the claimant; and the outcome for the claimant was not good.

(2) Their evidence on the topics set out in the summaries could, if given by them, assist the claimant more than the defendant. They would not be likely to want that, though I do not rule out that they might. Other things being equal, they would be likely to want to assist the defendant rather than the claimant.

(3) They have left the defendant's employment, but the defendant's representatives have not disputed, or chosen to obtain instructions on, the proposition suggested in the claimant's skeleton argument that they are inhibited by continuing contractual obligations of the type that are very common in the industry from giving evidence voluntarily;

(4) The defendant is not calling them and is doing all it can to stop them giving evidence.

(5) The witnesses' reaction to service of the summonses on them was to contact the defendant and not the claimant. One of them, indeed, has not returned a call from the claimant's solicitors.

112. For the avoidance of doubt, although I have dealt with the position of the two witnesses together, I have considered carefully the potential evidence of each separately. I have been shown the emails to which they were party, showing the extent of their involvement with the claimant's case. There are not many of those emails and they might not take very long to deal with in evidence, but they could be important.

113. My conclusion is not altered by the fact that, rather against the odds, the claimant is able to call Mr Sneddon. His position is different. He was more junior than the two witnesses. He dealt personally with the claimant and was on good terms with him for a time. And he ceased to be the claimant's relationship manager before the critical events in the case had taken place.

114. I do not accept as realistic another point made by Mr Sinclair: that the witnesses might prefer to be called by the claimant rather than the defendant, so that the claimant would be unable to cross-examine them and the claimant would be bound by their answers in chief. That would not necessarily be the position at trial, though it may well be. It would depend on, among other things, what evidence they should give in chief.

115. The second issue is the extent to which the two witnesses can give relevant evidence. The defendant says they cannot, but as at present advised I disagree. The fact that there are other witnesses being called by the defendant who will be giving evidence on the same topics does not, contrary to the suggestion in the defendant's skeleton argument, mean that the evidence of these two witnesses is irrelevant. You can have a situation where witness A and witness B give evidence on the same topic, which is mutually contradictory. It is not for one party alone to select which witnesses should cover which topics.

116. The likely absence of recall on Mr Workman's part, another matter mentioned in the defendant's skeleton argument, is not a factor that weighs heavily with me. Both witnesses may well remember these events, particularly when reminded by being shown documents. As I have said, there are not very many documents that they need to look at. Nor do I accept that it is difficult to see what the evidence of these witnesses could add to those being called by the defendant. For the purposes of the trial my mind remains fully open on these issues, but such is my thinking for the purposes of deciding this application.

117. Next, is it compatible with the overriding objective to allow the summaries to be relied on? Subject to procedural considerations and the *Denton* exercise, in my judgment it is. Justice is served by relevant evidence being called, not by preventing it from being called.

118. Next, are the summaries adequate? Do they adequately set out "the matters about which the party serving the … summary proposes to question the witness"; CPR 32.92(b). In my judgment they do. There is no lack of clarity in the summaries.

I think it is primarily for the party seeking to rely on the summary to say whether that party knows or does not know what evidence the witness will give. Very few things in life are known for certain. This is not a case where the witness's evidence is purely a matter of factual recollection, as in *Scarlett v. Grace*, were the issue was whether a seat belt had been worn. The evidence of these witnesses will or may include evidence about their motivation and state of mind. That is not within the claimant's knowledge.

119. Is it fair, in all the circumstances, to confront the defendant with the summaries? Subject to the considerations set out in the *Denton* case to which I am coming, in my judgment it plainly is. 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 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.

120. I, therefore, come to the question of relief from sanctions. I agree with the defendant that the default here is significant and serious. The application could and should have been made in August 2019, even though that was the summer break period. It is surprising and, with respect, reprehensible that the claimant's solicitors waited so long before serving the draft summaries. The defendant might have thought the issue had gone away, until notified on 27 September 2019 by the claimant's solicitors that the claimant intended to obtain witness summonses in respect of two individuals.

121. What are the reasons for default? I have considered carefully Mr Elam's explanation for the delay, which is in one of his witness statements, to which Mr Simms took me. However, I find that the reasons for the default were, essentially, slowness on the part of the solicitors to wake up to the need to get on with serving summaries on the defendant and apply for permission. The claimant's solicitors should not have waited until the pre-trial review. They should have applied in August 2019.

122. The third stage of the exercise is to consider all the circumstances of the case, to enable the court to deal justly with the application for relief from sanctions, including the need for litigation to be conducted effectively and at proportionate cost, and to enforce compliance with rules, practice directions and orders.

123. Here, the defendant has been alive to the issue since 3 October 2019 and has had the draft summaries since 7 October 2019. I do not think the conduct of the trial will be significantly impaired if the witnesses are called. The compass of their evidence is relatively narrow. I am confident that it can be dealt with within a day. The time estimate for the trial, indeed, has been informed by the possibility that it will include the giving of their evidence.

124. I do not accept that the case is comparable to one where lengthy, late, witness statements are served shortly before trial. The summaries are compact. I do not accept that the witnesses or the defendant will be ambushed, or that the defendant will be prevented by lack of time from preparing properly for trial.

125. The defendant has found the time to put substantial resources into dealing with procedural issues, including those argued before me yesterday. There is nothing wrong with that, but it shows how adept are the defendant and its lawyers at getting things done efficiently and quickly.

126. I have no fears for the fairness of the trial. It will not be disrupted. The evidence is already contained within the estimate. I expect and hope to start the trial on Monday rather than Wednesday; Tuesday being unavailable due to a commitment of counsel. The cost of the trial will be modestly increased, but that cost is likely to be borne by the losing party, which does not, at this stage, appear to me unjust.

127. I do bear in mind the need to enforce compliance with the rules. I have had to think long and hard about that, given the seriousness of the default. I do think it would be close to folly for lawyers, in future, to rely on this judgment as laying down any general principle or excusing the default that occurred here through unjustified delay. The claimant took a real risk in leaving this application so late but, in the end, I am just persuaded that this factor is outweighed, in all the circumstances by the other factors I have mentioned and that this is a proper case for relief from sanctions.

128. I, therefore, grant that relief and permission to rely on the witnesses' summaries.

<u>The defendant's applications to set aside the witness summonses</u>

129. The defendant applies to set aside the summonses in respect of Mr Sach and Mr Workman. Mr Sinclair reminds me of rule 34.3(4) states: "[t]he court may set aside or

vary with a summons issued under this rule". He submits, on the authority of Freedman J's decision in *Solicitors Regulation Authority, Ogene v. Naqvi* [2019] EWHC 1420 (Admin) at [26], that the defendant has standing to make the application. He says that the lateness of the summonses and the circumstances in which they were obtained are such that the court should set aside the summonses and not permit the claimant to call the witnesses.

130. He compares the position to that in *Gamatronic (UK) Ltd v. Hamilton* [2016] EWHC 1455 (QB), in which Garnham J set aside a witness summons, observing at [37]: "[i]n the absence of either a witness statement or an adequate witness summary, or other adequate explanation, I see no grounds for maintaining the witness summons". So that was a place where there was no witness summary.

131. Mr Sinclair goes on to repeat his argument that the witnesses have no relevant evidence to give. He submits that the summonses are, therefore, oppressive and he essentially repeats his argument that it is not fair to the defendant or the witnesses to require their evidence to be given at such short notice.

132. For the claimant, Mr Simms observes that the arguments in this application substantially overlap with those in the previous one and that the two would be likely to stand or fall together.

133. He did, however, dispute the proposition that the defendant had any standing to bring the third application to set aside the witness summonses. He disputed the proposition that Freedman J's decision in the *Solicitors Regulation Authority* case was an adequate foundation for the defendant's standing, and he took me to one of the cases cited to Freedman J, *Marcel v. Commissioner of Police for the Metropolis* [1992] Ch 225; a decision of the then Vice-Chancellor, Sir Nicholas Browne-Wilkinson, and a Court of Appeal comprising Dillon and Nolan LJJ and Sir Christopher Slade.

134. There, a person from whom documents had been seized by police wished the police to produce them in a subsequent civil action. Mr Simms took me to passages in the judgment of the Vice-Chancellor at 239C, in the judgment of Dillon LJ at 253A-C and in the judgment of Sir Christopher Slade at 267B. Those passages, he submitted, at least cast doubt on the defendant's standing here.

135. He went on to refer me to a passage in the current 19th edition of *Phipson on Evidence*, at paragraph 8-21, part of which states as follows:

"It is not necessarily the case that the other party to the litigation has a right to apply to set aside a witness summons, although the authorities indicate that, in specific instances, he may object. It has been recognised that an opposing party in litigation may have a limited interest in setting aside a witness summons or subpoena, namely an interest that the hearing should not be allowed to expand beyond the trial of the issues raised by the pleadings and matters necessarily ancillary thereto… ."

136. Those observations in *Phipson* are supplemented by footnotes numbered 91 and 92, citing a number of cases that were not cited to me yesterday. I am unclear whether they were cited to Freedman J in the *Solicitors Regulatory Authority* case. They are *Harmony Shipping v Saudi Europe Line* [1979] 1 WLR 1380; *Boeing Company v PPG Industries*

Inc. [1988] 3 All ER 839; *Jonal Property Ltd v Ms McLeod Holdings Ltd* [1994] S.A.S.C. 4380, a decision of the Supreme court of South Australia, said by the editors of *Phipson* to support the proposition that in general, there is no standing in an opposing party to apply to set aside a subpoena; and *Bengalla Mining Co Pty Ltd v Barclay Mowlem Construction* [2001] N.S.W.S.C. 93, N.S.W. Sup; a decision of the Supreme Court of South Wales.

137. In my judgment, this is not the appropriate occasion on which to decide, on a firm basis, whether the defendant has standing to bring this application. I have not heard full argument and I have not been taken to the cases cited in the footnotes of *Phipson*. I also note that Freedman J was dealing with a case where the facts were different, and he too had to make his decision *extempore* and under considerable time pressure, possibly even greater time pressure than is now on me.

138. I think the appropriate course, today, is to assume without deciding that the defendant has standing. The question of standing raises potentially difficult issues about the interaction or tension between the principle that there is no property in a witness and the principle that a party to litigation should be protected against oppressive and irrelevant evidence and is entitled to ask for case management decisions to secure that right.

139. On the assumption that the defendant has standing to make the application, I am not prepared to accede to it. My reasoning on this third application overlaps considerably with what I have already said when giving reasons for allowing the summaries to be relied on. I do not repeat what I have already said when dealing with that matter.

140. It is relevant here that the application is not made by the witnesses themselves. Given my provisional view that their evidence could be relevant to issues I have to decide at trial, I do not think it would be appropriate to set them aside.

141. I think the justice of the position here is adequately protected by the right of the witness to apply to set aside the summons. I do not think it is for the defendant to do it for them, without having contacted them despite knowing, since early October 2019, of the claimant's intention to call them.

142. In all the circumstances, I do not think this is a case where I should set aside the summonses. As at present advised, I think justice requires that the defendant should not be allowed to assert what comes perilously close to asserting a *de facto* right of property in these witnesses.

Conclusion

143. I will make an order embodying the decisions in this judgment and I invite the parties, please, to email an agreed draft order to my clerk for approval. I am very grateful to the parties for their helpful submissions.

We hereby certify that the above is, as amended by the judge, an accurate and complete record of the proceedings or part thereof.