Neutral Citation Number: [2020] EWHC 3328 QB)

Case No: QB-2018-001043

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2020

Before :

ROGER TER HAAR Q.C.
(sitting as a Deputy High Court Judge)

- -

Between :

VADIM DON BENYATOV	**Claimant**
- and -	
CREDIT SUISSE SECURITIES (EUROPE)	**Defendant**

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- -

Charles Ciumei Q.C. and Andrew Legg (instructed by **Scott & Scott (UK) LLP)**) for the **Claimant**
Paul Goulding Q.C., Paul Skinner and Emma Foubister (instructed by **Cahill Gordon & Reindel (UK) LLP)**) for the **Defendant**

Hearing dates: 25 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

ROGER TER HAAR Q.C.

Covid-19 protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Tuesday 8th December 2020.

Roger ter Haar Q.C. :

1. This is my fifth judgment in this matter. The first, handed down on 22 January 2020, dealt with the Defendant's applications:

   (1) to strike out the claim brought by the Claimant;

   (2) if or insofar as that application did not succeed, for a conditional order requiring the Claimant to pay £1.15 million into court;

   (3) alternatively, for an order that the Claimant provide security for costs in the sum of £1.15 million.

2. In that judgment I dismissed the applications for a conditional order and for security for costs. As to the first application, that succeeded to a significant degree but also failed to a significant degree.

3. My second judgment was handed down on 18 February 2020 and dealt with the costs of the applications. I concluded that the Defendant should pay the Claimant one third of his costs of the three applications.

4. My third judgment was handed down on 20 March 2020, and related to an order as to interim payment as to costs.

5. My fourth judgment was handed down on 25 November 2020 and dealt with the terms of the amendments to the Claimant's pleading which should be permitted and an application on the part of the Defendant to strike out certain parts of the draft Particulars of Claim.

6. In broad terms I decided as follows:

   (1) I dismissed the strike out application;

   (2) I refused permission to introduce new contractual claims on the basis that they are statute-barred;

   (3) Otherwise I generally permitted the proposed amendments although I decided that certain allegations should be better particularised.

7. This judgment now deals with the following matters:

   (1) Finalising the pleading;

   (2) The costs of the amendments and the hearing relating to the amendments;

   (3) Consideration of the Defendant's application for permission to appeal my first judgment;

   (4) Whether I should vacate the trial window fixed for this case, and, if not, what directions should be given in respect of steps to be taken leading to that hearing.

Finalising the amendments to the Particulars of Claim

8. My fourth judgment was handed down on 25 November 2020, but was, in accordance with the usual practice, provided to the parties in draft on 16 October 2020. It was anticipated by me that the parties would confer and attempt to agree the terms of an amended pleading which reflected my judgment.

9. In the event to a very large extent the amendments have been agreed, but some differences remain.

10. In part the differences result from late thoughts on the part of the Claimant resulting in some amendments which are not the result of implementing my fourth judgment. So far as these are concerned, they seem to me generally not to expand the case unreasonably, and they are allowed so long as adequately particularised.

11. There have been a number of iterations of the draft pleading. For the avoidance of doubt, the draft which I am considering is that which appears in tab 9E of the hearing bundle for 25 November 2020, numbered 179G.1 to 179G.71, together with Annex A to that pleading which is at pages 116 to 134 of that bundle.

12. Paragraphs 25A.14 and 25A.15: those paragraphs need to be read with paragraph 25A.16:

> "25A.14 Paragraphs 27-28 of the Amended Particulars of Claim, i.e. the fact that it was clearly envisaged by both parties at the time of entry into the Contract that Mr Benyatov would be working in emerging market countries of the former Soviet Union in eastern and southern eastern Europe including Romania, which was a high risk country;
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> "25A.15 Paragraphs 27-28 of the Amended Particulars of Claim, i.e. the fact that it was clearly envisaged by both parties at the time of entry into the Contract that Mr Benyatov would be working in emerging market countries of the former Soviet Union in eastern and southern eastern Europe on the privatisation of significant state-owned companies, which was a high risk transaction;
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> "25A.16 The said risks included the risk of being subjected to politically or commercially motivated judicial or criminal action including but not limited to arbitrary detention, criminal charges, prosecution, conviction and imprisonment or other corrupt action of interference with an individual's fundamental rights and freedoms."

13. In the Defendant's skeleton argument it is said:

> "In C's letter of 18.11.20 at para 2.1(e) **[SB/1/5/73]**, C does not suggest that he has permission to make this amendment or that it reflects the Judgment but instead suggests that "*this provides further particulars and clarification*" in particular in relation to what was meant by the "*high risk*" nature of the relevant location and transactions. However, these amendments do nothing to particularise or clarify what was meant by "*high risk*". Moreover, they aver that C would be working in

> emerging market countries "*of the former Soviet Union…including Romania*". Romania was never a country of the Soviet Union."

14. The Claimant accepts that the reference to "Soviet Union" should be corrected to say "Soviet bloc".

15. In my judgment the case is now sufficiently particularised and the amendment will be allowed.

16. Paragraph 25B.1: The issue here concerns the extent of the case which the Claimant can put forward to rely upon the implication as a matter of law of the contractual duties relied upon. The Defendant's submission is as follows:

> "C had indicated that he was willing to amend this paragraph to meet D's objection, but he resiled from that as late as 23 November. The objection here was that the facts and matters set out in paragraph 25A, to which 25B.1 cross-referred, bring in 25A.22 and 25A.23, which C had not sought nor obtained permission to rely on as matters in support of the alleged implication of the contractual duties as a matter of law. He then proposed an amendment namely that the facts and matters relied on "*includ[e]*" the other sub-paragraphs of 25A (see [**SB/1/6/97]**). That did not however make clear that 25A.22 and 25A.23 are thereby excluded and so D reasonably asked C to rectify this. Instead of doing so however, C has resiled from his previous position. D therefore continues to object to this amendment."

17. Whilst I have very considerable doubts as to whether anything very much turns upon whether the amendment is allowed as asked or has to be qualified by making it clear that paragraphs 25A.22 and 25A.23 are to be omitted from the incorporation effected by paragraph 25B.1, it seems to me that the Defendant's objection is well founded. Accordingly the draft should be amended to make this clear.

18. Paragraphs 25D and 54.1.2: the objections were as follows:

> "Paragraphs 183 and 188 of the Judgment required C to particularise his case as to which (a) consulate or State Department staff or (b) intelligence personnel or (c) academics he refers.
>
> "(a) At the hearing, Mr Ciumei QC responded to the Judge by confirming that the consulate staff meant the American consulate: Day 2, page 28, lines 20-24. Yet, C now seeks to amend to delete "*consulate*" and instead allege "*American, UK or Swiss embassy employees (such as members of the chancery or political teams) or US State Department staff)…based in the relevant embassies in Bucharest at the material time (ie in 2005-2006), or employees of the EU delegation in Romania*". C should not now be permitted to go beyond what his Leading Counsel told the Court in response to the Judge's enquiry and D's submissions, nor to do so in such an extensive way.
>
> "(b) No further particulars of which "*intelligence personnel*" have been given.

> "(c) As to the requirement to particularise which academics, the proposed amendment now reads "*such as those with research interests in Slavonic and East European Studies, and in particular in corruption, economic crime, corporate governance, privatisations, and/or the role of networks and patron-client relationships*." In listing a wide variety of broad subject areas (e.g. "*economic crime*") in a non-exhaustive fashion ("*such as*") with a vague reference to potentially more than a dozen countries ("*Slavonic and East European*"), C is plainly not providing any meaningful form of particularisation, let alone complying with what the Court ordered in this instance (namely, that the actual academics be particularised).
>
> "(d) Para 25D also seeks to add a further commercial intelligence organisation, namely CEC Government Relations, without any explanation. The identity of commercial intelligence organisations was not the subject of any objection or request for particularisation by D at the hearing; C neither sought nor obtained permission to amend to add this further name; and he should not be permitted to do so now."

19. I accept that these amendments go further than I allowed, but in my view the expansion of the case is relatively limited, and the Defendant will be able to deal with the expanded case in the timescale and with substantially the same evidence as that which would have been called for if there had been no such expansion of the case.

20. As to the level of particularisation, it seems to me that the Defendant knows the case which it has to meet.

21. The amendments will be allowed in the terms put forward.

22. Paragraph 25E: This paragraph pleads reliance on Section 6 of the Human Rights Act 1998. Whilst the text of this paragraph was in the original pleading, it has been repositioned. It is this which has led to the Defendant's objection:

> "C's original case was that the pleaded contractual obligations must be interpreted and applied in a way that is compatible with Article 8 of the ECHR. This paragraph has been moved so as to expand this aspect of the case to the effect that this plea now also relates to the tortious duties alleged. No permission has however been sought or obtained to expand the case in this way. It is now too late to do so and this paragraph should clarify that "*the above obligations*" means "*the above contractual obligations*."

23. I accept that this amendment is not encompassed within my previous judgment. However it does not seem to me that the Defendant would be in any significant way prejudiced if it is allowed, and I grant permission.

24. Paragraph 54.1.5: The Defendant's objection is as follows:

> "This paragraph seeks to bring in a new allegation on which the Court's permission was neither sought nor obtained. In paragraph 197 of the Judgment, it was said that "*it is by no means obvious that the Romanian*

> *authorities would have been willing to liaise with the Defendant, or what would have happened if there had been such liaison*", and went on to note that it "*is possible that in future the Claimant may be able to bring forward a properly particularised case, but in my judgment permission to amend in this sub-paragraph should be refused*." Notwithstanding this clear ruling against C, he seeks to reintroduce, without seeking permission to do so, this paragraph with some minor tweaks, such as by replacing "*Romanian security and intelligence services*" with its abbreviated form, the "*SRI*". C has no permission to make this amendment."

25. This objection is well taken. This amendment is refused.

26. Paragraph 54.1A: The Defendant's submission is as follows:

> "Paragraph 194 of the Judgment stated that it was legitimate for D to ask (a) is it alleged D knew? (b) if so, (i) who at D knew, (ii) when and (iii) how did they know and held that "*it will be condition of the grant of permission that these particulars are given*." That condition has not been met. Specifically, (a) C had originally addressed the question of "when" D is alleged to have known of the matters in paragraph 54.1A.1 of the APoC, but not "who" or "how" (see **[SB/1/6108-109]**), but he has now deleted reference even to "when" (see **[SB/1/9E/179G.33]**); (b) he has not addressed any of "who", "when" or "how" D is alleged to have known of the matters in paragraphs 54.1A.2, 54.1A.3 or 54.1A.4. When this was pointed out in correspondence, C's response was that "*the allegation is that your client either knew or should have known of the matters set out… Due to the inadequacy of your client's disclosure our client cannot (at present) definitively plead that your client had actual knowledge of the matters pleaded in paragraph 54.1A.2-3 and so the question of "who", "when" and "how" do not arise*." (para 2.1(m) of his letter of 18.11.20 **[SB/1/5/75]**). C thus accepts that he is unable to meet the condition on which permission was granted. Further, C has accepted that he has no proper basis to plead the allegations that D had actual knowledge of the matters he alleges. This extraordinary state of affairs should not be permitted to continue."

27. The Claimant's answer in its submissions is as follows:

> "It is not clear whether any objection is maintained to these paragraphs …. If so, there is no basis for such an objection, since the amendments provide the best particulars of knowledge available to Mr Benyatov based on the inadequate disclosure provided by the Defendant to date, and asserts that the Defendant in any event (and irrespective of actual knowledge) should have known about these matters – to which the Defendant can plead in response."

28. I have no way of assessing whether the disclosure given thus far has been inadequate, but I accept Mr Ciumei's assurance that these are the best particulars which the Claimant can presently give. I give permission to amend the pleading as requested, subject, however, to an important caveat: I do so on the express understanding (which

seems to me clear from the pleading) that at present there is no case of actual knowledge made against the Defendant. If proper grounds for such a serious allegation were to emerge, I would expect a further application to be made to amend to make such allegation expressly. Any such application would of course fall to be considered by the Court on its merits when made.

29. Annex A, tabs 13-22: Annex A sets out documents relied upon by the Claimant, identifying with particularity the passages relied upon, and the inferences to be drawn from those passages. It is a useful document. The Defendant's objections are as follows:

> "D continues to have a number of reservations about Annex A and notes that pleading to it will necessarily be a lengthy and costly exercise. However, in the interests of proportionality, D limits itself to the following three objections:
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> "(a) The following documents all post-date C's arrest and so cannot be said to support the allegation that certain risks were widely documented in the public domain, and/or should have been known to D, prior to C's arrest: Tabs 7-10 **[SB/2/14/681-764]**, 13-16 **[SB/2/14/781-808]** and 18 **[SB/2/16/811]** (see also Appendix 3 to this skeleton argument).
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> "(b) In relation to tabs 13-16 **[SB/2/14/781-808]**, these documents all either consist of or relate to a protocol put in place between the Romanian Prosecutor's Office, the High Court of Cassation and Justice and the Romanian Intelligence Service in 2009. They cannot rationally be relevant to the state of D's knowledge about risks some 3-4 years earlier.
>
> "(c) In relation to tabs 17-22 **[SB/2/15-20/809-817]**, these are all new documents that were not identified in C's written submissions for the October hearing on which he sought permission to rely. C did not seek and was not granted permission to rely on new documents, which were only provided to D for the first time on 10.11.20."

30. The Claimant's submission is as follows:

> "Producing Annex A was a substantial exercise, to address the Court's direction to identify passages relied on to demonstrate that the risks were widely documented in the public domain (as per paragraph 25D APOC **[Supp.1/9E/179G.23/56]**), and to identify inferences arising therefrom. The Defendant appears to [have] misunderstood the task set by the Court at paragraph 187 of the draft judgment in this regard, by alleging that the Court directed Mr Benyatov not to rely on any further documents. That was plainly not directed, as Scott+Scott's letter dated 18 November 2020 at paragraph 2.2(j) **[Supp.1/5/74]** points out (which has not been answered). Mr Benyatov considers that the only appropriate response for points of dispute in relation to the Annex is to follow the course set by the QB guide at paragraph

> 6.7.4(11) that the Amended Defence record any such response or objection in its own schedule, which can be resolved at trial. Enough disproportionate and unnecessary cost has been wasted on peripheral pleading points raised by the Defendant."

31. I regard Annex A as being useful (as I have already said) and important. For the reasons given below, I decline the Defendant's suggestion that the present trial window should be vacated. Accordingly in considering this part of the pleading I need to assess whether the Defendant can deal with this Annex between now and trial.

32. I accept (as Annex A itself accepts) that the documents at tabs 17-22 are new. I have copies of the documents in those tabs. In my judgment the Defendant will be able to deal with them (and the other documents) in the time available.

33. It is also right that many of the documents post-date the Claimant's arrest, but it is the Claimant's case that they illuminate the environment into which the Claimant was sent when he went to work in Romania. This is a perfectly intelligible case: it is not for me to decide whether it will succeed or not.

34. For these reasons I grant permission to rely upon Annex A in full.

35. This deals with the objections to the pleading. In the process of amendment the document has become very complex. As a matter of urgency a "clean" copy of the pleading must be produced.

36. Further, in order to make life a little easier when it is necessary for the Court to consider the history of the pleading, I direct that tables of derivations should be prepared by the Claimant and agreed, if possible, by the Defendant. I say "tables" because it seems to me desirable to have a table setting out the paragraphs in the original pleading and what has now happened to them, and a table setting out the paragraphs in the finalised pleading and where each came from (and when each was introduced).

Costs

37. There are the following matters for me to consider:

    (1) The costs of and caused by the amendments, including whether any part of the costs should be assessed on an indemnity basis;

    (2) The costs of the Defendant's strike out application;

    (3) Whether I should make an order for payment on account of costs;

    (4) The time for payment of the amount which I ordered the Defendant to pay to the Claimant in paragraph 11 of the March Order.

<u>The costs of the amendments</u>

38. The costs in issue are very large.

39. The Claimant's cost schedule totals £221,176.30, of which £103,150 relates to counsel's fees.

40. The Defendant's cost schedule totals £393,382.08, of which £224,028.08 relates to counsel's fees.

41. My understanding of these schedules is that the Claimant's schedule does not include the costs of drafting the amendments, but does include costs of considering the Defendant's objections to the pleadings. The Defendant's cost schedule does not include the cost of amending the Defence, which is yet to be done.

42. The starting point is properly set out in the Defendant's skeleton argument at paragraph 7(1) to (3):

> "The following principles apply to the costs of amendments to a statement of case:"
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> "(1) The 'general rule' or 'conventional order' on an amendment application is that those who obtain permission to amend are ordered to pay the other party's costs of and caused by the amendment: *Taylor v Burton* [2014] EWCA Civ 21 at [30]-[34]. Rimer LJ (with whom Ryder LJ agreed) said at [30]:
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> > "[Counsel] reminded us that the general rule is that those who obtain permission to amend are ordered to pay the other parties' costs of and occasioned by the amendment. He referred us to para 17.3.10 in the notes to Volume 1 of Civil Procedure, which records that such orders are "often" made; and to para 8.5 of The Costs Practice Direction, which records that such orders are "commonly" made. Both references reflect the judicial practice with which anyone with experience of contentious litigation will be familiar."
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> "(2) Practice Direction 17 – Amendments to Statements of Case begins:
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> > "A party applying for an amendment will usually be responsible for the costs of and arising from the amendment."
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> "(3) Practice Direction 44, para 4.2 states:
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> > "There are certain costs orders which the court will commonly make in proceedings before trial. The following table sets out the general effect of these orders."
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> Next to "Costs of and caused by", the text continues:
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> > "Where, for example, the court makes this order on an application to amend a statement of case, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case"."

43. Applying those principles, I have no difficulty in ordering that the Claimant should bear his costs of drafting the amendments to the Particulars of Claim and correspondence about the iterations of the draft amendment. Equally, I have no difficulty in ordering

that the Claimant should pay the reasonable costs of amending the Defence (a cost yet to come) and of considering the various drafts.

44. The Claimant argues that an exception should be made for the incorporation of the material previously in the RRFI into the main pleading, because that was done at my suggestion. I accept this: those costs (and that portion of the Defendant's costs which are attributable to pleading to it, which will be principally the cost of pleading to Annex A) should be costs in the case.

45. However, substantial as those costs may be, the greater part of the £600,000 covered by the two cost schedules, particularly counsel's fees, relates to the hearing on the 1st and 2nd October and preparing the objections made by the Defendant to the proposed amendments.

46. The scale of those objections is reflected not only in the fees incurred for that hearing but also in the fact that the hearing took two days and resulted in a 52 page judgment.

47. In my view there is a tension between the general rule as to who pays for amendments set out above, and the general principles of CPR 44 whereby generally the successful party receives its costs.

48. At this point I am not dealing with the costs of considering and pleading to the amendments, in respect of which the general rule as to amendments applies. What I am dealing with at this point are the costs of a considerable assault upon the pleadings as proposed.

49. That assault was generally unsuccessful save as to the statute-barred contract claims and as to the level of particularisation of certain paragraphs. If those had been the only issues before the Court, it is likely that the matters could have been dealt with in a day.

50. Given on the one hand the general principle that the costs of amendment, including costs of reasonable submissions to the court in opposition to the amendments, should be paid by the party applying to amend, and on the other hand that the applying party should not have to pay for unreasonable objections, a difficult balance has to be struck.

51. On the one hand, the Claimant has gone through several iterations of the pleading in order to arrive at a draft which even in its latest form was the subject of some successful objections. On the other hand the Defendant has launched widespread attacks on the pleading which have to a large extent failed and which resulted in a longer hearing than would otherwise have been necessary.

52. In those circumstances it is difficult to identify a clear winner in this large procedural battle. It is perhaps best to consider this as one substantial battle in a war which will be resolved at trial or on appeal.

53. In those circumstances I have come to the unusual conclusion that the costs of preparing for the October hearing and of the hearing itself should be costs in the case. Those costs will be assessed on the standard basis.

The costs of the Defendant's strike out application

54. This application failed. There is no reason why the usual order for costs should not follow. Accordingly the Defendant will pay the Claimant's costs of the Defendant's strike out application to be assessed on the standard basis.

Should I order an interim payment on account of costs?

55. Given the decisions I have made above, this is not a case in which any payment on account of costs will be ordered.

The time for payment of the amount due from the Defendant in respect of the March Order

56. In my order dated 20 March 2020, I ordered that the Defendant should pay the Claimant £40,000. The Defendant asks that I should vary the Order so that time shall not run until the final determination of the Defendant's appeal.

57. As will be seen below, I refuse permission to appeal, but it is apparent that the application will be renewed before the Court of Appeal. In the circumstances the application seems to me appropriate and I grant it.

Permission to Appeal

58. The Defendant seeks permission to appeal against my first judgment. If that appeal succeeds on the strike out application, it would inevitably involve the setting aside of all five judgments. Accordingly, for the avoidance of doubt, I treat this as being an application to appeal against all five judgments (including therefore this one).

59. The Defendant has very helpfully placed before me draft Grounds of Appeal and also a detailed and very helpful skeleton argument in support of the application.

60. Ground 1 contends that I applied the wrong test. Whilst ultimately it would be for the Court of Appeal to decide whether I correctly applied the correct test, I confirm for the avoidance of doubt that the test which I intended to apply and did apply was that which the Defendant's skeleton argument submits I should have applied. In particular the test which I was applying was whether the Claimant had a realistic prospect of success. I believe that was made clear, for example, in paragraphs 50, 82 and 154 of the judgment.

61. I take Grounds 2 and 3 together. So far as these are concerned, it is important to step back and take a broad view.

62. The background to the application to strike out includes that at the Case Management Conference on 22 March 2019 it was agreed that there should be expert evidence as to "the risks of doing business in Romania between 1 January 2005 to 22 November 2006, in particular the risk of covert surveillance, the risks of wrongful and politically motivated criminal proceedings being brought against foreign businessmen and the extent to which any such risks were publicly known, reasonably discoverable and could be mitigated by businessmen and/or their employers working in Romania during this period".[1]

[1] See paragraph 40 of the judgment

63. This was relevant both to the provisions of the CPR as set out in paragraphs 64 and 65 of the first judgment which I applied in paragraphs 73 to 81 of that judgment, and as to what those actions said as to the views of the Defendant as to the merits, a factor referred to in the citation from the *Brinks* case which I set out at paragraph 79 of the judgment and sought to apply at paragraphs 85 to 89 of the judgment.

64. The expert evidence which it was agreed should be admitted went to the pre-arrest case, particularly the case in tort.

65. Against that background I considered the pre-arrest case, bearing in mind the frequently repeated reminders from the higher courts of deciding cases after adducing evidence – the *Altimo* principle to which I referred at paragraph 52 of the judgment.

66. I have no doubt whatsoever that this case throws up interesting and important points of law which may well trouble the higher courts in due course. However, in respect of those points of law where I considered there was more than a fanciful prospect of success, given the lateness of the application and the guidance of the higher courts, I concluded that it would be wrong to grant summary judgment or to strike out the claim, but rather that the points of law should be considered against the background of the facts as found at trial.

67. To grant permission to appeal would be quite contrary to that view.

68. Ground 4 relates to causation. In my view if the Court at trial were to hold that the indemnity claim or the duty of care claim otherwise succeeded, I do not regard it as difficult to suppose that the Court would not be very troubled by issues of causation.

69. Grounds 5 and 6 raise challenges to the procedural orders which I made. I do not regard either Ground to raise an arguable case justifying permission to appeal.

70. Accordingly permission to appeal is refused in respect of all the proposed Grounds of Appeal.

Case Management Issues

71. In July of this year a trial was listed for a window starting on 26 April 2021. The Defendant asks for that date to be vacated.

72. In my judgment it should be retained.

73. The case against the Defendant, whilst the subject of considerable amendment, is fundamentally the same in the elements which have survived as it always was.

74. I accept that in the original pleading there was a substantial element of the case relating to post arrest events – indeed it could be said that that was perhaps the greater part of the case – and that element of the case has now gone.

75. However, as the order for experts at the CMC to which I have referred at paragraph 63 above makes clear, it was always part of the case which the Defendant had to meet that the risks of requiring the Claimant to do business in Romania should have been appreciated by the Defendant.

76. After I handed down my first judgment in January 2020, it was clear that that case survived unless a successful appeal was launched against that judgment.

77. In July of this year, as I have already observed, a trial window was fixed.

78. It seems to me that the Defendant should have been considering the evidence required to address the pre-arrest case from the outset of these proceedings.

79. I was left with the impression that even now the Defendant's legal team may have avoided looking at the factual issues relevant to defending this very large claim.

80. If that is so, it is surprising. In cost schedules placed before me, the Defendant claims to have spent a million pounds on the strike out application and the amendment issues. I find it difficult to believe that a million pounds was spent without any consideration of the evidential issues arising if the claim was not struck out or if the amendments were not allowed.

81. However, if it is true that the Defendant has avoided investigations in the hope or expectation that there will be a successful appeal against my first judgment (which would not, of course, explain the failure to carry out investigations before service of the Defence or before the March 2019 CMC) that is a commercial risk taken by a major financial institution advised by some of the world's top lawyers.

82. Accordingly, I approach the case management issues with some scepticism as to the suggestion that the Defendant cannot be ready for an April trial.

83. To take the steps necessary before trial one by one:

    (1) Pleadings: there will have to be an Amended Defence. The Defendant has the benefit of the services of three of the best counsel at the Bar, whose submissions to me show that they are well on top of the case. Whilst I have no doubt that there will come a weighty Amended Defence, it should be available early in the New Year: I see no reason why the other steps in the action need to be delayed whilst that is prepared.

    (2) Disclosure: the Clamant is pressing for retention of the April trial date. If there is any outstanding disclosure, it is likely to be in the Defendant's possession. By pressing for retention of the April date, the Claimant and his team must accept that this is on the basis that disclosure is basically complete, save for limited and targeted requests, if these can be justified.

    (3) Witness Statements: as indicated above, if the Defendant is not ready to serve witness statements by a date in mid-January 2021, it would be because of a failure to pursue obviously necessary inquiries some time ago. In any event, it seems to me that the factual evidence which the Defendant will wish to adduce will mainly be negative: there was no risk, we knew of no risk, we took all reasonable precautions. If that is right, the ambit of factual investigation on the part of the Defendant will be limited. Accordingly I regard a date in mid-January 2021 as appropriate for exchange of witness statements.

(4) Expert evidence: the Defendant agreed in March 2019 to the need for expert evidence. I have no details as to what steps if any were taken to obtain such evidence. All I need to say is that I would have expected steps to have been taken to identify the expert by the date of the hearing of the CMC or soon after, and steps to obtain the expert's views taken promptly once the Defendant knew in principle my view that the pre-arrest aspects of the claim should proceed to trial. I see no reason why the preparation of the evidence anticipated at the March 2019 CMC cannot proceed in parallel with lay witness evidence, to allow a meeting of the experts in January 2021, a joint statement in mid-February 2021, and exchange of reports at the end of February 2021.

(5) Cost budgeting: this is outstanding. Given the Defendant's willingness to spend very large amounts on lawyers in resisting this claim, it is the Claimant rather than the Defendant who needs the protection of a cost budget. Thus the cost budgeting process is not, in my view, a ground for accepting the Defendant's application to vacate the trial date.

84. For these reasons, in my view unless the Court of Appeal grants permission to appeal, the trial date should remain in the Court's diary as presently fixed.

Terms of the Order

85. After the parties were provided with a draft of the above judgment I received in the usual way lists of suggested corrections. There was nothing of substance, and I have implemented those suggestions in this version of the judgment. I also received submissions as to the terms of the consequential order. There were differences between the parties which I resolve below.

86. The first and major difference between the parties is whether I should give directions beyond the service of amended pleadings and fixing a date for a CCMC. The Defendant submits that I should not do so. I accept the Claimant's submission that I can and should issue such further directions, and I note that there appears to have been a change in the Defendant's position between its solicitors' letter of 1 December and the Note produced on 3 December 2020.

87. Amended Defence: the Claimant proposes 31 December 2020, the Defendant 13 January 2021. On the basis that work on the other steps necessary for trial can proceed in parallel, I accept the Defendant's proposal.

88. Amended Reply: This will be 14 days after the Amended Defence.

89. New Disclosure: The Claimant submits that the Defendant should already have completed disclosure, but says that in any event the date should be 12 January 2021. The Defendant proposes 1 February 2021. I accept that disclosure should already have taken place, but I (also accept that there may be some documents which have not yet been produced. I do not believe that the Defendant's proposal will delay the trial, and I accept 1 February 2021 as the date for any new disclosure.

90. Witness evidence: The Claimant proposes 21 January 2021, which reflects my judgment above. The Defendant proposes 8 February 2021. Whilst this is somewhat later than I suggest above in this judgment, I do not believe the adoption of the

Defendant's suggestion will jeopardise the trial date, and I order the exchange of witness statements on 8 February 2021 on that basis.

91. Expert evidence: This appears to me to be one of the most important differences between the parties. The Claimant proposes exchange after the experts have met on a without prejudice basis and produced joint statements. The Defendant proposes sequential service of reports followed by meeting(s) and joint statement(s). I agree with the Claimant on this issue. It is relevant that the agreed direction for expert evidence to which I refer at paragraph 63 above permits opinion evidence on objective facts – what were the risks, and how widely were they known? This evidence is not dependent upon the witness statements to be exchanged, and therefore need not await that exchange.

92. As to sequencing, there is in my experience no universal rule as to whether exchange precedes without prejudice discussions or not. In my judgment, in this case the earliest possible discussions between experts are desirable so that common ground can be established. This should shorten the reports as served, and will enhance the chances of the trial date being maintained. If the experts have met and held discussions, I see no advantage in sequential production of the reports.

93. On that basis I accept the Claimant's proposed dates set out in paragraphs 17, 18 and 19 of the draft put before me (meeting by 3 February 2021; joint statements by 17 February and exchange by 26 February 2021.

94. A direction as to the status of the RRFI: The Defendant seeks a provision in the order recording that the Claimant no longer relies upon the contents of the RRFI of the Particulars of Claim, its contents having now been taken into the principal pleading. Whilst I do not think this is necessary, it is probably tidier for it to be recorded, and I so order.

95. Tables of Derivation: I accept the Claimant's proposal in paragraph 14 of the Response provided on 4 December.

96. Costs of Responding to Annex A: The Defendant seeks a costs order that separates the costs of pleading to those parts of Annex A which are "new" and those parts which were previously in the RRFI. I fully understand the logic of this, but judge the process to be impractical, and contrary to what I have said at paragraph 45 above. The costs will be costs in the case.

97. Costs of the Amended Reply: This raises similar issues to those considered in the previous paragraph in respect of Annex A. The Amended Reply will partly respond to the defence to new allegation and partly to the defence to the incorporated parts of Annex A. The costs of the Amended Reply will also be costs in the case.

98. Revised Costs Budgets: The Claimant suggests 18 December 2020, the Defendant suggests 23 December 2020. As any hearing in respect of cost budgeting will not take place until the New Year, I am happy to accept the Defendant's proposal.

99. Costs management hearing: This will take place on the first available date after 13 January 2021, the date for service of the Amended Defence. Given the time taken on all previous interlocutory hearings since I became involved in this matter, a full day

will be set aside. This should be before the end of January. It may be that the convenience of counsel may have to give way to accommodating the hearing in this relatively narrow window, but I note that both parties have both leading and junior counsel.

100. Permission to Appeal: The Defendant seeks permission to appeal my case management decisions in this judgment. Permission is refused: I regard the decisions made as being within my discretion, particularly where, as the Claimant has pointed out, no evidence to support the application to adjourn the April trial window has been served.

101. It has been suggested that I should direct that if permission to appeal is granted in respect of my first judgment, I should direct that the April trial window be vacated. Whilst that may well be the result of grant of permission to appeal, in my view that is a matter for the Court of Appeal to consider.