Neutral Citation Number: [2020] EWHC 3250 (Comm)

Case No: CL-2016-000172

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: **13 November 2020**

Before :

Mrs Justice Moulder

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Between :

PJSC Tatneft	**Claimant**
- and -	
(1) Gennadiy Bogolyubov	**Defendant**
(2) Igor Kolomoisky	
(3) Alexander Yaroslavsky	
(4) Pavel Ovcharenko	

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David Railton QC, Henry King QC, and James Sheehan (instructed by **Debevoise & Plimpton LLP**) for the **Claimant**
Ewan McQuater QC and Matthew Parker (instructed by **Enyo Law**) for the **First Defendant**
Mark Howard QC, Ruth den Besten and Tom ford (instructed by **Fieldfisher**) for the **Second Defendant**
Ken MacLean QC and Owain Draper (instructed by **Mishcon de Reya**) for the **Third Defendant**
Marcus Staff (instructed by **Sherrards**) for the **Fourth Defendant**

Hearing dates: **13th November 2020**

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Judgment

Mrs Justice Moulder Friday, 13 November 2020

1. This is the court's judgment on the claimant's application (the "Application") dated Sunday, 8 November 2020 to admit the witness statement of Ms Savelova dated 8 November 2020.

2. The court has had the benefit of written and oral submissions from all sides. I do not propose to set out in detail those submissions but I have of course considered them in reaching my conclusion.

Background

3. The background to these proceedings are well known and need not be set out for the purposes of this Application. It is, however, relevant to note the following:

   i) Witness statements for this trial were ordered to be served by 29 April 2020.

   ii) The trial in this matter started on 12 October 2020 and is scheduled to continue until 21 December 2020.

   iii) At this stage, the claimant's witnesses have finished giving their evidence and being cross-examined, apart from one witness who has had to be rescheduled to a date in November due to illness.

   iv) The first and second defendants have elected not to give evidence but the third and fourth defendants have already given their evidence and the court is currently in the middle of hearing evidence from one of the witnesses for the third defendant.

The Application

4. By its application, the claimant seeks permission to rely on the witness statement of Ms Savelova and to call Ms Savelova to give oral evidence, and thus applies for relief from sanctions.

5. Ms Savelova is a lawyer working for Tatneft. In the witness statement she describes her position as Head of Legal in the Strategic Planning Department since 2007. She also states that she reported to Mr Syubaev, who has already given evidence in this trial for Tatneft. At paragraph 9 of her witness statement, she states that she has been closely involved in the day-to-day issues surrounding the events that have led up to these proceedings.

6. In its application, the claimant says that Tatneft did not serve a witness statement from Ms Savelova because she was unwilling at that stage to give evidence, because, as set out in paragraphs 10 to 12 of her statement, she was concerned for her personal safety. She refers to media reports and rumours about Privat Group which she says she could not verify but which made her fearful and concerned for her life, having regard to her involvement with relevant events.

7. However, for the reasons set out in paragraphs 13 to 15 of her statement, she states that she is now willing to give evidence. In summary, she acknowledges that she has been following this remote trial online, but counsel for the defendants have referred to the fact that she is not providing evidence at trial and that they have suggested that Mr Maganov and Mr Syubaev do not have detailed knowledge of all underlying background matters. She states that she interprets comments made by the defendants' counsel as suggesting that she has acted in bad faith by deliberately not providing evidence, and she is concerned that this is providing a misleading and harmful impression of both Tatneft and her, with implications for the reputations of both.

8. She states that she has been and remains fearful about providing evidence. However, she has decided that it is appropriate to step forward and offer to provide evidence. She states that she has "misgivings" but "it now seems like the right thing to me".

9. She states that although her concerns remain, she will not have to spend many months living with and worrying about the matter whilst waiting to give evidence, as she would have had to do if she had provided a witness statement in April 2020.

10. It is accepted for the claimant that if the evidence is now to be admitted and Ms Savelova called to give oral evidence, the defendants must have time to prepare for that cross-examination. It is now proposed by the claimant that the timetable for the trial should be extended: allowing for her cross-examination to take place in December from the 8th to the 10th when the parties would currently be preparing closing submissions, and that the trial timetable should be extended so that oral closing submissions should then take place next term in January. In the alternative, the claimant has

submitted orally today that one day should be sufficient for cross-examination of Ms Savelova and that therefore that could be accommodated within the current trial timetable.

Relevant Legal Principles

11. It was common ground that relief from sanctions is required. CPR 32.10 states:

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

12. CPR Rule 3.9 deals with relief from sanctions. It states:

"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

13. The correct approach to the application of this rule had previously given rise to much litigation, but it is common ground that the court should now apply the guidance of the Court of Appeal in *Denton v White* [2014] EWCA Civ 906. The Court of Appeal stated that the court should apply a three-stage test.

Relief from sanctions-discussion

14. The first stage is to identify and assess the seriousness or significance of the failure to comply, which engages Rule 3.9.

15. The claimant accepted that in this case it is a serious and significant breach. It was submitted for the claimant that the timing has been explained in Ms Savelova's witness statement and that Tatneft and its legal team have acted as quickly as possible to produce the statement and the application within the confines of the trial, since she decided on 28 October 2020 that she was now willing to give evidence.

16. As noted by counsel for the second defendant in his skeleton, other cases dealing with relief from sanctions for late witness statements have involved applications prior to trial. This, by contrast, is an application to adduce a witness statement partway through the trial itself.

17. I do not think that the explanation for the timing of the application affects the assessment of the seriousness of the breach, although it is, in my view, relevant to the third stage.

18. Accordingly, accepting that the breach is serious and significant, the court moves to consider the second stage, namely why the failure or default occurred. It was submitted for the claimant in summary that there was good reason for the breach, that is Ms Savelova's fears for her safety and, as a single mother, for her children. The court was referred to media statements which were exhibited to her statement. It was submitted for the claimant that the tools which lie at the disposition of the court to protect the identity of witnesses are "not realistic"; and that any suggestion that Ms Savelova had previously put personal details into the public domain were limited to work contact details.

19. For the second defendant, counsel orally repeated his denial in the written submissions that there is any substance in the concerns raised by Ms Savelova. Counsel submitted that there was no suggestion of any personal threat having been made against Ms Savelova or indeed any other witness in the case. It was submitted for the second defendant that this application is tactical: that Ms Savelova has previously been prepared to give evidence through Mr Williams of Akin Gump in connection with the freezing injunction, but is now not prepared to be cross-examined. It was submitted for the second defendant that there was no evidence before the court that Ms Savelova was previously asked but refused to give evidence. I note that this was rejected in reply by Mr King for Tatneft, who referred the court to the signed application which had been made.

20. As I indicated in the course of oral submissions, I do not consider it necessary to express a view on the validity of Ms Savelova's underlying concerns. I note that she states in her witness statement that they are based on media reports and rumour. In my view, the court cannot and should not

attempt to assess her assertions; I am concerned only to consider her stated perception, rather than the underlying basis, for the purposes of deciding this application.

21. I do note, however, that these are not concerns which have been raised hitherto in the course of the proceedings which have been ongoing since 2016, even in correspondence. Rather, as referred to above, Ms Savelova was stated expressly by Mr Williams to be the source of the information provided by him in his evidence in March 2016, July 2016 and September 2016.

22. When asked about her absence in the course of the trial, her superior, Mr Syubaev, has not given this explanation, referring instead to the possibility of her absence being attributable to issues of privilege. I note that there are no documents which have been produced, either internal or inter partes correspondence, which support this purported concern as underlying her absence.

23. However, even if the court were to assume that concerns for her safety lay behind her previous failure to provide a witness statement, it is not apparent that anything has changed in this regard which would provide a credible explanation as to why she is now willing to give evidence and which would therefore support the stated explanation for the original failure.

24. Having heard the relevant references by counsel to Ms Savelova's absence in the course of the trial, I have difficulty accepting that any express or implicit criticism of either Tatneft or her in relation to her failure to give evidence would outweigh her stated concerns for her personal safety, if they are genuine. I am not, therefore, satisfied that there was a good reason for the failure.

25. However, although this means that, in my view, the court is dealing with a serious and significant breach for which there was no good reason, this does not mean that the application for relief from sanctions will automatically fail. The court must still consider all the circumstances so as to enable it to deal justly with the application (see *Denton* at [31]). This is referred to in *Denton* as "the third stage".

26. As was stated by the Court of Appeal in *Denton*, in considering all the circumstances, the factors in subparagraphs (a) and (b) of CPR 3.9 are of particular importance: subparagraph (a) for litigation to

be conducted efficiently and at proportionate cost, and (b) to enforce compliance with rules, practice directions and orders.

27. It was submitted for the claimant that the evidence which would be given by Ms Savelova is relevant and important evidence which is likely to assist the court on the key issue of knowledge.

28. It was submitted for the claimant that it would enable the claimant to rebut the adverse inference which the defendants now seek to draw. It was submitted that the claimant was given no notice by the defendants of their intention to ask the court to draw an adverse inference from her absence, and the court was referred to the authorities of *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) [154(ii)] and *Imam-Sadeque v* 344 *BlueBay* [2012] EWHC 3511 (QB) at [10]. It was submitted that it is necessary for a party seeking to ask the court to draw an adverse inference to set out the issue and give the other party an opportunity to explain in evidence why the witness was not called.

29. It was submitted that Mr Syubaev could only speculate as to the reasons for her absence; and, in relation to a letter which was sent on behalf of the first defendant on 1 April 2020, in which the possibility of an adverse inference being sought was referred to, the claimant submitted that that was limited to issues concerning the preservation of documents and Tatneft did call witnesses to address this issue.

30. It was submitted for the claimant that Tatneft will be prejudiced if they are deprived of the opportunity to adduce evidence and that any prejudice to the defendants is tempered by the fact that they have a highly experienced team who can adjust their cross-examination. It was submitted that the cross-examination of Ms Savelova would cover the same ground as has been explored with other witnesses.

31. It was submitted for the claimant that the cross-examination could be accommodated in the trial timetable, either by moving oral closing submissions to next term or limiting the cross-examination to one day. It was submitted that justice required that the court should hear this evidence.

32. For the defendants it was submitted by Mr Howard that:

(i) this application results from a change of heart by Tatneft and is a tactical step and an attempt to to avoid the adverse inference;

(ii) there would be significant prejudice to the defendants if such evidence is to admitted and cross-examination allowed: the defendants completed their cross-examination on the basis that Ms Savelova was not going to give evidence; the evidence which is now put forward is tailored to assist Tatneft; Tatneft has had the opportunity to see the opening skeletons and the cross-examination of their other witnesses and then seek to respond through the evidence of Ms Savelova.

(iii) the content of this witness statement is unsatisfactory as it does not set out the detail but leaves matters to cross-examination, leaving further uncertainty and prejudice.

33. Counsel for the first defendant submitted that the claimant could have taken steps to protect the confidentiality or anonymity of the witness. It was also pointed out that the letter of 1 April 2020 which was sent on behalf of the first defendant concerning the risk of an adverse inference being sought meant that Tatneft had had to make a decision as to who should be called, and this would have focused their minds, in effect, on the possibility of an adverse inference.

34. For the third defendant, Mr MacLean stressed that this “wait-and-see” approach should not be allowed, particularly where the witness in question, as in this case, is a central figure. It was submitted that the claimant has not been full and frank and has not placed its cards on the table.

35. As stated above, in considering the circumstances of the case, the court gives particular weight to the factors for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

36. As noted in *Denton* at [35]:

"*The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it."*

37. I start therefore with the seriousness of the breach. This is not a case where a deadline has been missed by a few hours or even a few days; this is a case where a witness statement is sought to be introduced some six months after the deadline and, more particularly, after the trial has started, not only after the trial has started but after cross-examination of the claimant's witnesses has largely finished. It does not arise out of a new or unforeseen matter which has arisen in the course of the trial. Ms Savelova's evidence has always been relevant and likely to be significant, as is evident from the reliance on it in the earlier interlocutory proceedings.

38. Moreover, the consequence of admitting such evidence as proposed by the claimant is that although the trial will not have to be adjourned, a trial which will have already occupied the whole of one legal term will have to be extended into next term. I do not accept the claimant's submission that Ms Savelova could be cross-examined in the course of one day. The breadth and significance of her evidence makes this highly unlikely and it would not be fair, in my view, for the court to impose such a limitation on the period for cross-examination. There is also an additional risk of other witnesses being sought to be recalled.

39. This therefore raises issues as to whether, notwithstanding the amount at stake in this trial, such an extension would be proportionate, given the amount of time already allocated to this trial and bearing in mind the need to allocate court resources to other litigants. Whilst the parties, it would appear, have adopted an approach in this trial of following every conceivable avenue regardless of cost, this does not entitle the parties to extend the time agreed and allocated to the trial and the court will not agree to extend the trial period unless there is good reason.

40. It was submitted for the claimant that the application was made promptly and that this is a factor which weighs in favour of the application being allowed. However, it is difficult to understand why, given the likely impact of such evidence on the trial, no attempt was made by Tatneft or its representatives to foreshadow this application in the period of some days after Ms Savelova said she decided to give evidence on 28 October 2020. I accept that time had to be found to prepare the

witness statement itself, but, had the possibility of Ms Savelova giving evidence been raised earlier in the course of the trial, not only would it have been known prior to completion of cross-examination of the claimant's witnesses (leaving aside Ms Bagautdinova who had been delayed due to illness), it might have been possible, given the absence of two of the defendants, to accommodate this witness within the existing timetable. That is no longer the position and, as noted above, the impact on the trial timetable and the court's resources is therefore a relevant factor.

41. Both factors in subparagraphs (a) and (b), in the circumstances of this case, in my view militate in favour of refusing relief.

42. What factors therefore weigh in favour of the claimant and in favour of granting relief? I agree that it is likely that Ms Savelova may give relevant evidence and this weighs in favour of allowing her evidence to be heard. She is not a peripheral witness: on her own evidence she says that she was closely involved in the day-to-day issues surrounding the events that have led up to the proceedings, and this is a view which is borne out by the evidence which has been advanced in the course of this trial. In particular, her evidence is likely to be relevant to the issue of limitation and the knowledge of S-K on which the defendants have placed significant reliance in the defence of this claim. It follows, therefore, that if the evidence of Ms Savelova is not admitted, it is likely to prejudice the claimant, in that evidence which may support their case will not be heard.

43. It was also submitted for the claimant that the claimant was not given notice that the defendants would invite the court to draw an adverse inference from her failure to give evidence, or that the claimant was not given an opportunity to adduce evidence in response to the request that the court should draw an adverse inference from her failure to give evidence.

44. In my view, there is no doubt that, as a highly experienced legal team, the claimant's legal team knew there was a risk of an adverse inference being sought if Ms Savelova was not called to give evidence. This is a common feature of commercial litigation. I do not accept the submission from the claimant that any failure to give notice prior to the trial meant that the claimant was unaware of

that risk. The reliance by the claimant on her alleged conversation with Mr Gubaidullin in the street, for example, and her central role more generally as a Tatneft lawyer, meant that she could be expected to be a key witness on the issue of knowledge. The possibility of an adverse inference was expressly raised by the first defendant, albeit in the context of the preservation of documents.

45. I do not accept that Tatneft was not given an opportunity to put in evidence by way of explanation to rebut the proposed adverse inference. The answer cannot be that a witness who is previously absent is then allowed to turn up part way through the trial.

46. It is said for the claimant that the witness could be accommodated in December and thus this would give time to the defendants to prepare the cross-examination and that the cross-examination would cover ground which has already been covered with other witnesses.

47. I have already dealt with the impact on the timetable. I also take into account, however, the prejudice which will be placed on the defendants' team if, partway through this complex and lengthy trial, the defendants are required to divert to prepare cross-examination of Ms Savelova. The court is part-way through the evidence and there are a number of experts yet to be heard and cross-examined.

48. Turning then to the other factors which weigh against granting relief. I have already referred to the factors in subparagraphs (a) and (b) and to the failure by Tatneft to foreshadow the possibility of Ms Savelova giving evidence. However, the more fundamental reason which weighs against the admission of this witness statement and the application to allow oral evidence is that there is a substantial risk that this evidence, both in the witness statement and orally, is and will be framed in a way which seeks to respond to the evidence which has been given in the course of the trial. In effect it, allows the claimant, having heard nearly all the evidence given by its other witnesses for Tatneft in cross-examination, to seek to bolster its case by producing a witness to address gaps in their case. A particularly striking example of this evidence apparently being responsive to the evidence which

has been heard in cross-examination is in paragraph 43 of her witness statement where Ms Savelova includes evidence about a stated need for confidentiality.

49. In this regard, the considerations raised on this application bear no similarity, in my view, to the decision by the first and second defendants not to give evidence, which of course does not involve a breach of the civil procedure rules.

50. In the circumstances, it is impossible to conclude that the admission of this evidence could be said to be fair or just. As I said, the evidence does not go to a new issue which has arisen in the course of the trial; it goes in large part to the issue of knowledge and limitation which is an issue between the parties and has been the cornerstone of the defence advanced at least by the second defendant as well as relied upon to a greater and lesser extent by the other defendants.

51. I have considered whether the risk identified of the witness statement being used to address gaps in evidence could be addressed through cross-examination. The problem for the court is that this witness statement has only been drafted in the past few days and is not, for example, one which was drafted in the past and is now sought to be relied upon. To the extent the evidence is not supported by contemporaneous documentation, the court will be asked to assess the weight to be given to such evidence by reference therefore to evidence which has clearly only been given after the evidence of the other witnesses has been heard and potential shortcomings identified.

52. Cross-examination is a means to test the evidence of a witness, but if in cross-examination the witness merely maintains the evidence as set out in the witness statement, in this case the court would have no reliable way of assessing whether the evidence reflected the independent recollection of the witness or is the product of having heard evidence in the course of the trial, and no way of assessing whether this evidence would have been given if prepared in advance of trial. This cannot be addressed satisfactorily, in my view, merely by submissions.

53. In my view, the inherent unreliability of evidence produced in these circumstances, and the inability properly to assess the evidence produced in this manner, coupled with the unfairness to the

defendants of admitting evidence which runs a high risk of having been tailored to fit the current state of Tatneft's evidential case, means that the admission of such evidence at this stage of the proceedings is contrary to the interests of justice.

54. Weighing all the factors discussed, in my view it is clear that in the circumstances of this case the application must be refused.

55. In the alternative, it was submitted by the claimant that the claimant should be permitted to rely on the witness statement as hearsay evidence, whilst noting that the court has the power to exclude such evidence which would otherwise be admissible. It was submitted for the claimant that the witness statement as hearsay evidence should not be excluded; that it should be admitted so that the court knows the position as to what Ms Savelova says as to why she did not give evidence to the court; that there is no good reason to exclude the statement, given that the admission of a witness statement would not of itself result in a disruption to the trial; and that the defendants should not be able to resist this evidence being introduced, given that submissions could be made in the usual way as to weight.

56. In my view, the witness statement should not be admitted as hearsay evidence. The objection in this case is that this evidence, as indicated above, is potentially unreliable because of its timing, and the risk is one which cannot be satisfactorily tested or weighed by the court, even with the benefit of submissions. Accordingly, for that reason, the request that this court should admit it as hearsay evidence is refused and the court exercises its power under CPR 32.1 to exclude the evidence which would otherwise be admissible.