Neutral Citation Number: [2019] EWHC 346 (QB)

Case Nos: HQ13M03735
HQ14M02898

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before :

MR JUSTICE WARBY

- -

Between :

Frank Kofi Otuo	**Claimant**
- and -	
The Watch Tower Bible and Tract Society of Britain	**Defendant**

And between:-

Frank Kofi Otuo	**Claimant**
- and -	
(1) Jonathan David Morley	
(2) The Watch Tower Bible and Tract Society of Britain	**Defendants**

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- -

The Claimant in person
Shane H Brady (instructed by **Legal Department, Watch Tower Bible and Tract Society of Britain**) for the **Defendants**

Hearing dates: 11 and 15 February 2019

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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.

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THE HONOURABLE MR JUSTICE WARBY– Relief from sanctions (C) and permission for witness summaries

MR JUSTICE WARBY :

Introduction

1. Following my order of 11 February 2019, Mr Otuo applied for relief from sanctions pursuant to CPR 3.9, in respect of his failure to serve witness statements of witnesses he wishes to call at the trial. He applied, also, for permission to serve witness summaries instead of statements.

2. The default with which I am concerned is not a question of missing the deadline for exchange, because that deadline was extended by agreement between the parties, or has been dealt with by my earlier decision granting relief from sanctions for lateness. The issue here is failure to serve signed statements, and serving summaries instead. That is what Mr Otuo did on the extended deadline of 1 February 2019.

3. The documents he served on that date were a single signed statement from him, and a 5-page document headed "Witness Summaries", with the following introductory wording: "the following witnesses will be witness summoned to testify at the trial next month". There then followed a list of 10 headings, incorporating 13 names and, in relation to each name or pair of names, a very brief summary of the topics on which Mr Otuo intended to obtain evidence from that individual.

4. An example will suffice to illustrate the nature of Mr Otuo's document. His paragraph (c) reads as follows:

> "**c) Peter Ellis or Bevan John Vigo**
>
> To testify regarding:
>
> (1) the Structure and Governance of the Society and the Judicial processes of the Witnesses, Disfellowshipping and Reinstatement;
>
> (2) innuendo meaning of words complained of in Claim 1;
>
> (3) implications of disfellowshipping of Congregant."

5. The normal rule of course is that a party who wishes to call oral evidence from a witness must serve a signed statement from that witness. The standard directions require this.

6. CPR 32.9 provides as follows:

> "Witness summaries
>
> **32.9**
>
> (1) A party who –
>
> (a) is required to serve a witness statement for use at trial; but

> (b) is unable to obtain one, may apply, without notice, for permission to serve a witness summary instead.
>
> (2) A witness summary is a summary of –
>
> (a) the evidence, if known, which would otherwise be included in a witness statement; or
>
> (b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.
>
> (3) Unless the court orders otherwise, a witness summary must include the name and address of the intended witness.
>
> (4) Unless the court orders otherwise, a witness summary must be served within the period in which a witness statement would have had to be served.
>
> (5) Where a party serves a witness summary, so far as practicable rules 32.4 (requirement to serve witness statements for use at trial), 32.5(3) (amplifying witness statements), and 32.8 (form of witness statement) shall apply to the summary."

7. I have underlined some of the wording, on account of its importance in the overall regime allowing witness summaries. On its face, the rule only permits a party to apply to serve a summary in place of a statement if the party "is unable to obtain" a statement. That is a matter requiring proof. Further, if the applicant knows what the witness would say, if called, that needs to be put into the summary. It is only if the witness's evidence is not known that the summary can be restricted to "the matters about which the party … proposes to question the witness." The other party is entitled to know the witness's address. I do not say that these elements of the regime cannot ever be departed from, but they are clearly important features.

8. The regime for service of written evidence in this case was laid down by the Order of HHJ Parkes QC dated 17 September 2018 ("the Parkes Order"), which provided, by paragraph 16, as follows:-

> "16. Evidence of fact will be dealt with as follows:
>
> a. By 4.00pm on 14 January 2019 all parties must file and serve on each other copies of the signed statements of themselves and of all witnesses on whom they intend to rely in both claims, and all notices relating to evidence, and (in the case of any witness whom the party wishes to summons to give evidence) a copy of the summary of the evidence intended to be given.
>
> b. Oral evidence will not be permitted at trial from a witness whose statement or summary has not been served in

> accordance with this order or has been served late, except with permission from the Court."

9. I have previously ruled that this form of Order did not serve to grant Mr Otuo permission to serve summaries. There is nothing in these words which expressly grants permission to serve summaries in place of witness statements, and I see no room for implying the grant of permission into the order, merely because it contemplates – as it certainly does - that summaries might be served as well as or instead of witness statements. It would be surprising and, on the face of it, illegitimate for the Court to grant a general licence to serve summaries. It is a condition of permission to take that course that the party concerned "is unable to" obtain a witness statement. That is a matter that would normally require proof in relation to each individual witness, in respect of whom a summary is to be served. Moreover, the Court would normally need to be satisfied, before permitting service of a summary, that the witness had some relevant evidence to give. There is nothing in the judgment given by Judge Parkes on 30 August 2018 that indicates to me that any of these conditions were satisfied, or that he intended to grant Mr Otuo a general licence to serve witness summaries.

10. CPR 32.10 provides the sanction: "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." Permission will only be granted if the applicant satisfies the requirements for relief from sanctions. That is clear from the *Denton* case, in which the Court of Appeal reversed the decision of the Judge at first instance to grant relief from sanctions under r 32.10: *Denton v T H White* [2014] EWCA Civ 906 [2014] 1 WLR 3926 [52-53].

11. At the hearing on 15 February 2019, I indicated that I would grant relief from sanctions but subject to conditions. I heard argument on whether Mr Otuo should be allowed to rely on witnesses in respect of whom he had served no more than a summary, and reserved my decision until after I had ruled on the defendants' applications to strike out or stay the claims as a whole, or to strike out parts of the Reply. It was obviously essential to identify the issues (if any) for trial before addressing what evidence should be admitted.

12. I have now determined the defendants' applications, declining to stay or dismiss the claims in their entirety, but cutting down the issues for trial: see my judgment, [2019] EWHC 344 (QB). I am therefore now in a position to give both my reasons for granting relief from sanctions, and my decision and reasons in respect of the application for permission to serve summaries.

Relief from sanctions

Principles

13. The principles to be applied when deciding an application for relief from sanctions are set out fully in *Denton*, and I have summarised them in my earlier ruling on the defendants' application for relief from sanctions in respect of their application to strike out on grounds of non-justiciability. There is no need to repeat here what I said there.

14. But here there is the separate and important question of whether and to what extent permission to serve summaries is appropriate. It will not be enough for Mr Otuo to show that his default is minor, or excusable, or that in all the circumstances he should be allowed in principle to rely on one or more witness summaries. At this stage of this case, I am entitled to scrutinise the summaries in the light of the issues at stake and decide in the case of each individual proposed witness whether their potential evidence is of sufficient relevance and importance to the claimant's case to justify their being called at the trial, and whether the form of summary is compliant with the rules, and in all the circumstances sufficient to allow a fair trial. In ruling on the defendants' application to strike out parts of Mr Otuo's Replies I have relied on, and applied, established principles whereby the Court can, in pursuit of the legitimate aim of case management, limit the scope of the evidence which it allows the parties to lead, regardless of its admissibility in principle. Those same principles come into play in this context also.

Evidence/Submissions

15. Mr Otuo's evidence is that he had understood that the Parkes Order made provision for the service of witness summaries. It was, he says, understood that the intended witnesses are Jehovah's Witnesses who "completely shun me by decree from the second defendant". He then proceeds to address each potential witness, summarising his dealings with that witness, and outlining in rather more detail than in his original document, what relevant evidence he maintains the witness could give.

16. The application for relief from sanctions was not opposed by the defendants. They did however resist the substantive application for permission to serve and rely on summaries.

Reasons

17. In my judgment, the service of witness statements in respect of these individuals, without first having applied for and obtained permission to do so, was a significant default on the part of the claimant. Witness statements are a key tool in managing litigation effectively and at proportionate cost. It is essential for the proper management of litigation that parties are not given free rein to serve bare outlines of the kinds of topics that an intended witness might cover in evidence. This tends towards vagueness and uncertainty, and is liable to work unfairness against the other party.

18. That said, the reason for the default in this case is, if not excusable then understandable, bearing in mind Mr Otuo's status as a litigant in person, if the facts are as indicated by Mr Otuo's evidence. When it comes to consideration of all the circumstances, the need to enforce compliance with the orders of the Court must be given proper weight, despite what I have said about the understandable nature of the default. It is for Mr Otuo to show that despite his breach, he should be allowed to adduce some or all of the intended evidence. It is here that factor (a) comes in. It would be wrong in my judgment – because it would be inefficient and disproportionate – to allow Mr Otuo carte blanche. He cannot be allowed to call a range of witnesses for no better reason than the fact that they know something about an issue of relevance in the case.

19. In the end, my conclusion is that it would be just in principle to grant relief from sanctions, but only to the extent that Mr Otuo has satisfied me that he would have obtained, and should now obtain, permission to serve summaries instead of statements.

Permission to serve summaries

20. This aspect of the application requires a review, in relation to each proposed witness, of four issues: (1) the threshold question of whether Mr Otuo has shown an inability to obtain a witness statement; subject to that (2) the extent to which the witness is likely to be able to give relevant evidence; (3) the compatibility with the overriding objective of permitting Mr Otuo to lead evidence from the witness in question on the topics he has specified; and (4) the adequacy of the content of the summary.

21. The second and third of these considerations loom large in this case. First, the defendants' position is that all of the proposed evidence is irrelevant. Secondly because, as will be evident already, the descriptions of the topics to be the subject of questioning is very general and, as will appear, Mr Otuo has not obtained any form of proof of evidence from any of the proposed witnesses, many of whom he knows to be hostile to him personally, and to his claims in these actions. In several instances he, and the Court, have every reason to believe that the witness's evidence on the topics identified in Mr Otuo's summary would be adverse to Mr Otuo's case.

22. Outside the bounds of fiction, it is rare that a party will choose to call a witness "blind", without first obtaining a statement or proof of evidence, or some clear indication that the witness would give evidence favourable to the case of the party calling the witness. That is because it is rare that a party will be well-advised to do this at all, given the strong and fundamental rule that a party is not normally entitled to cross-examine or seek to discredit his own witness: *The Filiatra Legacy* [1991] 2 Lloyds Rep 337, 361 (CA). A party who puts in a witness statement is normally bound by its content. A party calling a witness, who can only ask a non-leading question, is bound by the answer. A vivid example of the practical impact of these rules in the defamation context is provided by *McPhilemy v Times Newspapers Ltd (No 2)* [2000] EMLR 575 (CA). In my judgment, these points are to be borne in mind when exercising the discretion at play on this application, particularly given Mr Otuo's status as a litigant in person. It may be a proper exercise of discretion to refuse permission to pursue a course which is liable to take up time on matters which may be peripheral at best and/or to do his case more harm than good.

23. I should say a word or two about the fourth consideration. What I mean by adequacy is two things. First, whether the summary satisfies the requirements of CPR 32.9(2)(a), by containing the evidence which the claimant knows and which would otherwise be contained in a witness statement. Secondly whether it is fair in all the circumstances to confront the defendants with a summary of the kind in question. This is a discretionary process, because the Court is always required to exercise its powers in accordance with the overriding objective, and is entitled to exclude relevant evidence from its consideration.

24. With those matters in mind, my conclusions in relation to the individuals in question are as follows (references to "Issue (1)" etc are to the issues identified in Mr Otuo's Witness Summary document):

(1) **Andrew Sutton.**

25. I believe that after discussion with me, Mr Otuo withdrew his application to call this witness. In case that is a misunderstanding, I refuse permission to rely on this witness summary. There is no evidence that Mr Otuo made any attempt whatever to secure a witness statement from this witness at any time before 5 February 2019, when he sent an email, to which there has been no reply. Issue (3) (meaning) is no longer live, following my determination of meaning. Evidence of good character or reputation is not required or admissible, so the witness can say nothing on issue (4). As to the other issues, the specification of the evidence it is proposed to lead is too vague and blurred. It is however possible to ascertain that the claimant hopes to elicit evidence from an elder of the Jehovah's witnesses that there was some kind of conspiracy against the claimant, to which Mr Sutton himself was a party. On the basis that this is a relevant issue, I have to say that having read and heard what Mr Otuo has to say about this, and bearing in mind the limitations on the form of question he could properly put to the witness I failed to understand how he could reasonably hope to elicit any evidence from this witness in support of his case

(2) **Collin Smith.**

26. The position is similar to that in relation to Mr Sutton, though not identical. If, contrary to my understanding, Mr Otuo still wished to call Mr Smith as his witness, permission to do so on the basis of this summary is refused. Again, there is no evidence that Mr Otuo made any attempt to secure a statement from this witness until as recently as 5 February 2019. This witness has however refused to provide a statement, so the threshold condition is satisfied. That is no surprise, because in this instance, the claimant proposes to call as his own witness an individual whom he accuses of conspiring with Mr Morley to fabricate an allegation of fraud against him. Again, even on the footing that the issue is a relevant one I see no reason to suppose that by calling Mr Smith as his witness Mr Otuo could possibly advance his own case. The exercise would in all probability be at best a waste of time for the witness, all parties, and the court.

(3) **Peter Ellis and Bevan John Vigo.**

27. There is no evidence before the Court to establish that the claimant is unable to obtain witness statements from these individuals. But Mr Otuo has told me that they would be reluctant, like others, to associate with him as a disfellowshipped individual. I am prepared to work on that basis. The defendants suggest that Mr Ellis is dead. I see no justification for calling two witnesses to deal with the same issues, anyway.

28. The proposed issues are those set out at [4] above. I would not allow either of these individuals to give evidence as to the innuendo meanings of the words complained of in Claim 1, as those have been dealt with by my ruling and neither of these individuals is alleged to have had the relevant special knowledge. The implications of disfellowshipping can be adequately dealt with by other witnesses. That leaves the topic broadly and vaguely described in para (c)(1) of Mr Otuo's schedule. Mr Otuo explained in submissions that the relevant issue is responsibility for publication.

29. At one stage in argument Mr Otuo thought about abandoning these proposed witnesses in favour of cross-examination of the defendants' witness, Mr Trythall. But

on mature reflection he stood by his application. I will with some hesitation permit Mr Vigo alone to be called to deal with one aspect of the matter only, namely the organisational structure of the Jehovah's Witnesses, including Watch Tower, so far as it relates to the pleaded case about the responsibility of Watch Tower for the publication of the words complained of.

30. Any evidence to be elicited must relate solely to that topic. I will require Mr Otuo to set out in writing and file and serve well in advance of trial a statement of the nature of the evidence which, to the best of his knowledge, he believes this witness would give, if truthful, on that topic. The deadline for service will be Friday 1 March 2019.

(4) **Mr Rahmani.**

31. Mr Otuo wavered over whether he wished to call this witness but eventually made clear that he did. I will not allow him to be called to give evidence on meaning (he has nothing relevant to say), or on Mr Morley's character (such evidence is irrelevant and inadmissible), or as to Mr Otuo's "image" in the Congregation (evidence of a claimant's good character or reputation is inadmissible, or at least unnecessary because these are presumed in his favour).

32. That leaves some broadly described topics, directed to the issues of qualified privilege and malice. I shall permit him to be called to give evidence as to the matters which are still pleaded on those issues, subject to the conditions specified at 30 above.

(5) **Ruth Otuo.**

33. This is the claimant's wife. It seems rather bizarre that a statement is not available from Mrs Otuo, with whom there seems to have been no falling out. But I work on the basis that the disfellowshipping decision is the cause. I shall allow her to give evidence on issue (5) (effects on the claimant and their family), whilst noting that Mr Otuo cannot claim damages for hurt caused to other people. I will also permit her to be called on the question of whether the facts relied on in support of the fraud innuendo meaning were known to the four pleaded individuals in respect of whom there are not yet any admissions (the Newitts, Ms Greenwich and Mr de Silva). Mr Otuo proposes to call all four of these as witnesses, and cannot call one witness to contradict another (see above); but he has some tactical decisions to make which I will not force upon him at too early a stage.

34. Having explored the relevance of the other three issues mentioned in the summary with Mr Otuo, I am left unpersuaded that Mrs Otuo can provide the court with any useful evidence on any other issue of relevance. It emerged, for instance, that one thing that Mr Otuo wishes to elicit from his wife is her recollection of what Mr Brierley told Mr and Mrs Otuo, in a phone call several years ago, about what Mr Morley had said to Mr Brierley. This remote hearsay evidence would be adduced, in case Mrs Otuo's recollection turned out to be better than that of Mr Otuo himself. This is all far too speculative and remote from the real issues in the case. Permission is refused to that extent.

(6) **Bill Dallas.**

35. Mr Otuo cut down his application in relation to this witness, seeking only evidence on four of the original six proposed topics. I will allow him to be called to give evidence on topics (2) to (4), if and to the extent (and only to the extent) that such evidence relates to the pleaded issues post-strike-out, and subject to the conditions specified at 30 above.

(7) **Daniel Donohue.**

36. Mr Otuo cut down his application in this respect also, seeking only to call this witness to say that after Mr Otuo had been disfellowshipped, Mr Morley asked Mr Dohonue not to speak to Mr Otuo. I regard this as incapable of supporting the case of malice, and thus refuse permission to adduce evidence from this witness.

(8) **Richard and Anna Newitt.**

37. These are potential innuendo witnesses in relation to the fraud meanings I have found in respect of Claim 1. Their names are pleaded as such. Mr Otuo seems to have made no attempt to contact them before putting forward their names as witnesses, but I proceed on the basis that the disfellowshipping decision disabled him in practice from obtaining a statement from either. I permit them to be called on issues (1) and (4) in Mr Otuo's summary, limited to evidence about the innuendo facts pleaded in paragraph 6(b) of the Particulars of Claim. I refuse permission on issues (2) and (3), as such evidence would be irrelevant and/or inadmissible.

(9) **Sonia Greenwich and Olivier de Silva.**

38. They are also potential innuendo witnesses, whose names are pleaded. I make the same orders as I have made in relation to the Newitts.

39. Now that Mr Otuo has contacted them, they have made plain in messages that have been shown to me that they would be the most reluctant witnesses. Ms Greenwich wrote, on 14 February, that she has "no desire to be a witness in any court case that you are involved in" making clear that her loyalties lie elsewhere. She continues "There is nothing I can say that can help you." Mr Da Silva has said he has "absolutely no interest in being summed to court to be a witness against any of my spiritual brothers". Despite this, Mr Otuo still wishes to call them as witnesses. The threshold condition is amply satisfied. The reluctance of these witnesses to give evidence is not the touchstone. They can clearly give relevant evidence about matters that are in issue. The position with regard to them is identical to that relating to the Newitts: they can give admissible evidence of being present at the meeting in 2012, and of the knowledge they had at the time. But not about other matters. It may not be wise for Mr Otuo to call them blind, but I cannot say in their cases as I can in others that it would appear to be clearly pointless or self-defeating.

(10) **Ken Gracias.**

40. Mr Otuo originally listed no fewer than 9 issues on which he wished to elicit evidence from this witness. Issue (1) is irrelevant, or unhelpful to the Court Issue (2) has been resolved and issue (3) has been admitted. The supposed relevance of four further issues (nos (6), (7), (8) and (9)) was explained to me by Mr Otuo in submissions. He wishes to establish, in support of his larger case of conspiracy, that there has been a

deliberate attempt to suppress documents, to which Mr Morley and this witness, Mr Gracias, were party. Mr Gracias is therefore in a similar position to Mr Sutton. I refuse permission because the issue is remote from what really matters in this case, and the prospects of eliciting useful evidence upon it from this witness do not justify the time, expense and complexity of making the attempt.

41. That leaves Mr Otuo's issues (4) and (5), which mirror issues on which Mr Otuo wishes to call others, such as Mr Dallas. I am not presently quite sure where Mr Outo believes this will take him in practice. If I were in Mr Otuo's position I would have considerable qualms about doing this. But I shall leave that decision to him. I make the same order in his case as I do in that of Mr Dallas.

Service by email

42. Finally, I must address an application made by Mr Otuo in his application notice of 7 February 2019, for permission to serve witness summonses on his witnesses by an alternative method, namely email. I refuse this application.

43. The normal methods of service authorised by CPR 6.20 include personal service, or service by first class post, as well as other methods. Service by electronic means is provided for by PD6A, but its provisions do not apply here.

44. The Court's powers to allow service by an alternative method are governed by CPR 6.27, which applies the regime laid down under CPR 6.15 for the claim form, to other documents which must be served. Alternative methods may be allowed where there is "good reason" to do so: r 6.15(1). The application must be supported by evidence: r 6.15(3)(a). Here, it is not apparent to me why Mr Otuo cannot identify the addresses of those whom he wishes to serve, and send them witness summonses by first class post in good time before the trial. I have read and re-read Mr Otuo's evidence, and not identified any evidential explanation of the good reason for permitting service by email. He has not satisfied me that there is a good reason. I also bear in mind, as an additional reason for refusal, the WhatsApp message which was put before me by Mr Brady as a ground for refusing this application. In this message Mr Otuo wrote offensively and threateningly to Mr Morley.