Neutral Citation Number: [2020] EWHC 3213 (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: 25/11/2020

Before:

ROGER TER HAAR Q.C.
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:

VADIM DON BENYATOV	**Claimant**
- and -	
CREDIT SUISSE SECURITIES (EUROPE) LTD	**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: 1 and 2 October 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. SITTING AS A DEPUTY HIGH COURT JUDGE

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 25 November 2020.

Roger ter Haar Q.C.:

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

    i) to strike out the claim brought by Claimant;

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

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

2. In that judgment (my "First 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. The issues to which this judgment relates require me to an extent to go again over territory covered in my First Judgment.

6. There are two applications before the Court:

    i) The Claimant's application dated 11 May 2020 for permission to amend the Particulars of Claim;

    ii) The Defendant's application dated 11 June 2020 to strike out certain paragraphs of the Particulars of Claim.

7. I have been provided with a multi-coloured draft Amended Particulars of Claim. In that draft, the Claimant has put forward proposed amendments in the following colours:

    i) Amendments in red are those consequential upon my First Judgment dated 22 January 2020;

    ii) Amendments in green incorporate, at my suggestion, matters pleaded in the Claimant's Response to the Defendant's Request for Further Information dated 21 March 2018 and the Claimant's Schedule of Loss;

    iii) Amendments in purple are those in respect of which the Claimant requires permission or consent.

    (This categorisation is the Claimant's and in significant respects is disputed by the Defendant).

8. On the same draft are highlighted in yellow the amendments to which no objection is taken by the Defendant.

9. There are very many amendments to which objection is taken.

10. Also highlighted, in green, are passages which the Defendant contends, but the Claimant disputes, should be removed to reflect points in my First Judgment. These are the subject of the Defendant's strike out application. In his written and oral submissions, Mr Goulding Q.C., representing the Defendant, sought to add paragraphs 4 and 5 and the second sentence of paragraph 42 to those highlighted in green on the draft before me, and therefore to the list of passages which he sought to have struck out.

11. The following categories of passages in the draft pleading, as analysed by the Defendant, are in dispute:

    i) The Claimant's proposed new claims in contract;

    ii) The Claimant's proposed amendment to the tort claim;

    iii) The Claimant's continued reliance on his Responses to the Requests for Further Information;

    iv) Particular individual proposed amendments; and

    v) Consequential changes to the Particulars of Claim to reflect the conclusions in my First Judgment.

12. For the Claimant, Mr Ciumei Q.C. addressed the issues in a different order. Mr Ciumei addressed the issues in the following order:

    i) Red text: amendments consequent upon my First Judgment;

    ii) Green text: amendments by way of incorporation of the contents of Replies to Request for Information;

    iii) Complaints about insufficient particularisation;

    iv) Complaints in respect of the incorporation of the Schedule of Loss;

    v) Purple text: "true amendments". Under this heading there are six sub-headings, as I set out below.

13. As will be seen below, I have found it convenient to deal with the issues in the order adopted by Mr Ciumei. However, before doing so, there are some preliminary matters raised by each party.

Preliminary Matters

14. The facts underlying this claim and the procedural history before the matter first came before me are set out in paragraphs 4 to 45 of my First Judgment. I do not repeat here what I set out there.

15. For the Claimant, there is understandable emphasis upon the disparity in resources between the parties. That is entirely and obviously a genuine point, but in my analysis it carries little weight, given that the Defendant's objections are to be assessed objectively as well founded or not.

16. However, there is a second point made by the Claimant which is to complain about the extent and nature of the objections taken. As will be seen below, I have found that complaint to be in large measure well founded.

17. For the Defendant, there are also a number of preliminary points made:

    i) The Claimant's delay: the claim relates to events that took place prior to the Claimant's arrest in 2006 (the post-arrest claims having been struck out in my First Judgment). Although the proceedings were issued on 12 January 2018, the Claimant waited until 11 May 2020 to plead the new claims to which I refer below. That is, says the Defendant, a very significant delay;

    ii) The Claimant's prolixity: the Defendant submits that despite the current draft being the sixth iteration of the pleading, the draft is still "*anything but the 'concise statement of the facts on which the claimant relies' required by CPR 16.4. Rather, this sixth iteration is prolix, lacks coherence and is pleaded in a manner which is antithetical to the fair and efficient management of the case*";

    iii) The Claimant's lack of co-operation: the Defendant says that whilst it has sought to engage constructively in correspondence on the issues that arise for determination, the Claimant's approach has been characterised by recalcitrance and unreasonableness.

18. As to these points:

    i) There has undoubtedly been delay, which necessitates consideration of the impact of the Limitation Acts on the new contractual claims, but otherwise it seems to me that a large measure of the delay arises out of the procedural delays caused by the strike out application which I ruled upon in my First Judgment, and the understandable re-evaluation of the case which has taken place. However, I accept that where proposed amendments involve investigation now of new factual matters dating back many years, I should be slow to allow such amendments.

    ii) The pleading has certainly grown, not least because of the inclusion into it of material previously contained in Replies to Requests for Further Information. If I felt that the pleading was unreasonably prolix, the remedy would probably be to allow the Claimant to replead. Given the history of the action thus far, I would be reluctant to invite what in all probability would be a further flurry of lengthy letters between the parties. In the event, I do not think that the pleading is so prolix as to justify refusal of permission to amend on that ground: it may be lengthy, but once put into a "clean" format, it will present a perfectly manageable agenda for trial;

    iii) As to the third objection, there has been an extraordinary amount of correspondence regarding the amendments. I do not see anything in the

Claimant's solicitors' correspondence which I would characterise as recalcitrant or unreasonable.

Relevant CPR and Guidance

19. The Defendant's counsel's skeleton argument helpfully sets out a summary of the relevant CPR and guidance which I should apply:

    i) The court must seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost when it exercises any power given to it by the CPR: CPR 1.1(1) and 1.2(a). It is the duty of the parties to help the court to further the overriding objective: CPR 1.3;

    ii) Particulars of Claim must include a concise statement of the facts on which the claimant relies: CPR 16.4(1)(a). This requirement of concision is "*very important in practice*": QB Guide 4.4.2 and 6.7.4(1);

    iii) Once a statement of case has been served, a party may amend it only with the written consent of all the other parties or with the permission of the court: CPR 17.1(2).

20. That summary appears to me to be accurate.

Principles derived from the authorities

21. The Defendant's skeleton argument helpfully sets out the principles derived from the authorities which it says I should apply:

    i) Whether the matter is raised on an application to strike out or for summary judgment or for permission to amend, the court will not allow a party to pursue a case that has no real prospect of success, because to do so is unfair to the other party and leads to nothing but a waste of costs and valuable court time: *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWCA Civ 1335; [2011] QB 943 at [12].

    ii) For the amendments to be allowed, the applicant must show that they have a real, as opposed to a fanciful, prospect of success which is more than merely arguable and carries some degree of conviction: *Slater & Gordon (UK) Ltd v Watchstone Group plc* [2019] EWHC 2371 (Comm) at [34].

    iii) Where the application gives rise to a short point of law, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it: *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

    iv) Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric: *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) at [1].

v) Every case must be pleaded in sufficient detail to enable the other party to understand the case it has to meet. If a party seeking to amend is unable or unwilling to provide proper particulars of any allegation, it is not right to require the other party to deal with it as best he can: *Habibsons Bank* at [12].

vi) Factors to be taken into account in deciding whether to grant an amendment include: (i) the history as regards the amendment and the explanation as to why it is being made late; (ii) the prejudice which will be caused to the applicant if the amendment is refused; (iii) the prejudice which will be caused to the resisting party if the amendment is allowed; and (iv) whether the text of the amendment is satisfactory in terms of clarity and particularity: *Brown v Innovatorone Plc* [2011] EWHC 3221 (Comm) at [14].

22. As general propositions derived from the cases, this summary is not in dispute, and I accept it as accurate.

23. In paragraph 18(2) above I have already commented on the Defendant's point as to prolixity which is a reflection of proposition (4) in the above summary of points from the authorities.

24. In addition to the above, there is relevant case law on the principles to be applied where a proposed amendment will or may introduce a new cause of action which is statute-barred. This is referred to below.

Red text amendments consequent upon my First Judgment

25. In my First Judgment I ordered that certain claims made should be struck out. My conclusions included paragraph 260 of my First Judgment in which I recorded that a number of identified paragraphs should be struck out.

26. In the Order following upon my judgment, which I approved, paragraph 1 provided:

> "The following parts of the Particulars of Claim are struck out: paragraphs 19.2 (subject to any permission granted hereafter to amend), 19.3-19.7, 20, the first sentence of paragraph 25, paragraphs 25.3, 47.2-53, 54.3, 55.3, the third sentence of paragraph 56 and paragraph 59."

27. Paragraphs 3 to 6 of the Order provided as follows:

> "3. The Claimant shall by 4pm on 24 February 2020 serve on the Defendant a draft Amended Particulars of Claim:
>
> a. to reflect the conclusions in the judgment of the Court of 22 January 2020 ("the Judgment") including in respect of paragraphs 22, 23, 24, 25.4, 54.4 and 58 of the Particulars of Claim;
>
> b. to incorporate matters pleaded in the Claimant's Response dated 21 May 2018 to the Defendant's Request for Further Information dated 21 March 2018

and the Claimant's Schedule of Loss dated 24 May 2019;

c. to include any further amendments that the Claimant may wish to make (subject to consent or permission).

4. The draft amended Particulars of Claim should clearly distinguish (whether by means of colour or otherwise) between those amendments intended to be made pursuant to each of 3(a), 3(b) and 3(c) above.

5. The Defendant shall by 4 pm on 23 March 2020 indicate in writing to the Claimant's solicitors:

a. which of the amendments made pursuant to paragraph 3(a) above it agrees are consequential on the Judgment;

b. which of the draft amendments made pursuant to paragraph 3(b) above it agrees reflect matters originally pleaded in the Claimant's response to the Request for Further Information referred to in paragraph 3(b) above;

c. to which of the draft amendments made in paragraph 3(c) it consents;

d. which parts of the draft Amended Particulars of Claim that have not been amended pursuant to paragraphs 3(a)-(c) of this Order ought to have been so amended consequential on the Judgment and why.

6. Absent agreement of the parties in relation to the proposed amendments, the Claimant shall issue and serve his application to amend his Particulars of Claim by no later than 20 April 2020, such application to be reserved to Deputy Judge ter Haar QC ('the Amendment Application')".

28. This section of this judgment is concerned with the amendments proposed by the Claimant under the aegis of paragraph 3(a) of that Order.

29. As already indicated, the Claimant's proposed amendments, substantially deletions, are shown in red in the draft placed before me.

30. Those amendments which are accepted, which is almost the entirety of this category of amendments, are highlighted in yellow. (The exception is an amendment in paragraph 45).

31. The problem, as viewed by the Defendant, is that the proposed deletions do not go far enough. The Defendant contends that the following paragraphs in addition to those proposed for deletion by the Claimant should be deleted:

i) paragraphs 3-5 and 22-24;

ii) paragraphs 36-41 and 42 (last sentence); and

iii) part of paragraph 45.

32. Except for the proposed deletion of paragraphs 4 and 5 and the second sentence of paragraph 42, these paragraphs are the subject of the Defendant's strike out application. My impression is that the failure to include the excepted passages was an oversight. In my judgment there is no prejudice to the Claimant in treating the Defendant's application as encompassing all the passages referred to in paragraph 31 above.

33. A first point is whether it is open to the Defendant to make this application. Because of the conclusion I have reached on the substantive merits of this part of the case, it is not necessary for me to decide this procedural issue.

34. The point which the Defendant makes is that in my First Judgment I struck out the Claimant's causes of action relating to post-arrest events: see in particular paragraphs 163 to 170, 177, 178, 179 to 188, 191 to 199, 202, 233 to 238, 246, and 248 of my First Judgment. In those circumstances, Mr Goulding contends that references to post-arrest events, particularly in the terms of the Amended Particulars of Claim, should be struck out.

35. He contends in support of that contention that what remains is irrelevant and prejudicial. He points out that the pleading will be on the court file and available for inspection.

36. In my view the level of prejudice which the Defendant might suffer as a result of the continued inclusion of the contested paragraphs is none or almost none.

37. The Claimant's case as to post-arrest events is already reflected in the existing pleading on the Court file, and has been extensively referred to in my First Judgment. Accordingly I do not regard the continued retention of these passages as likely to cause the Defendant any or, at any rate, any significant, prejudice.

38. As to relevance, in my view the post-arrest history is relevant as part of the history which the Claimant will inevitably rely on in order to establish his loss if his claim succeeds on liability. In this respect, I remain of the view which I expressed in respect of paragraphs 23 and 24 in paragraphs 199 and 202 of my First Judgment.

39. For these reasons the Defendant's strike out application fails.

Green amendments: introduction of matters in the Response to Request for Further Information

40. These amendments are somewhat unusual, and derive from a suggestion that I made during the course of the original application to strike out.

41. The claim was originally issued on 22 January 2018. It was followed on 21 March 2018 by the Defendant's service of the Defence and a Request for Further Information.

42. A Response to that Request for Further Information was served on 21 May 2018. That Response ("the RRFI") was substantial and ran to 34 pages.

43. In the course of the original strike out application before me there was extensive reference to the RRFI. Also at that hearing, as I recorded at paragraphs 252 to 259, there was discussion of possible amendment to the Particulars of Claim.

44. It seemed to me that the trial judge could well end up with a highly coloured Amended Particulars of Claim, expansion of the original version of that pleading in the RRFI which as a document contained Further Information in respect of parts of the principal pleading which I had ordered should be struck out, as well as a Reply and a Response to a Request for Further Information of the Reply. In those circumstances, I suggested that when the Particulars of Claim were amended to reflect my decision on the strike out application, the contents of the RRFI could usefully be incorporated into the amended version of the principal pleading.

45. My hope was (and still is) that this would simplify the task of the trial judge.

46. Both parties accepted that this was a useful exercise – or, at any rate, did not suggest it was not a useful exercise.

47. Unfortunately, the exercise has in some respects proved contentious.

48. In the Order which I made, and which I have set out at paragraph 27 above, this is encompassed by paragraph 3(b).

49. The consequential amendments are coloured green in the draft before me.

50. Many of those amendments are the subject of objection by the Defendant on the basis that they are insufficiently particularised.

51. Given the history of how this class of amendments came about, it is important to understand that this exercise was not intended to be an exercise in introducing any new claim or claims, but rather to conveniently "re-house" (the Claimant's expression) particulars of a case already pleaded.

52. In the Claimant's counsel's skeleton argument submissions are made as to the proper approach to be adopted in respect of this category of amendments:

> "29. These amendments were made pursuant to the Court's direction that the Claimant "*shall*" incorporate paragraphs of the RRFI and the Schedule of Loss into the APOC. There is no requirement now to obtain permission for this exercise. …. Indeed, the RRFI's are already statements of case, pursuant to the definition in CPR 2.3(1), and there is no basis to suggest that they cannot be relied upon, or that permission is required to do so. There has been no further request for information pursuant to CPR 18, and no application to the Court thereunder. As Mr Southwell stated in his WS at paragraph 9 **[1/3/38]**, the proper course is to treat the content of the RRFI's as unobjectionable – were it otherwise, it would be procedurally

incumbent on the Defendant to have made an application or further request.

30. The only basis in respect of which the Defendant is permitted to object to green amendments is if it does not "*reflect matters originally pleaded*" i.e. the converse of paragraph 5(b) of the Strike Out Order. This contrasts with paragraph 3(c) of the Strike Out Order which states that any further amendments the Claimant wishes to make are "*subject to consent or permission*". **None** of the various complaints made about these paragraphs meet that criteria – as such failure to consent to such material is a clear example of the inappropriate nature of the objections made by the Defendants. The Defendant is not otherwise entitled to undertake a root and branch objection of either the RRFI or the Schedule of Loss.

…..

32. The Defendant has suggested that 're-housing' pleaded material in this manner requires the application of principles applicable to amending statements of case: see letter dated 8 May 2020 at paragraph 7 **[1/4/120]**, and, potentially in the alternative, has suggested that it has now sought further information in respect of certain of this material: see paragraph 8(3) at **[1/4/121]**. However, no application pursuant to CPR 18 has been made, and no request for further information advanced that complies with the Practice Direction to CPR Part 18 (NB in particular paragraph 1.5).

33. If the Claimant had decided that it would be too much difficulty to move the material to the APOC, then the Defendant would have no basis for advancing its complaints in connection with this material. There can be no basis for doing so by the Claimant making every effort to comply with the Court's invitation to move material into a single document as far as possible.

34. There appears to be some confusion on the part of the Defendant about the status of the existing RRFI's following the APOC (see paragraph 21(2) of WS1 of Mr Kelly **[1/6/137]**). The Claimant's position is that there is unlikely to be any need to refer to them moving forward – all relevant material is in the APOC. However, the RRFIs were responsive to particular questions raised by the Defendants, the answers to some of which were not appropriate to include in the APOC. The Court had foreseen that it may not be possible to include all such material (see "*so far as that's feasible*" at Day 4/p.31:17 **[2/61/1092]**). For example, there was no basis to include responses to requests 9.1-9.5 at **[1/15/242-3]** in the APOC. They may not in practice be referred to extensively at trial, but

if it is necessary to do so the Claimant reserves the right to refer to such answers."

53. On the other hand, the Defendant submits that the nature of the amendments made makes it difficult for it to plead to the amended pleading, not least because (according to the Defendant) the case is insufficiently particularised.

54. I accept the thrust of the Claimant's submissions. The RRFI expands upon the Claimant's case in a way anticipated by and permitted under the CPR. Insofar as the RRFI contains expansion upon specific allegations in the original Particulars of Claim which have not been struck out, my First Judgment has not struck out those pleadings. Accordingly, nothing in my First Judgment expressly or implicitly struck out those parts of the pleading.

55. In my judgment, it would not be permissible for the Defendant to use my order for "re-housing" to justify a strike out of particulars in the RRFI which would not otherwise have been the subject of the strike out order which I made.

56. The Defendant contends that it would be difficult to plead to the green passages in the draft Amended Particulars of Claim. I do not accept that as a general proposition.

57. On the other hand, the move from the RRFI to the principal pleading means that the Defendant must plead by way of an Amended Defence, which means that the Defendant is entitled to look closely at the particularisation of the amended pleading. If the case is insufficiently particularised, then the remedy, in my judgment, is that the Defendant would be entitled to further particularisation, but not striking out, of the offending paragraphs.

58. In consequence I will look below at the criticisms made of individual paragraphs.

59. On the other hand, I accept that the Claimant's reservation of rights in respect of the re-housing exercise, whereby the Claimant reserves the right to rely upon what remains of the RRFI despite the re-housing exercise, is unacceptable. It is for the Claimant to make its position clear and unequivocal, otherwise the exercise may cause more problems than it solves.

60. In the course of oral submissions and in answer to questions from the Court, the Claimant accepted this, and indicated that subject to a point on paragraph 25.1 of the draft Amended Particulars of Claim, everything that the Claimant wished to rely upon from the RRFI is now in the draft amended pleading. Accordingly, so long as the green amendments are allowed, and subject to the point on paragraph 25.1, the original RRFI can be set aside.

61. There is also before the Court a Response to the Defendant's Part 18 Request for Further Information of the Claimant's RRFI dated 21 May 2018 and Reply dated 29 May 2018. This primarily provides further information in respect of the Reply. The Claimant has not attempted to re-house the information provided in this pleading, and the Defendant does not suggest that he should have done. Accordingly, this pleading still stands, subject to the point that part of the pleading relates to the original post-arrest claims. In my view Answer 1 in that RRFI stands now as a matter of historical record, rather than as particulars of any surviving post-arrest claim. Answers 2 and 3

set out the history of events relevant to the quantum of any claim which may succeed on liability.

Green text: sufficiency of particularisation

62. In a number of paragraphs of the draft pleading there are to be found both green text and violet text. This somewhat complicates matters since I accept the Claimant's submission that insofar as the green text relates to matters already in the RRFI, the re-housing exercise should not be tested against the tests set out at paragraphs 21(1) and (2) above relating to prospects of success. On the other hand, the purple text, being admittedly new material, does fall to be tested in that way.

63. Further, as I have already indicated, lack of particularity in the green text should not result in the deletion of text which, but for the re-housing order, would have survived in the RRFI after my First Judgment.

64. These considerations make it more convenient to look at each of the paragraphs which are said to have been insufficiently particularised one by one, as Mr. Goulding did in his submissions.

Green text: Incorporation of Schedule of Loss

65. One particular part of the green text can be dealt with separately.

66. As originally pleaded, paragraph 55.2 of the original Particulars of Claim claimed:

> "Lost future income as a result of being unable to work as a senior finance professional in the future. Mr. Benyatov's future loss of earnings for the next 13 years (until Mr Benyatov is 65 years old) equates to approximately US$52m, or £39m at current exchange rates."

67. In the proposed amendment the proposed changes are in green text:

> "Lost future income as a result of being unable to work as a senior finance professional in the future. Mr. Benyatov's future loss of earnings for the next ~~1~~23 years (until Mr Benyatov is 65 years old), applying the Ogden discount multiplier and an adjustment factor, equates to approximately US$78,302,000~~52~~m, or approximately £60.292 million ~~39m~~ at current exchange rates."

68. In May 2019 the Claimant served a Schedule of Loss. This claimed under the heading "Future loss of earnings" the following entry:

> "23.03 years (Ogden discount multiplier) @ US4 million p.a. (gross) x 0.85 (adjustment factor) US$78,302,000"

69. Thus the claim now incorporated into the draft amended pleading has been on the record for over a year.

70. On 21 June 2019 the Defendant served a Counter-Schedule of Loss. This pleaded to the merits of the Future Loss of Earnings claim that was in the Claimant's Schedule of Loss. It was not pleaded that this was a claim which was in any way impermissible as a pleading.

71. The Defendant's present position was not raised in terms until recently.

72. The Defendant's present position also seems to me to be inconsistent with paragraph 3(b) of my Order which expressly ordered that the Schedule of Loss should be incorporated into the amended pleading.

73. But, even were this a new way of putting the amount of the claim, I would allow the amendment. Whilst it is undoubtedly a very large increase in the amount of the claim, I do not see any significant difficulty for the Defendant in dealing with it. It will obviously involve questions for the Claimant to answer in evidence, and the change in case will doubtless be deployed against the Claimant forensically. However I do not view the case as being so weak as being a claim for which permission to amend should not be given, were that necessary.

74. Accordingly, for the above reasons, insofar as permission to amend paragraph 55.2 might be necessary (contrary to my view that it has been permitted by my Order), it is granted.

The Purple Amendments

75. These are the amendments for which the Claimant accepts he must seek permission to amend.

76. The Claimant places these into the following categories:

    i) Parallel contractual duties alongside those in tort in connection with pre-arrest assessment of risk;

    ii) Further particulars of the indemnity relied on;

    iii) Further particulars of the matters pleaded in the RRFI's;

    iv) Further particulars of the tortious duties of care;

    v) Further particulars of breach, both in connection with duties pleaded in parallel in contract as well as tort;

    vi) Further particulars of the nature of Mr Benyatov's loss.

77. The Defendant's categorisation which I have set out at paragraph 11 above approaches the pleading in rather different categorisation. I have already dealt with the Defendant's category (5), the Claimant's category (3) – proposed changes to reflect conclusions in the judgment.

78. As will be seen I have found it convenient to deal with the Defendant's categories (1) and (2), which overlap with the Claimant's categories (1), (4) and (5), and the

Claimant's category (6) before dealing with the Defendant's objections to a large number of individual paragraphs.

New contract claims

79. The paragraphs to which the Defendant objects under this heading are paragraphs 19.1B, 19.2, 19.2A, 19.3, 19.4, 19A, 19B (save in relation to 19.1 and, if allowed, 19.1A), 19D and 47 (save for 47.1) of the Amended Particulars of Claim.

80. I deal with paragraphs 19.1 and 19.1A below in the section of this judgment concerning the Claimant's indemnity claim.

81. The Defendant has objections to the particularity of some parts of the proposed pleading, but the main overarching ground for objection is that the new causes of action are statute-barred. By way of expansion upon that ground of objection, there are three limbs to the Defendant's objection:

    i) that the Claimant's reliance upon section 32 of the Limitation Act 1980 has no real prospect of success;

    ii) alternatively, the Defendant's limitation defence is arguable and the new claims do not arise out of the same facts or substantially the same facts as a claim in respect of which the Claimant has already claimed a remedy in the proceedings; and

    iii) that in the exercise of the Court's discretion permission to amend should be refused.

82. The Defendant starts by putting forward two propositions.

83. First, if the Claimant's reliance on section 32 has no real prospect of success, permission to amend should be refused.

84. Second, if the court does not conclude that the Claimant's reliance on section 32 has no real prospect of success, section 35 of the 1980 Act and CPR 17.4(2) apply. This involves a four-stage test summarised in *Hyde v Nygate* [2019] EWHC 1516 (Ch) at [26]:

    i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period (**Stage 1**)?

    ii) If yes, do the proposed amendments seek to add a new cause of action (**Stage 2**)?

    iii) If yes, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the court has no discretion to permit the amendment (**Stage 3**).

    iv) If yes, the court has a discretion to allow or refuse the amendment (**Stage 4**).

85. Neither of these propositions are disputed by the Claimant, but their application in this case is.

86. Paragraph 19 of the proposed Amended Particulars of Claim relates to the Claimant's claims in contract.

87. My First Judgment left only the indemnity claim of the Claimant's original claims in contract extant. In that regard paragraphs 19.2, 19.3 and 19.4 of the draft pleading do not accurately reflect either my First Judgment or the terms of the Order - the order was that they should be struck out.

88. In the amended pleading, the Claimant now seeks to put forward its case in respect of alleged duties of care in tort as being also a case in contract in respect of parallel duties in contract to those previously pleaded solely in tort.

89. As the case in tort has been significantly widened, this has resulted in a large amount of purple (and green) text incorporating the tortious case, mutatis mutandis, as particulars of the case in contract.

90. The fundamental point made by the Defendant, in addition to objecting to the formulation of particular allegations is that the claims in contract are statute-barred.

Section 32 of the Limitation Act 1980

91. The case put forward stripped to its essence is that the Defendant owed the Claimant a contractual duty of care to carry out a risk assessment in respect of his work in Romania. There are understandable associated duties alleged:

    i) to advise Mr Benyatov of the outcome of the risk assessment;

    ii) to provide Mr Benyatov with advice and/or training and/or guidance and/or awareness of how to mitigate any identified risks/suspicion of criminal activity/susceptibility to prosecution in relation to his conduct of the Defendant's business in Romania; and

    iii) to provide Mr Benyatov with advice and/or training and/or guidance and/or awareness of how to deal with the risk of covert surveillance by authorities in the course of the Defendant's business in Romania.

92. The present proceedings were issued on 22 January 2018. Accordingly any claim in respect of breach of contract was statute barred on the date that the proceedings were issued unless the breach occurred within 6 years of that date.

93. The Claimant was arrested on 22 November 2006. I have already struck out any post-arrest claims, and, in any event, any risk assessment the absence or execution of which might found a cause of action would have taken place prior to the arrest.

94. Accordingly, any contractual cause of action relating to a risk assessment would prima facie have arisen well before the start of the period of six years before the issue of these proceedings.

95. In those circumstances, Mr Ciumei was entirely right to concede that any cause of action falling within the proposed amended pleading in contract is prima facie statute-barred.

96. It follows that for the proposed new cause of action to succeed, the Claimant must succeed in circumventing the prima facie limitation position by relying upon section 32 of the 1980 Act.

97. Section 32 provides so far as relevant:

> "(1) …where in the case of any action for which a period of limitation is prescribed by this Act…
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant…
>
> the period of limitation shall not begin to run until the plaintiff has discovered the…concealment…or could with reasonable diligence have discovered it…
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

98. Mr Goulding submits in his skeleton argument that:

> "In relation to s32, the following principles apply:"
>
> "(1) A claimant who proposes to invoke s32(1)(b) must prove the facts necessary to bring the case within the paragraph: *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18; [2003] 1 AC 384 at [60].
>
> (2) *Relevant fact*: s32(1)(b) is to be applied narrowly rather than broadly. A relevant fact is something essential to complete the cause of action. It does not apply to facts which might make C's case stronger: *Arcadia Group Brands Ltd v Visa* [2014] EWHC 3561 (Comm) at [24].
>
> (3) *Deliberate commission of a breach of duty*: Deliberate commission of a breach of duty requires a defendant to know that it is committing a breach of duty. An act which was intentional, but which was not done in the knowledge that it was a breach of duty, does not constitute deliberate concealment for the purposes of s32(2): *Cave* at [24]-[25], [58], [60].
>
> (4) Where a claimant is relying on s32(2), he must expressly plead that the breaches of duty relied on were committed with the knowledge that they were wrongful: *Trilogy v Harcus Sinclair* [2016] EWHC 170 (Ch) at [50]-[52].
>
> (5) *Reasonable diligence*: The question is when the claimant <u>could</u> with reasonable diligence have discovered the

> concealment not when he should have done so. He must establish that he could not have discovered the concealment without exceptional measures which he could not reasonably have been expected to take. There is an assumption that the claimant desires to discover whether there has been a relevant fact concealed from him: *Hussain v Mukhtar* [2016] EWHC 424 (QB) at [40]-[43]."

99. In these propositions, proposition (1) needs to be treated with a little caution, but otherwise I accept that this is an accurate summary of the applicable guidance from the authorities.

100. In respect of proposition (1), there was argument before me as to the extent that a Claimant has an obligation to plead and establish an entitlement to rely upon section 32.

101. In my view, the pleading requirement depends upon very particular circumstances in each case. In most cases, a Claimant is entitled to plead the cause of action and then wait to see if a limitation defence is raised, then raising section 32 if such a defence is raised.

102. In many cases, because of pre-action protocol correspondence, for example, the Claimant's advisers will know that the Defendant intends to rely upon a limitation defence. In those circumstances, it is permissible, and may often be sensible, for the Claimant to meet the limitation head on in the Particulars of Claim: but it is not required by the CPR.

103. In this case, there is a late application for amendment. If the Claimant has a case under section 32, the limitation issue having been clearly raised by the Defendant, then it is reasonable for the Court to expect the Claimant to show his hand in respect of any arguable case under section 32.

104. This is consistent with the requirement referred to in paragraphs 21(1) and (2) above for the Court to assess the prospects of success of the case put forward in a proposed amendment.

105. In the application of Section 32 to this case, what is required is either a deliberate failure to carry out a risk assessment (or to give advice etc. as summarised in paragraphs 93(2) and (3) above) or a deliberate concealment of breach.

106. I fully accept that there may not be a requirement at this stage to produce a formal pleading setting out the Claimant's case as to section 32. However, in the context of this late application for amendment, it was incumbent upon the Claimant in some way to enable the Court to understand what the case will be at trial.

107. An allegation of deliberate breach of contract, or an allegation of deliberate concealment of a breach, whilst not an allegation of fraud, is nevertheless in each case a serious allegation justifying a firm evidential base.

108. When I asked Mr Ciumei about how the case was put, there was the following exchange between the Court and him (transcript day 2/page 70 line 21 to page 72 line 6):

> "THE DEPUTY JUDGE: Can I just ask you this: if you don't know who it was, what is the basis for putting forward a case that concealment was deliberate or intentional?
>
> MR CIUMEI: The basis for that is, as I have indicated, the fact that we asked them these simple questions and they haven't come up with an answer.
>
> THE DEPUTY JUDGE: Aren't we in a similar sort of territory on the authorities which say that if you're putting forward an allegation of fraud, you have to have a solid basis for it? I know this isn't as such an allegation of fraud, but it's a pretty serious allegation, that you're deliberately concealing matters. Simply not answering correspondence doesn't seem to me to raise a prima facie case of deliberate concealment, but I'd just like to you to deal with that point.
>
> MR CIUMEI: Of course, my Lord. I would answer it as follows:
>
> First of all, I don't accept it is tantamount to a fraud allegation. What is required is deliberate concealment. That could have occurred in this way: undoubtedly when Mr Benyatov was arrested – we saw some of the emails – there would have been an enormous hullabaloo within the defendant and somebody would have been asking at a senior level how on earth it was that this had occurred and why hadn't someone noticed in advance that it had happened. So there may have been some backside covering going on within the organisation.
>
> That's all that's required, not that there's some – we're not talking about a serious fraud allegation. In my submission, we have asked more than once a straight question. It's not just a question of – I appreciate if you have a run of correspondence and the issue arises tangentially, in that and there isn't an answer or clear answer, that may not support an inference, but we have asked them a direct question on more than one occasion and no answer has been given. There has been obfuscation. So at a minimum, there is reluctance to look into it and we say that is consistent with concealment."

109. Thus Mr Ciumei made clear that the Claimant's case is not that any breach of contract was committed deliberately, but rather that there was deliberate concealment of the breaches alleged.

110. That passage also makes clear that the basis upon which the case of deliberate concealment is based is the alleged failure by those representing the Defendant to

answer straight questions as to whether any risk assessment was carried out by the Defendant.

111. A failure to answer questions, no matter how straight, in circumstances where the Defendant had no obligation to answer the questions, is a fragile basis for a case of deliberate concealment. In my judgment, the Defendant is right to submit that despite the Claimant's solicitor, Mr Southwell, having provided a witness statement, no evidence has been adduced to make good the assertion that breaches of contractual duty were deliberately concealed, despite disclosure having taken place.

112. The witness statement from the Claimant's solicitor, Mr Southwell, which was placed before the Court said as follows:

> "39. As to the Defendant's limitation defence, we have explained in correspondence that, to the extent that the Defendant does wish to press this point, the Claimant will rely on sections 32(1)(b) and (2) of the Limitation Act 1980. The Claimant's position is as follows:
>
> 39.1 The Defendant committed various breaches of contractual duty which it owed to the Claimant, namely those breaches of duty set out in paragraphs 47 and 54.5 of the draft APoC;
>
> 39.2 Those breaches were deliberately concealed from the Claimant, alternatively those breaches were deliberate and were unlikely to be discovered for a long time;
>
> 39.3 The Claimant did not discover the breach of duty until he received the Defendant's disclosure on 1 November 2019;
>
> 39.4 In circumstances where: (i) the Claimant was an employee of the Defendant until June 2015; (ii) the Claimant was engaged in defending himself from prosecution in Romania until his conviction on 27 January 2015 and relied on the Defendant to assist him in that regard; (iii) the Claimant believed that his best chance of escaping conviction was for the Defendant to intervene in the Romanian proceedings on his behalf; and (iv) the Defendant's senior management had indicated to the Claimant on numerous occasions that the Defendant would exhaust every appropriate avenue that would enhance his chances of success, the Claimant could not with reasonable diligence have discovered the Defendant's breach of duty until the conclusion of the proceeding in Romania (at the earliest)."

113. This does not take the Claimant's case any further forward in establishing that there was any deliberate concealment of breaches – still less in establishing that any breaches had been deliberately committed, a suggestion in paragraph 39.2 which appears to have no basis whatsoever.

114. On the material before me, there is insufficient evidence to support a case that there was deliberate concealment of any breaches of contract in respect of carrying out, or failing to carry out, a risk assessment.

115. I have considered whether I should take the view that something may yet emerge to support the case of deliberate concealment. Given that disclosure has taken place, in my view I should not do so.

116. It is also to be noted that the Claimant himself has not provided an explanation of when he first realised there had been no, or no satisfactory, risk assessment. It seems to me fair comment that from the moment of his arrest he must very probably have been asking himself whether anything the Defendant did or did not do had landed him in the terrible predicament in which he found himself, and whether the Defendant had paid sufficient attention to the risks which he faced before he was arrested.

117. The explanation in paragraph 39.3 of Mr Southwell's witness statement as to when the Claimant realised the Defendant's breach of duty is difficult to understand: paragraph 25 of the original Particulars of Claim pleaded a tortious claim arising out of a failure to carry out a risk assessment, which casts doubt on the December 2019 date. Further, it is not at all clear what it was in the disclosure which changed the Claimant's perception of the case.

118. As to paragraph 39.4 of that witness statement, there is strength in Mr Goulding's submission that the question is not when the relevant breach should have been discovered but when it could have been discovered (see paragraph 98(5) above).

119. Thus it is difficult to discern what period of deferment should be taken for the purposes of section 32(1) of the Act beyond the date of arrest.

120. For the above reasons, I proceed upon the basis that the contractual causes of action are now statute barred. Accordingly, the answer to Stage 1 is that the proposed amendments are outside the applicable limitation period.

Do the proposed amendments seek to add a new cause of action?

121. This is the Stage 2 question.

122. There is no dispute that the proposed amendments seek to add a new cause or new causes of action.

Does the new cause (causes) of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

123. Mr Goulding submits in his skeleton argument that the principles which I should apply in answering this, the Stage 3 question, are as follows:

    i) The purpose of the provision in section 35(5) is to avoid placing a defendant in the position where, if the amendment is allowed, it will be obliged after expiry of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which it could reasonably be assumed to have investigated for the purpose of

defending the unamended claim: *Ballinger v Mercer Ltd* [2014] EWCA Civ 996; [2014] 1 WLR 3597 at [33]-[38].

ii) The term "*same or substantially the same*" is not synonymous with "*similar*": *Ballinger* at [37].

iii) An allegation of intentional or deliberate wrongdoing is to add a new allegation of fact to an existing claim of negligence: *Akers v Samba Financial Group* [2019] EWCA Civ 416; [2019] 4 WLR 54 at [35]-[36].

124. I accept propositions (1) and (2), but approach proposition (3) with some caution.

125. This is not a case where the attempt is to amend to add a new cause of action based upon intentional or deliberate wrongdoing, which is the situation which confronted the Court of Appeal in *Akers v Samba Financial Group*. Thus this case is not on all fours with that case.

126. The way in which Mr Goulding puts the case is that the allegations sought to be introduced will inevitably engage consideration of the application of section 32 of the Limitation Act, and therefore will introduce into the case allegations of deliberate concealment.

127. This appears to be a novel case in law, but flounders in this case because I have found that there is no evidence of deliberate concealment.

128. With that point answered in that way, I come to the conclusion that the new case arises out of the same or substantially the same facts as the existing case. But I would in any event have rejected this part of the Defendant's case: whilst I accept that in examining whether section 35 applies it would be necessary to consider an extra element, namely whether there was a deliberate concealment of breaches, it seems to me that the facts which the Court would consider would be <u>substantially</u> the same as on the existing case. In considering whether any risk assessment was carried out and, if so, with what consequences, it seems to me inevitable that the parties will investigate with care what was said (or not said) about risk assessments in the aftermath of the arrest and conviction of the Claimant.

129. Accordingly, I hold that the Claimant has satisfied the Stage 3 test.

<u>*Discretion*</u>

130. Accordingly, I come to Stage 4: should I, in the exercise of my discretion, grant permission to amend?

131. Again, Mr Goulding has set out the principles which he submits that I should apply:

i) The discretion to allow an amendment after the expiry of a limitation period should not lightly or routinely be exercised in a way that would deprive a defendant of a limitation defence: *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch) at [41].

ii) The Claimant bears the burden of persuading the court of the justice of allowing him an amendment even though the limitation period has arguably expired: *Seele Austria GmbH & Co KG v Tokio Marine Europe Insurance Ltd* [2009] EWHC 2066 (TCC) at [61].

iii) The discretion to be exercised in those circumstances is different in nature to the discretion to be exercised in allowing an amendment of a pleading where no question of limitation arises. The court will examine the length of the delay, the reasons for the delay, and any prejudice resulting therefrom: *Seele* at [61].

132. In Seele Christopher Clarke J. (as he then was) said this:

> "61. In case I am wrong on that I turn to consider whether or not I should exercise my discretion in favour of allowing an amendment to the Particulars of Claim. In this respect Seele shoulders the burden of persuading me of the justice of allowing them such an amendment even though the limitation period has arguably expired: *Hancock Shipping v Kawasaki* [1992] 1 WLR 1025. The discretion to be exercised in those circumstances is different in nature to the discretion which is to be exercised in allowing an amendment of a pleading in which no question of limitation arises: *Hancock*, 1031 F – 1032 B. The Court will examine the length of that delay, the reasons for the delay, and the prejudice resulting therefrom. That prejudice may consist of the effect of delay on the defence of the new claim, which is the most usual head of prejudice. But, in an appropriate case, it may involve the consideration of the prejudice suffered by reason of the fact that a tenable case has not been pleaded until after the expiry of the limitation period before which either an unexplained or, when explained, an untenable case was put forward.
>
> 62. For the reasons set out below I have not been persuaded that justice calls for me to allow an amendment.
>
> 63. Firstly, to do so will deprive the defendant of a possible limitation defence which may and, in my judgment, is likely to be a good one. The relevance of that as a consideration is established in *Hancock*, 1029H – 1030G; cited with approval in *Lloyd's Bank v Rogers*. That is not conclusive. The very existence of a discretion contemplates that it may be exercised in favour of an amendment when the limitation period has expired in circumstances where the new claim arises out of the same or substantially the same facts as are already in issue. That is a condition which I do not regard as satisfied in this case. But, if I am wrong on that it would still be relevant to take into account that there are many differences between the claim in the amended claim and the claim now sought to be made.

> 64. Secondly, the limitation period is six years. It is apparent from Mr. Holzleitner's statement that the documents and evidence were to hand by February 2004. So there was ample time for Seele to get its tackle in order. Its failure to do so is in no way the fault of the defendants or the result of circumstances beyond Seele's control. The proceedings were not started until June 2006. There has been a long delay, for which there is not much by way of excuse, before a tenable claim saw the light of day on the pleadings …."

133. In his skeleton argument, Mr Goulding submits that the discretion should not be exercised in favour of giving permission to amend:

i) The Claimant deliberately decided, at the outset, not to bring contract claims relating to risk assessment. It may be inferred that the reason was that the Claimant recognised that contract claims relating to risk assessment were out of time. He should not be permitted to change tack now simply because his post-arrest contract claims have been struck out.

ii) The Claimant has not advanced any or any satisfactory reason as to why he did not bring risk assessment contract claims before now.

iii) Relation back: If the contract claims are permitted, they are deemed to have been commenced on the same date as this action, i.e. 22 January 18: section 35(1)(b) of the 1980 Act. That means that any cause of action that accrued on or after 22 January 2012 would be in time. This would risk serious prejudice to the Defendant. If the Claimant proved that he could not with reasonable diligence have discovered any concealment until his conviction on 3 December 2013, the contract claims would be in time in this action but out of time if brought in a new action.

iv) The Claimant can still pursue his risk assessment claim in tort. He would therefore suffer no prejudice by not being permitted to rely on the new contract claims.

v) The contract claims are weak on limitation grounds alone.

134. In my view points (1) and (2) are points well made.

135. Whilst a claim brought in contract has some jurisprudential advantages for the Claimant, I accept that point (4) is substantially justified.

136. Points (3) and (5) need some further discussion. For the reasons I have given above, it seems to me that the contractual claim is statute-barred now because of the conclusions I have reached on Section 32 of the 1980 Act. Thus the effect of amendment would engage the doctrine of relation back. This means, as the Defendant submits, that any cause of action that accrued after 22 January 2012 would be in time: conversely any cause of action that accrued before 22 January 2012 would be statute barred.

137. The arrest took place on 22 November 2006. Thus any effective risk assessment would have had to take have taken place, or advice following such an assessment given, by 21 November 2006 at the latest. Thus, it seems to me that proposition (5) may, if anything, understate the position. It seems to me the proposition could be accurately re-phrased as "the contract claims are extremely weak on limitation grounds alone."

138. Taking these points together, and applying the guidance given by Christopher Clarke J. in *Seele*, I have not been persuaded that justice calls for me to permit this category of amendments.

Indemnity Claims: paragraphs 19.1 and 19.1A

139. Paragraphs 19.1 and 19.1A of the draft amended pleading relate to the Claimant's claim for an indemnity.

140. There is a minor amendment to paragraph 19.1 which is not opposed.

141. The new paragraph 19.1A reads as follows:

> "[At all material times, the Defendant owed to Mr Benyatov the following duties]
>
> To indemnify Mr Benyatov in respect of all losses, costs, expenses and claims he has suffered arising out of any unlawful enterprise upon which he was required to embark without knowledge that it was unlawful. This obligation continues after the termination of the Contract in respect of the duties performed by Mr Benyatov as an employee and/or agent of the Defendant."

142. This seems to me to be a modest addition to the case which I held in my First Judgment should be permitted to continue.

143. The Defendant argues that the reference to "an unlawful enterprise" is too vague for it to be able to plead to it.

144. I do not accept that submission. In my view the pleading is sufficiently clear and should be permitted.

Amendments to the tort claim.

145. This concerns two categories of amendments:

    i) The Claimant seeks to delete *"financial"* before the word *"loss"* or *"losses"* in the draft amended pleading at paragraphs 8, 25.4, 45, 46 and 54.4;

    ii) He claims for loss of his FCA authorisation on 5 December 2013 in the draft amended pleading at paragraph 55.2A.

Deletion of the word "financial"

146. In paragraph 65 of his skeleton argument, Mr. Ciumei explains this amendment as follows:

> "Mr Benyatov is free to characterise his losses as he sees fit. It is plain from his claim as already pleaded that he has suffered life-changing stigma and damage to his reputation in consequence of the breaches of contract and duty by the Defendant. He is entitled to make plain that he has not purely suffered economic loss – his loss is his ability to work because of the stigma and damage to his reputation consequent upon conviction and the fact that he cannot work on the financial services sector: see *Rihan* at [577]. The fact that Mr Benyatov was required to maintain regulatory approval, and the fact of its loss resulting from his conviction has been added in the APOC by consent at paragraphs 17A and 35."

147. The reference to *Rihan* is a reference to the decision of Kerr J. in *Rihan v Ernst & Young Global Ltd and others* [2020] EWHC 901 (QB) in which at paragraph [577] the learned judge said:

> "…the majority in *Spring* (other than Lord Goff) rejected the invitation to apply that reasoning to deny recognition of a novel duty of care which overlapped with the territory of another tort or torts (defamation and malicious falsehood). Furthermore, the members of the court (or the majority) in *Spring* and *Mahmud* did not regard the economic damage in those cases as damage to reputation; the claimant's reputation could suffer and could cause him financial loss, but conceptually the damage was loss of employment opportunity (see Lord Nicholls in *Mahmud* at 40B-41C; lord Steyn at 50A-52G; and the speeches of Lords Slynn and Woolf in *Spring*)."

148. In opposing this amendment, Mr Goulding submits in his skeleton argument:

> "31. It is never sufficient to ask simply whether A owes B a duty of care. Rather, it is always necessary to determine the scope of the duty by reference to the kind of loss from which A must take care to save B harmless: *Caparo Industries Plc v Dickman* [1990] 2 AC 605, per Lord Bridge at 627D; Lord Oliver at 651F-G; *Rihan v Ernst & Young Global Ltd* [2020] EWHC 901 (QB) at [460]-[462]
>
> 32. Up until now, the alleged duty of care in tort has been pleaded as a duty to protect C from economic losses, namely lost earnings: PoC [25] (**[1/13/197]**), [55.1], [55.2] (**[1/13/204]**).
>
> 33. The deletion of the word "*financial*" invites the question: if not "*financial*", what kind of loss is the duty to prevent? The duty of care must be pleaded by reference to the kind of loss to

> be prevented, yet the APoC fails in this fundamental requirement."

149. It is obviously the case that at trial the trial judge is likely to have to grapple with interesting issues as to whether the Defendant owed to the Claimant any duty in tort, and, if so, what is the basis for such duty.

150. However, the issue which I have to face in respect of this amendment is whether on this amended case, if allowed, the Claimant has a real, as opposed to a fanciful, prospect of success.

151. I have already held in my First Judgment that the tortious claim pleaded in the original Particulars of Claim should survive the attempt to strike it out.

152. In my view the Defendant's attempt to resist this group of amendments should be rejected. Nothing is fundamentally changed by the proposed deletions. The case is that on the pleaded facts a duty or duties in tort arose. Whether that is right or not depends upon the trial judge's analysis of the law applied to the facts as found at trial. I reject the attempt to paint this part of the Claimant's case into a corner. At the end of the day, once the facts have been found, the Court must decide whether the law recognises a breach of a duty of care calling for a remedy, whether that is categorised as a claim in respect of financial loss or differently characterised.

The claim in respect of loss of FCA authorisation

153. This concerns paragraph 55.2A of the proposed amendment. That alleges that the Claimant suffered loss as follows:

> "Loss of his FCA authorisation on 5 December 2013, as a result of which Mr Benyatov has been unable to work as a senior finance professional since the determination of his employment on 13 June 2015 to date, resulting in loss of income (as set out at paragraphs 55.1 and 55.2 above)."

154. This plea has resulted in an erudite debate as to whether this paragraph puts forward a claim for loss of property.

155. That debate seems to me, on both sides of the debate, esoteric and unrealistic, but particularly on the part of the Defendant which is once again attempting to paint the Claimant's case into a corner.

156. Stepping back, the Claimant's case has two related limbs:

i) the Defendant having for the purpose of furthering its commercial interests placed the Claimant in a position where it could be alleged (successfully, thus far) that the Claimant had committed crimes under Romanian law, it should indemnify the Claimant against the consequences of his having been placed in that situation;

ii) before exposing the Claimant to that perilous situation, the Defendant should have undertaken a risk assessment on more than one occasion, and given the

Claimant guidance flowing from the conclusions of a carefully executed risk assessment.

157. Either or both those claims, as thus broadly described, may succeed – that was the reasoning in my First Judgment. If either of those claims succeed, then the Court will need to consider what losses flow from the success of one or other or both of those claims.

158. Paragraph 55.2 does not as drafted set up a different claimed head of liability. It simply spells out one consequence of the predicament in which the Claimant found himself. The amount of money claimed does not change as a result.

159. As I understand the position, there is no dispute that the Claimant lost his FCA authorisation, and that in consequence his ability to carry on any form of occupation related to financial services in the United Kingdom was, to put it blandly, compromised.

160. I see no reason whatsoever why this claim should not be permitted to proceed. On no view can it be said to be unarguable, although for my part I doubt whether it adds anything of significance to the Claimant's case if otherwise sound, or to be capable of rescuing the Claimant's case if otherwise unsound, whether on the facts or the law.

Conclusion on the tortious claims

161. For the above reasons, what might be described as the overarching objections to the Claimant's proposed amendment to his claims in tort are rejected.

Objections to particular paragraphs of the proposed Amended Particulars of Claim

162. The Defendant has objections to a number of individual paragraphs of the proposed amendments.

163. Before dealing with these, it is important to note the structure of the proposed amended pleading.

164. At the original strike out hearing before me, the Defendant made the point that where an alleged duty of care in tort flows out of a parallel obligation owed in contract, the claim in tort must first set up the obligation in contract.

165. The significance of this approach is that whilst a particular set of facts may give rise to a duty of care both in contract and in tort, the tortious duty flows from the contractual relationship – obvious examples in English law are the parallel duties of care owed in contract and tort by professionals such as solicitors and accountants. However, claims in tort are more generously treated in English law for limitation purposes than claims in contract. Thus, the Defendant argued, and the Claimant in the amended pleading has accepted, that as a precursor to establishing tortious duties of care, the Claimant must first establish duties of care in contract, even if any breaches of the contractual duties of care are now statute-barred.

166. This conceptual debate is reflected in the draft pleading before me. The Claimant has set out to plead, in detail, the contractual duties owed, and then to cross-refer to the contractual duties in pleading the tortious duties alleged.

167. The result of this is that much of the meat of the case as to duties alleged is to be found in the new allegations of contractual duties, which I have refused to permit above, whilst the case in tort refers back to those contractual allegations.

168. This is illustrated by reference to paragraph 25.5 of the draft, which repeats as allegations of a tortious duty the alleged contractual duty to "*perform the duties in paragraphs 19.1B and 19.2A.1.19-19.2.4*".

169. The consequence of this somewhat complicated jigsaw is that whilst I have refused permission to introduce a new contractual cause (or new contractual causes) of action, I must envisage that the Claimant will wish to bring back its allegations of contractual duty (and breaches) as particulars of tortious duty and breach of such duty. In short, what is now in paragraph 19 is likely to be lifted and placed in paragraph 25 of the pleading.

170. Accordingly it is necessary for me to make decisions on the complaints of lack of particularity in the present paragraph 19 of the draft pleading to avoid later waste of costs when an application is made to put the self-same allegations in paragraph 25. With the preamble I now turn to the Defendant's objections to individual amendments.

171. Paragraph 19.1A: I have already ruled upon this in paragraphs 141 to 146 above. This paragraph can stand.

172. Paragraph 19.2: it was pointed out in the course of oral submissions that I have already ordered that this paragraph should be struck out. It should be removed from the amended pleading.

173. Paragraphs 19.3 and 19.4: again these are paragraphs which I previously ordered should be struck out. I have considered whether these can be "re-housed" in section 25 of the pleading as particulars of the Claimant's case as to what tortious duties were owed. I am willing to hear further submissions on this, but my present view is that they would add nothing of substance to the case in tort presently included in the draft pleading.

174. Paragraphs 19A and 19B: the greater part of these paragraphs is in green text, indicating that it previously formed part of the RRFI. Whilst, in accordance with this judgment, these paragraphs can no longer stand as particulars of a separate cause of action in contract, they are permissible as particulars of a contractual duty out of which tortious duties may be said to flow. In my view both the green and purple text in these paragraphs is permissible on that basis, subject to the following:

    i) As indicated above, the pleading will have to be restructured in order to make it clear that the claim in contract has been removed and that these matters are pleaded in the context of the claim in tort;

ii) I agree with the Defendant that the purple text in paragraph 19A.4 is strictly irrelevant, and should therefore be excised, although I have no doubt that the same fact will emerge at the trial of this action;

iii) I agree with the Defendant that the references in paragraph 19A.9 to a report in 2006 calls for further explanation if any case is to be made as to the role of the Risk Committee before 2006. Otherwise I do not accept the Defendant's criticisms of this paragraph: whilst it could have been included in the original pleading, and whilst to some degree it broadens the case, the allegations seem to me to be a permissible limited expansion of the case into evidential areas which would almost certainly have been investigated even without the amendment;

iv) It is said by the Defendant that the Global Compliance Manual referred to in paragraph 19A.12 is the 2012 Manual. This calls for clarification: as this is green text (and therefore comes from the RRFI), it seems to me that the appropriate course is to require the Claimant to further particularise his case: I invite submissions on timing and method of doing this;

v) I agree with the Defendant that the allegation in paragraphs 19A.14 and 19A.15 that "it was clearly envisaged" is pregnant as to who it was who envisaged the matters alleged. Again this is green text. As in respect of paragraph 19A.12, it seems to me that the appropriate course is to require the Claimant to further particularise his case: I invite submissions on timing and method of doing this;

vi) The Defendant submits that paragraph 19A.20, referring to Section 309 of the Companies Act 1985 has no real prospect of success. I agree. I note that Mr. Ciumei said that this is not a massive point. It should be removed.

175. Paragraphs 19D – 19D.3: These paragraphs are criticised as being insufficiently particularised. In particular, the Defendant asks when did an assessment of political risk become standard procedure? When is it alleged that the Defendant entered Romania? What are the *"accepted standards"* referred to in paragraph 19D.3? Accepted by whom?

176. These are all questions which could have been asked when these matters were set out in the RRFI. They are all matters which it can be expected will be the subject of expert evidence in due course. Nevertheless, the questions having been raised, it is sensible and reasonable for them to be answered now, except for the question as to when the Defendant entered Romania, which is a matter within the Defendant's own knowledge. As in respect of parts of paragraph 19A, it seems to me that the appropriate course is to require the Claimant to further particularise his case: I invite submissions on timing and method of doing this;

177. Paragraphs 25-25.4: The objection is that these paragraphs are not sufficiently particularised because the duty alleged is not pleaded by reference to the kind of loss to be prevented. This is substantially the same argument as was made in respect of the word "financial" (see paragraphs 148 to 154 above). In my view the case is sufficiently particularised in this regard.

178. Paragraphs 25AA and 25A: These are criticised as being inadequately particularised and prolix. By far the greatest part of the text is green, and therefore "re-housing" of the RRFI. In my view it would not be appropriate in respect of those parts to refuse permission to amend on the grounds of prolixity, since that would invite a rejoinder from the Claimant that to the extent that the case had previously been pleaded in the RRFI it should survive. It is true that the pleading is lengthy, but not so lengthy or so prolix as to prevent a fair trial, or such as to cause any significant increase in the costs which will inevitably be incurred.

179. The small amounts of purple text do not add unacceptably to the case.

180. The other objection is that the case is insufficiently particularised: the questions raised are (a) Is it alleged that these matters were known to the Defendant or to the Claimant? And (b) What is meant by *"high risk in relation to political risk"* or *"risk of political exposure in deal-making"*? The answer to (a) is, I assume, known to the Defendant. As to (b), it seems to me that the claim is adequately pleaded.

181. Paragraph 25B: This paragraph has green and purple text. The Defendant's first point is that the paragraph is insufficiently particularised: (a) what is meant by saying that these risks were *"widely documented in the public domain"* or *"available*" or *"openly published"*? (b) What are the *"yardsticks"* referred to here? (c) Which consulate or State Department staff or intelligence personnel or academics?

182. I indicated in the course of the hearing that I felt that there was strength in those points.

183. After the hearing had finished, the Claimant submitted a "Post-Hearing Note on Paragraph 25B of the Draft APOC". This pointed out that by a letter dated 11 June 2018 the Claimant's solicitors had provided the Defendant with copies of a substantial quantity of documentation. This would, at first sight, answer objection (a) set out in paragraph 181 above.

184. The Defendant provided a "Response to Claimant's Post-Hearing Note on Paragraph 25B of the Draft APOC". It is submitted that the provision of documents was a "document dump" and that sufficient particulars had still not been given.

185. In my judgment, the documents provided go a long way towards satisfying objection (a) on the assumption (which should be confirmed by the Claimant) that this is the comprehensive set upon which the Claimant wishes to rely. However, there is a substantial quantity of documentation, and in my view it would be appropriate for the Claimant to identify (i) particular passages relied upon in; and (ii) inferences it says should be drawn from, that documentation.

186. The documentation does not answer objections (b) or (c).

187. As in respect of paragraphs 19A and 19D, it seems to me that the appropriate course is to require the Claimant to further particularise his case: I invite submissions on timing and method of doing this.

188. The other objection taken is that the purple text has no real prospect of success. That sentence reads as follows:

> "Further or alternatively, the Defendant could and should have been informed about such risks by engaging with, for example, the US Ambassador to Romania or relevant consulate or State Department staff (including intelligence personnel), academics with relevant expertise and/or commercial intelligence organisations such as Control Risks, Kroll, or Hakluyt)."

I do not accept this submission: if the other matters pleaded are established, and subject to better particularisation, then the sort of inquiries referred to in that sentence are well arguably the sort of inquiries which a trial judge could hold should have been carried out.

189. Paragraph 47: this pleads breaches of contract, but the same allegations are also pleaded as breaches of tortious duty. Subject to the particular points below, these will have to be re-worked as particulars of negligence.

190. Paragraph 47.9.2: the Defendant says that paragraph 47.9.2 corresponds to paragraph 25B and has the same defects as paragraph 25B. I agree to the extent that I have accepted those criticisms in paragraphs 181 to 186 above.

191. Paragraph 47.10: The objection here is to the word *"included"*. Whilst the use of that word implies that there may be more to come, in my view the pleading is sufficient in the context of standard procedural directions in this Court, including in particular disclosure and the process of meeting of experts followed by experts' reports.

192. Paragraph 47.10.1-4: the objection is that these paragraphs are insufficiently particularised: (a) is it alleged the Defendant knew? (b) If so, who at the Defendant knew, and when and how did they know? These are legitimate questions. Given that this is a purple amendment for which permission is required, it will be a condition of the grant of permission that these particulars are given: I invite submissions on timing and method of doing this.

193. Paragraph 47.16: This paragraph reads as follows:

> "Failed to conduct any and/or any appropriate liaison with the Romanian authorities (including but not limited to notifying the Romanian security and intelligence services) before conducting business involving energy privatisation and/or before tasking Mr Benyatov with such activities."

194. The objections to this are (a) that it is insufficiently particularised: what should the Defendant have done with whom? (b) It has no real prospect of success.

195. I agree that as pleaded this is a difficult plea. 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.

196. 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.

197. Paragraph 55.2: see paragraphs 65 to 74 above.

Paragraph 45

198. As originally pleaded, paragraph 45 pleaded as follows:

> "There is and was at all material times after November 2006 and particularly after December 2013 a clear and obvious risk to Mr. Benyatov's safety and well-being, and there are financial losses, arising in consequence of the performance by him of his duties under the Contract. He has lost his livelihood and cannot now find employment in his chosen field; he is separated from his family (who are in the UK, whilst he has to remain in the USA); and, he risks arrest, extradition and lengthy imprisonment if he travels to the UK or Europe, even to visit his family, as he is the subject of an Interpol Red Notice and European Arrest Warrant."

199. As proposed this will now read:

> "There ~~is and~~ was at all material times after Mr Benyatov was sent to Romania until his arrest in November 2006 ~~and particularly after December 2013 a clear and obvious~~ a reasonably foreseeable risk to Mr. Benyatov's safety and well-being which the Defendant could have guarded against by proportionate measures, and there are ~~financial~~ losses, arising in consequence of the performance by ~~him~~ Mr Benyatov of his duties under the Contract. He has lost his livelihood and cannot now find employment in his chosen field; he ~~is~~ has been separated from his family ~~(who are in the UK, whilst he has to remain in the USA)~~; and, he risks arrest, extradition and lengthy imprisonment if he travels to the UK or Europe, even to visit his family, as he ~~is~~ was the subject of an Interpol Red Notice and remains the subject of a European Arrest Warrant."

200. The Defendant submits that the first two lines of paragraph 45 concern the post-arrest period and are irrelevant to the remaining claims. It is said that this is pointless and repetitive and makes evident that the Claimant's aim is simply to salvage as much of the existing pleading as possible, whatever the cost.

201. I accept that the effect of these amendments is to shift from a post-arrest case to a pre-arrest case. I also accept that it adds little to what is pleaded elsewhere. However, in my view it does so in a manner which is inoffensive. The proposed amendments will be permitted.

Conclusions

202. The upshot of the above is that the Defendant's strike out application fails and that generally the proposed amendments will be permitted with the significant exception of the proposed case in contract, and with the less significant rulings in respect of particular paragraphs.

203. As discussed with the parties at the hearing, it will be necessary for a new draft pleading to be prepared to reflect my rulings in this judgment. In due course it will be convenient to have a new clean pleading for use at trial.