Neutral Citation Number: [2022] EWHC 775 (Ch)

Case No: BL-2017-000665

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

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

Date: 1 April 2022

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

JSC COMMERCIAL BANK PRIVATBANK

Claimant

- and –

(1) IGOR VALERYEVICH KOLOMOISKY
(2) GENNADIY BORISOVICH BOGOLYUBOV
(3) TEAMTREND LIMITED
(4) TRADE POINT AGRO LIMITED
(5) COLLYER LIMITED
(6) ROSSYN INVESTING CORP
(7) MILBERT VENTURES INC
(8) ZAO UKRTRANSITSERVICE LTD

Defendants

Andrew Hunter QC, Robert Anderson QC, James Willan QC, Tim Akkouh QC, Christopher Lloyd, David Baker and **Conor McLaughlin** (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Mark Howard QC, Michael Bools QC, Alec Haydon QC, Geoffrey Kuehne and **Ben Woolgar** (instructed by **Fieldfisher LLP**) for the **First Defendant**
Clare Montgomery QC, Matthew Parker QC, Nathaniel Bird and **Alyssa Stansbury** (instructed by **Enyo Law LLP**) for the **Second Defendant**
Thomas Plewman QC and **Marc Delehanty** (instructed by **Pinsent Masons LLP**) for the **Third to Eighth Defendants**

Hearing date 28 March 2022

- -

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.

.....

THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 2pm on 1 April 2022

Mr Justice Trower:

Introduction

1. On 15 and 18 March 2022, seven of the eight defendants made applications for the adjournment of the trial, which is listed to commence on 7 June 2022 with a time estimate of 10 to 13 weeks. The court listed these applications for hearing at the PTR fixed to be heard over two days from 28 March 2022. I directed that the applications be heard before the other business to be determined at the PTR (including a number of applications for disclosure and further information) on the basis that the outcome of the adjournment applications would affect the question of whether the remaining relief sought ought to be granted. On the day of the hearing, the eighth defendant joined the third to seventh defendants' application in support of adjournment.

2. At the end of the first day of the hearing, I gave my ruling adjourning the trial to a date to be fixed during the first half of June 2023. Given the significance of the matter to the court and the parties, I decided that it was appropriate to explain my reasons for reaching that decision in greater detail than might normally have been the case. These are those reasons.

3. The basis for the applications can be stated quite simply. This is what Mr Mark Howard QC for the first defendant called a Ukrainian case. The claimant is a Ukrainian bank and the first defendant, the second defendant and the directors of the third to eighth defendants ("the corporate defendants") are all Ukrainian citizens who live in Ukraine. The non-party witnesses are Ukrainian as well. It is common ground that the issues and causes of action are governed by Ukrainian law save for an unjust enrichment claim against the corporate defendants which they contend to be governed by Cypriot law. On 24 February 2022, Russian forces invaded Ukraine, threatening its very existence as a state. The defendants contended that, up until the invasion, life was proceeding largely as normal, but that the impact of the war on themselves and others involved in the litigation on their behalf or who will give evidence for them at trial is very severe. It has already impaired their ability to deal with this litigation and will continue to do so for the foreseeable future.

4. It was submitted that it is difficult to imagine more compelling circumstances requiring an adjournment. All defendants said that there is no serious prospect that it could be tried today and that there are no serious proposals from the claimant as to how it could be. It is also said that it can already be clearly seen that the immensely disruptive consequences of the Russian invasion mean that it will not be possible for there to be a fair trial starting on 7 June 2022.

5. The claimant did not contend that the case is capable of being tried were it to start today, but it said that I cannot conclude now that a fair trial commencing on 7 June will not be possible. Rather, it invited the court to fix a further PTR in just over one month's time when it will be in a better position to consider whether an adjournment is necessary and if so what the appropriate length of the adjournment should be.

6. In making that submission, the claimant stressed the determination of the Ukrainian people to carry on their lives as normally as possible. It also contrasts its own evidence on this application, which demonstrates an ease of communication with its own

witnesses, experts and local lawyers who are all willing and able to take the case to trial in June, with the evidence put in by the defendants. This speaks of minimal contact between those in Ukraine and their English lawyers and a much greater disruption to everyday life in Ukraine than was said by the claimant to be reflected by what is actually happening on the ground.

7. The claimant submitted that the adjournment of such a substantial and significant trial at this stage would be what Mr Andrew Hunter QC called a "momentous decision" which should only be countenanced as a last resort. He said that the delay would cause very substantial prejudice not just to the claimant but to the state of Ukraine. The claimant relied on the evidence from a member of its supervisory board who acts as one of the three representatives of the state on that board:

> "These proceedings are of the utmost importance to the Bank and to the State, as the Bank's owner. In many ways, given the value of the Bank's claim in these proceedings, securing a prompt and effective recovery of the billions of dollars misappropriated from it by the defendants has become even more important for the Bank and the State since the war began. Any recoveries made by the Bank in these proceedings are likely to be critical to supporting Ukraine's financial system and rebuilding the country when the war is over."

8. The claimant also submitted that matters continue to develop rapidly on the ground and there is no need to pre-empt now the possibility that peace talks will lead to early stabilisation, and even resolution, well before June and that it should be possible to continue to prepare for trial in the meantime.

The claims in these proceedings

9. In a judgment I gave in July 2021 ([2021] EWHC 1910 (Ch)), when giving my reasons for terminating a confidentiality club order, I summarised the claimant's case and the principal issues that arose out of the defendants' defences. In so doing I drew on a judgment of the Court of Appeal ([2020] Ch 783) delivered on the defendants' jurisdiction challenge, the then current versions of the parties' case summary and a list of common ground and contested issues. Although the parties' statements of case have been amended since then, the essential thrust of their respective positions remains unchanged. I can therefore repeat what I said then.

10. The first and second defendants were amongst the founders of the claimant, a bank incorporated in Ukraine in 1992. Prior to the nationalisation of the claimant in December 2016, they were the ultimate beneficial owners of more than 80% of its shares. The extent of their control over any material decisions made by the claimant is an important issue in the proceedings.

11. The claimant alleges that the first and second defendants orchestrated the fraudulent misappropriation of over US$1.9 billion. The misappropriation is said to have been achieved through loans made by the claimant to 47 Ukrainian and 3 Cypriot borrowers between April 2013 and August 2014. These borrowers then entered into supply agreements with supplier companies including the corporate defendants. The supply agreements, said by the claimant to be shams, were for the supply of quantities of

commodities and industrial equipment and provided for the pre-payment of the entire purchase price before the time for delivery of the commodities or equipment had arrived.

12. The claimant alleges that, in respect of prepayments totalling US$1.9 billion, no goods or commodities were supplied, and the prepayments were not repaid by the suppliers to the borrowers. It also claims that loans in that amount have not been repaid to it by the borrowers and claims US$1.9 billion as loss from the defendants. The claimant says that the total amount it seeks to recover now stands at US$4.2 billion (including interest), the recovery of which will eventually benefit the state of Ukraine as its sole shareholder.

13. The claimant contends that the misappropriation was disguised by, amongst other things, the grant of sham security for the loans, including over both shares in companies owned or controlled by the first and second defendants and the borrowers' rights under the supply agreements. It is said that they were also disguised by the entering into of further sham supply agreements which purported to provide for payment after delivery. The claimant relies on the fact that the first and second defendants have never explained the commercial rationale for these supply agreements.

14. Some of the corporate defendants assert that they entered into the supply agreements as agent for undisclosed principals and say that they have no knowledge of their commercial purpose. The others assert that the transactions they entered into were genuine and entered into at arm's length. They accept that they remain obliged to repay the counterparty borrowers the amounts of the prepayments. The corporate defendants, the undisclosed principals and all of the borrowers are said by the claimant to have been controlled by the first and second defendants. This is denied by the defendants, save that the first defendant admits that he had an interest in 9 of the borrowers and the second defendant admits that he had an interest in 14 of them.

15. The first and second defendant deny that they caused the loans to be made by the claimant or that they caused the supply agreements to be entered into by the borrowers or the suppliers. It is also denied by the first and second defendants that they were aware of the loans or the supply agreements at the time they were made. They do not admit that the loans were invalid.

16. The first and second defendants also contend that the loans have been repaid by cash and asset transfers. A large number of other companies were involved in these transfers and the claimant says:

    i) that the cash repayments were themselves funded by further intermediary loans to companies it says were owned or controlled by the first and second defendants;

    ii) that while it received ownership and control of certain assets, the transfer of those assets to it did not result in a valid reduction of the relevant loans.

17. The claimant also alleges that new loans for amounts in excess of US$5 billion were made shortly before nationalisation in a process called "the Transformation". Those amounts were then used to repay the original loans (together with a large number of other loans made by the claimant to other borrowers).

18. The Court of Appeal's conclusion on the arguability of the claimant's case was explained as follows ([2020] Ch 783 at paras [21] and [22]):

> 21. The defendants, including Mr Kolomoisky and Mr Bogolyubov, accept, for the purposes of this appeal, that there is a good arguable case that the bank lost approximately US$515m through these transactions and that they were orchestrated by Mr Kolomoisky and Mr Bogolyubov, using the borrowers and suppliers in the manner generally alleged by the bank. Mr Kolomoisky and Mr Bogolyubov have not themselves to date proffered any explanation for the transactions in question or sought to explain their commercial rationale, if any.
>
> 22. The judge observed in his judgment at para 25 that there was no difficulty with the bank proving a good arguable case of a fraudulent scheme. The evidence was "strongly indicative of an elaborate fraud perpetrated by someone, allied to an attempt to conceal from any auditor or regulator the existence of bad debts on the bank's books, and money-laundering on a vast scale. The borrowers had no commercial track record or any substantial assets. The documentary evidence clearly demonstrated that the supply agreements were shams, and "were used as a deceptive basis on which to justify very large sums of money owing out of the bank". The artificial complexity of the recycling of funds was itself indicative of a fraudulent scheme. At para 104, the judge noted that Mr Kolomoisky and Mr Bogolyubov had admitted "a good arguable case of fraud on an epic scale".

19. The extent to which any of the defendants advance a positive case is limited. In part, this is because they assert that their involvement in what occurred was minimal. In part, this is because they say that the accusations made against them by the claimant are broad and general and the particularisation of some of the central allegations in relation to the fraud is likely only to emerge by reference to documents referred to in the claimant's written opening submissions. For this reason, they have reserved their position as to whether or not they will give evidence at trial. It is said that much will depend on the case which the claimant manages to raise on the back of the documents. They have made quite clear on this application, however, that they reserve the right to give evidence and for that reason have a great deal of pre-trial preparation to enable them fairly to respond to the case made against them.

Power to Adjourn: the law

20. The court's power to adjourn the trial is derived from CPR 3.1(2)(b). In exercising that power, the court must seek to give effect to the overriding objective (CPR 1.2(a)). It follows that, in considering the application, the court must do what is appropriate to enable it to deal with the case justly and at proportionate cost.

21. The central role that the parties' right to a fair trial plays in an application of this sort was illustrated by the recent decision of the Court of Appeal in *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221. At first instance, Marcus Smith J was concerned with a contested application to adjourn a five-week fraud trial including claims in dishonest assistance and for fraudulent trading. The application was made in January 2021, two weeks before the adjourned trial was due to commence (the trial had already been adjourned once in the light of the Covid 19 pandemic). The

grounds for the adjournment were that an important witness, whom everybody had thought would never be able to attend the trial through illness and whose evidence was to be admitted under a hearsay notice, had recovered sufficiently to make it likely that, although she would still be unable to give evidence at a January trial, she would be able to give evidence if the trial were to commence at or after the end of September.

22. The judge refused the adjournment, but the Court of Appeal set aside his order. In para [30] of his judgment, Nugee LJ summarised the applicable principles as follows:

> "I consider the authorities below, but it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that Mr Scorey is right that the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

23. The last sentence of this citation makes clear that inconvenience to the other party or other court users is not a basis for refusing an adjournment in circumstances where the resulting trial would be unfair. There has to be injustice to the other party which cannot be compensated. Presumably this would arise where the other party's own Article 6 right to have a fair determination within a reasonable time will itself be infringed if the adjournment is granted, at which stage a balancing exercise is required. As the Court of Appeal explained in *Dhillon v Asiedu* [2012] EWCA Civ 1020 at para [33(a)]:

> "CPR 1.1(2)(d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR."

24. Mr Hunter also submitted that the Court of Appeal in *Bilta* (at para [49(1)]) made clear that I must be satisfied that a refusal of an adjournment will be unfair (and he stressed the word "will"). He also said that para [39] of the judgment of Nugee LJ required any court faced with an application in a case such as the present to scrutinise the evidence with care in order to satisfy itself that there really are the grave and insuperable difficulties that are alleged to exist. He emphasised that the court must also be satisfied that it is not possible to make adaptations to mitigate and resolve those difficulties.

Conditions in Ukraine

25. The defendants submitted that the Russian invasion and its consequences have severely impaired a number of essential aspects of the means by which a fair trial can be conducted. They include:

i) the inability of the defendants to give proper instructions to their English lawyers on the conduct of the litigation during a critical period in the run-up to the trial, exacerbated by an interruption to the services the defendants are accustomed to receiving from their assistants and lawyers based in Ukraine;

ii) the inability of the lawyers to provide detailed or adequate advice to their clients during that period on the conduct of the litigation;

iii) the inability of the defendants and their witnesses properly to prepare for giving evidence in relation to matters that occurred some time ago;

iv) the prospect of there being real and substantial difficulties in giving evidence whether in person in England or by video link from Ukraine;

v) a significant delay in the finalisation of the expert evidence in circumstances in which some, although not all, of the experts are in Ukraine.

26. It seems to me that what matters for these purposes is the impact of the invasion on the defendants themselves and those who are assisting them in the preparations being made for the trial or by giving evidence on their behalf. As will appear, that evidence is in a number of important respects both limited and unparticularised, but I have to assess its weight against the background of the more general evidence given about the conditions in Ukraine. That more general evidence may also help to inform why it is that the specific evidence relating to the difficulties which it is said that the defendants are having is lacking in the detail that might otherwise be expected.

27. All of the parties adduced general evidence on the conditions in the Ukraine in an attempt to assist the court in understanding the impact which the invasion has had on the daily lives of those who are living in Ukraine. Much of this was drawn from public sources, but it must come with these words of warning. It is inevitable that there will be some, and possibly many, parts of Ukraine for which any general words will be woefully inadequate to describe the appalling consequences of the Russian attack. Likewise, there will be some, and possibly many, parts of Ukraine which remain anyway at present relatively unaffected by the invasion.

28. Matters can obviously change very rapidly, but the evidence at the time of the hearing was that Russian forces are continuing to occupy significant parts of the country, and whilst their progress has been slower than was originally anticipated, the invaders have launched heavy artillery, missile and airstrikes on many Ukrainian cities causing widespread destruction. In some respects, life can continue with some semblance of normality even in cities such as Kyiv and Dnipro, but the regular interruption to day-to-day activities and normal working life is widespread. There have been hundreds, and quite possibly thousands, of civilian deaths and injuries. Travel within Ukraine is dangerous and there are curfews and other restrictions on travel which had been imposed in several parts of the country. Many Ukrainians cannot travel about because of the damage which has been done to the infrastructure.

29. Based on the evidence that was adduced, Ukraine has managed to continue to keep essential services functioning. Those services include, critically for present purposes, the internet, the electricity supply and the cellular phone network. However, there is no doubt that, although functioning, they do not always function as normal and there is

the kind of interruption to access in some parts of the country (with the internet line being cut and so forth), which it is not surprising to read about in relation to a war zone.

30. On any view Ukraine is in the middle of a major humanitarian crisis with many millions of people forcibly displaced within Ukraine and several million having fled to neighbouring countries. It seems from first-hand evidence adduced by the claimant that there are parts of Ukraine which feel relatively safe, but even in areas where there is at present no military action, air raid sirens which last for several hours are not uncommon. The court must also be sensitive to the fact that the impact of being in a country that has been invaded by an aggressive foreign power (and all the more in a part of that country which is either a war zone or close to one) is likely to affect different individuals in very different ways.

31. All parties adduced detailed evidence on the progress of the war and published statements by politicians, diplomats, journalists and pundits on the prospects for peace. They recognised however that I cannot form any view on the prospects as to what might happen in the course of the next few weeks, although the claimant urged me to accept that there was at least a possibility that the conditions would stabilise or improve so as to militate against any irreversible steps being taken now. While I accept that there is at least a possibility that the conditions will stabilise and improve, that does not mean to say that, even if they do, it will still be possible to have a fair trial commencing in June.

32. There is one other point that I should make at this stage. On the outbreak of war, a decree was issued introducing martial law throughout Ukraine. As a result of this decree all males between the ages of 18 and 60 have been prohibited from leaving Ukraine. They are all subject to potential conscription to assist in the war effort. These provisions have not only prevented the first and second defendants from leaving Ukraine should they otherwise have chosen to do so, but they have also made it impossible for other individuals instructed or employed by the first and second defendants to assist in the conduct of this litigation to travel outside Ukraine should it be necessary for them to do so.

33. I shall turn to the specific evidence given on behalf of each of the defendants and the claimant shortly, but in my view there is a real force in the submission made on behalf of all defendants that the conditions in Ukraine, different though they may be from place to place, are wholly incompatible with the ability of the defendants to prepare properly and fairly for a trial of the size, complexity and with the characteristics of the trial of these proceedings.

The position of the First Defendant

34. Evidence on behalf of the first defendant was given by Mr Andrew Lafferty, a senior litigation partner in the firm of solicitors instructed by him, Fieldfisher LLP. He made three witness statements on 8 March, 18 March and 24 March describing developments as they arose. The thrust of Mr Lafferty's evidence was that, since the invasion, Fieldfisher had not been able to conduct the litigation as usual. He expressed the view that it was unreal to think that the first defendant was able to carry on with business as

usual. Whatever the claimant may have been able to achieve with its own case preparation, the position was very different for his firm and their client.

35. As of 8 March, Mr Lafferty did not know where the first defendant was although he was understood to still be in Ukraine. The reason he was unable to discover exactly where he was related to threats to his personal safety. These threats flowed in large part from the fact that the first defendant is well known to be an enemy of President Putin and a wanted man in Russia. Investigations and a criminal prosecution have been commenced against him as a result of what Russia alleges to be war crimes that he committed while he was governor of Dnipropetrovsk oblast at the time of the Russian invasion of Crimea in 2014.

36. It is also assumed by Fieldfisher that the first defendant is on what has been called a Russian kill list, a concern which is plainly genuinely held by Mr Lafferty. Enforcement is said to be in the hands of groups of mercenaries operating inside Ukraine. On one view, these specific concerns as to personal safety might be thought to add little to the inevitable danger of living in a country that has been invaded by a foreign power and parts of which are an active war zone, while a desire by the first defendant to avoid the leakage of any information as to his precise whereabouts might be thought to smack of unfounded neurosis. However, the evidence as to the history of the first defendant's relationship with the authorities in Russia and the steps they have said that they will be taking against him all point to the first defendant having some solid justification for holding the concerns that he has said that he does.

37. This concern for his personal safety and security is said to be one of the reasons why the first defendant has been difficult to contact. Mr Lafferty gave evidence that his firm's primary means of communication with the first defendant is over a secure phone line to which it has access for this purpose or through face-to-face meetings. Between the commencement of the invasion on 24 February and 8 March Fieldfisher managed to hold only one conversation with the first defendant lasting a few minutes which was held on 28 February. In the course of that conversation the first defendant said that his attention was focused on ensuring the safety of himself and his family and supporting the Ukrainian efforts to resist the invasion.

38. By 15 March, i.e., shortly before Mr Lafferty made the second of his three witness statements, it appeared that the first defendant was still in Ukraine and was in a place that was subject to occasional Russian bombardment. Fieldfisher had managed one further conversation with him by this stage. The limited extent of communication with their client was something that Mr Lafferty said was a major contrast with the previous contact that they had had which had taken place several times a week and since May 2019 had often been face-to-face in Ukraine. This, he said, had been a necessary means of taking instructions because the first defendant considered videoconferencing to be insecure. Mr Lafferty explained how face-to-face meetings with the first defendant were now impossible and the plans which Mr Howard told me had been made for members of the counsel team to go to Ukraine to take instructions could no longer occur. He pointed out that the British government has advised against all travel to the whole of Ukraine on the grounds that there is "a real risk to life".

39. At this stage Mr Lafferty refuted the suggestion made by the claimant's solicitors that his firm may be able to carry on the conduct of the litigation in preparation for trial on the basis of general or standing instructions to act in accordance with their client's best

interests. He said that they had clear pre-existing instructions related to some matters such as, for example, disclosure. He said that he had no instructions on how to respond to the claimant's re-re-re-amended particulars of claim which had been served at the end of January and in response to which a re-re-re-amended defence was due to be served by 4 March. He said that this would in the normal course have required a trip to Ukraine, which has now become impossible.

40. I have considerable sympathy with Fieldfisher's approach on this aspect of the application. By any standards, this is major commercial litigation with enormous sums of money at stake and the defendants are individuals against whom very serious allegations of fraud are made. Even if there may have been stages earlier in the litigation in which Fieldfisher were given more general discretion to take steps or decline to take steps in accordance with what they conceived to be the first defendant's best interests, it is unrealistic to think that that might continue to be the position in relation to many matters at this stage of the case's pre-trial preparation.

41. The claimant sought to cast doubt on the extent to which the first defendant had been actively involved in the case. It described how the first defendant's earlier approach to the litigation displayed little personal involvement. Even if this description were to be an accurate summary of what has occurred hitherto, and it is difficult for me to form a view one way or the other on the point, I have little doubt that the court cannot proceed on the basis that this will continue to be the first defendant's position. Mr Lafferty gave detailed evidence in his 18 March witness statement of the matters on which he would expect the first defendant to participate actively as part of the pre-trial preparation; participation that will inevitably need to increase as the case gets closer to trial. As an individual defendant, dealing with a major fraud claim against him, there is no reason to believe that the first defendant will simply choose to allow his lawyers to get on with defending the claim without significant instructions from him both in relation to the approach that he wishes his lawyers to take in the conduct of the case and factual input to assist in the cross-examination of the claimant's witnesses.

42. Mr Lafferty also pointed out that the claimant's present estimate is that the first defendant's cross-examination will take 5.5 days. He has no instructions to confirm that the first defendant will be giving evidence in his own defence, although he has previously been given instructions to ensure that his right to do so is preserved and the first defendant has made a trial witness statement which has been served. He said that, in the absence of the war the first defendant would now be expected to be engaging in preparation for giving his evidence, including considering complex documents in detail and discussing matters with his legal team. I accept that, if there are severe impediments to his ability to carry out that preparation properly (an exercise that will take a great deal of time in a case such as this), real unfairness will arise. In my view, I should give substantial weight to Mr Lafferty's view that none of this is possible at present and has not been since the outset of the war.

43. It was also said by Mr Lafferty that there are difficulties in adducing evidence from other witnesses from whom statements have been served on the first defendant's behalf. One of these, Mr Volodymyr Yatsenko, would appear to be regarded by the claimant as an important witness, because several days have been estimated as required for his cross-examination. Mr Lafferty said that his firm has no channel of communication with those witnesses because he has normally proceeded through Ukrainian lawyers with whom contact is difficult.

44. Mr Lafferty also gave evidence about the problems that had been experienced with the first defendant's Ukrainian law expert, Mr Alyoshin. He explained that, as a result of the invasion, all four Ukrainian law experts (i.e., those for each party) agreed between themselves to ask their instructing solicitors to seek an extension for filing the supplemental reports and that the claimant's solicitors proposed a new deadline for their exchange. The first defendant's expert is unable to leave Ukraine because of the rules introduced in relation to martial law and Mr Lafferty said that he could not be expected to work on his report while Kyiv is under attack. He explained that there was much work still to be done.

45. The position in relation to the first defendant's expert was updated as a result of a telephone call held on 24 March, when Mr Alyoshin explained that he remains somewhere on the outskirts of Kyiv, that he could be mobilised into the army at any time, that he is currently engaged in active civic duties to assist with the war effort and that overall there are a number of logistical difficulties hindering his ability to work as usual, including not having access to his materials or the assistance of his team some of whom are now in western Ukraine and many of whom are heavily involved in volunteering to assist with the war effort.

46. The claimant sought to cast some doubt on the impression given by Mr Lafferty of the extent to which Mr Alyoshin's firm was operating as usual and referred to a number of updates on their website. Mr Lafferty pointed out that all of those publications were war-related, relatively short and that none of them were authored by Mr Alyoshin or any member of his team.

47. On 24 March 2022, Fieldfisher managed to speak to the first defendant for 20 minutes over a secure line. The first defendant informed Fieldfisher that he was wholly engaged in matters relating to the war effort in Ukraine, the details of which he was not at liberty to discuss. The claimant pointed to this conversation as clear evidence of the fact that the first defendant was well able to communicate with Fieldfisher when he chose to do so. It relied heavily on the fact that there is no evidence as to why the other activities in which he is engaged occupy so much of his time that he cannot engage in the litigation. It is said that the court simply does not have enough evidence to justify a conclusion that he is unable, as opposed to unwilling, to participate.

48. I accept without reservation that this is what Fieldfisher was told by the first defendant. I also have no reason to doubt that this reflected the way in which the first defendant was ordering his own priorities, whether or not that might (conveniently or otherwise) have had an adverse impact on the preparation of these proceedings. Whether that is a sufficient explanation as a matter of evidence is a matter to which I will return.

49. Mr Lafferty also explained, both in his witness statement of 18 March and his witness statement of 24 March, that the first defendant has been assisted in relation to these proceedings by a number of Ukrainian lawyers who have also been involved in acting for him in relation to litigation arising out of the nationalisation of the claimant and other bank-related disputes before the Ukrainian courts. He said that those lawyers play an important role in gathering factual information within Ukraine for these proceedings, explaining matters to the first defendant and giving him advice.

50. The role that these lawyers play in the preparations for the trial of these proceedings has been significantly interrupted. Thus, the principal Ukrainian law firm with whom

Fieldfisher liaise wrote to them on 26 February 2022 as follows: "There is a war in our country. In the current circumstances our firm's office has been disbanded for an indefinite time. All employees are busy with high priority tasks related to ensuring safety of their families and relatives. As soon as we are able to resume work, we will let you know." There was further contact between Fieldfisher and that firm on 24 March when it was confirmed that their office in Dnipro remains disbanded, with people in that city being scared that it may suffer the same fate as Kharkiv or Mariupol both of which have suffered devastating bombardment from the Russian invaders. The way in which Mr Lafferty explained what Fieldfisher was told by this lawyer is as follows:

> "He explained that air raid sirens go off frequently, several times a day and rockets are falling on the outskirts of Dnipro. In the circumstances, it is difficult for lawyers at his firm to work and they fall into various categories: (i) some are still trying to get their families out of the country; (ii) four or five people have joined the territorial defence and are undergoing active training; (iii) some have been called up through conscription; (iv) some are helping as volunteers which takes up most of their time; and (v) some are outside the main cities and he has no way of contacting them."

51. In these circumstances, Mr Lafferty expressed the view that the war had had what he called "a material and adverse impact on the ability of Mr Kolomoisky to prepare his case for trial in a way which renders it unsustainable for a fair trial to take place within the trial window". Whether that is correct is of course a matter for the court, but the professional view of an experienced litigation solicitor and partner in Fieldfisher expressed in the way it was requires very careful consideration.

The position of the second defendant

52. Evidence on the second defendant's adjournment application has also been given by his solicitor: Mr George Maling, a partner at Enyo Law LLP. He has made two witness statements, one dated 15 March 2022 and the second dated 25 March 2022 updating the court as to the position. As of 15 March, Mr Maling had spoken to his client twice since the commencement of the war, once on 9 March and again on 11 March. Both calls were for about 20 minutes. He had had no further calls with the second defendant by the time of his 25 March witness statement, but at the hearing Ms Clare Montgomery QC gave me an update on instructions in the light of contact with the second defendant that had taken place over the weekend. Following the hearing, on 31 March 2022, Mr Elliss of Enyo filed a third witness statement with the Court in which he explained that this information came from a conversation between Mr Elliss and the second defendant's representative on 27 March 2022, which reflected in turn a telephone call between the second defendant and his representative on the same day.

53. The second defendant is 60 years old, and his understanding is that, as a man of that age he, like the first defendant, has been prohibited from leaving the country since the start of the war. The claimant casts doubt on whether a 60-year-old would be permitted to leave Ukraine if he tried, but I am satisfied from the evidence I have seen that there is every possibility that he will be prevented from leaving if he tried to do so and may be conscripted to join the war effort. In any event the evidence is that the second

defendant has no plans to leave Ukraine and that he believes he has a duty to stay and do what he can to help in the defence of his country, which it is said the claimant's own shareholder has encouraged him to do. I have difficulty with the idea that, anyway at this stage of the armed conflict, an English court could or should do anything that might be thought to criticise or undermine such sentiments if genuinely held, more particularly where it is faced with a dispute that can quite properly be described as a Ukrainian case.

54. In the first of his two witness statements, Mr Maling gave a graphic account of what he was told by the second defendant occurred at the commencement of the invasion and his departure from Kyiv. It is plain that he found it a very distressing and indeed frightening experience – sentiments that have doubtless been held by countless others in Ukraine. In his witness statement of 25 March, Mr Maling addressed the claimant's response, large parts of which were directed at the nature of life in Ukraine and whether it is sufficiently bearable to permit the trial to proceed at the beginning of June.

55. The second defendant has confirmed to Mr Maling that he remains in Ukraine but had not (as of 25 March) told him about his precise location because of concerns for his own personal safety. Like the first defendant he expressed concern that his communications were being intercepted, having been the target of the Russian state for a number of years. In the case of the second defendant, his concerns derived partly from his relationship and association with the first defendant. He summarised his position as being that he was unaware whether or not he features on any kill list, but that given his connections with the first defendant, the history of being targeted by the Russian state and his status as a prominent Ukrainian businessman, there was a real possibility that any risks to the first defendant extend also to him. I find it difficult to form a clear view about the extent to which these concerns are well founded, but I am satisfied that there is enough evidence to indicate that they are at least credible.

56. As is the case with many other parts of the Ukraine, the place in which the second defendant was living has been bombed, and he has to go regularly into a shelter when the air raid sirens sound, something which delayed Mr Maling's second conversation with him. He told Mr Maling that nowhere is really safe, and he has real concerns about a sense of lawlessness in the streets, with men walking the streets with guns who were not obviously from the Ukrainian or Russian army and could be members of the militia for either side.

57. The second defendant told Mr Maling that his ability to carry on a normal life is impaired by a lack of access to the mobile telephone network. Neither his iPad nor his phone have a cellular connection. He normally uses the internet but has been having difficulties with the internet connection where he is living and the availability of public wi-fi has been intermittent. This is consistent with the experience of at least one of the claimant's witnesses who had no access to wi-fi for 4 days due to damaged cables, an issue that she says has now been resolved. The consequence of this so far as the second defendant is concerned is that he is unable to sit down and focus on requests for information from his lawyers for any significant period of time.

58. This evidence was challenged by the claimant as being overdone, and I think it is fair to say that Mr Maling accepted in the second of his witness statements that there is or may be functioning internet and cellular coverage in Ukraine. He remained insistent however that the second defendant does not have a cellular connection and at the time

of his 25 March witness statement did not know whether the internet has been restored at the place where the second defendant is living.

59. The second defendant's representative updated Mr Ellis over the weekend as to the second defendant's position which Ms Montgomery relayed on instructions. He confirmed that he was now near Lviv in a location that was not then subject to bombardment but was close to some missile strikes. He had had to respond to three air raid warnings on Friday and five on Saturday. His wi-fi had been restored but it was not sufficient to support internet-enabled calls. It remained the case that he will not use the cellular network because of security concerns, it being I was told very straightforward to identify the location of a caller using a cellular network.

60. He also told Mr Maling that his office no longer functions, all of his bodyguards, drivers and assistants had left to join the army and the war effort, or in the case of his female personal assistants have left the country with his help. He said, in quite emphatic terms that everything including banks were closed, that food and gas are expensive and hard to come by, and that there has been a total breakdown of normal society and normal life or business is not possible. He explained to Mr Maling that it is impossible to understand how one's mentality changes during a war: the only priorities were food, shelter and safety. So far as the second defendant's business activities are concerned, he explained that almost all his industrial assets are located in the east and south of Ukraine and most of those businesses have ground to a halt because of the war. His message to the managers of those businesses has been to make sure that people are safe and supported, and he explained how there were few people who were still prepared to work in them because most men of military age had either been conscripted or were preparing for that eventuality.

61. Mr Maling returned to this subject in his 25 March witness statement, having spoken to a Ukrainian member of the team at Enyo Law who has been assisting friends and family in Ukraine since the start of the invasion. He made two points in particular. The first is that the circumstances of people in Ukraine are not just different from region to region but from town to town. The second is that, whatever may be being said by the major Ukrainian banks on the continued satisfactory operation of the banking system may not accurately reflect the overall reality on the ground. He spoke for example of card payments frequently not being accepted for essential payments and long queues to withdraw local currency in cash.

62. In the light of this evidence, which was detailed and which I have only summarised, Mr Maling expressed the unqualified view that he did not believe that it will be possible for him properly to advise the second defendant on the important strategic issues that will arise regularly throughout the lead up to trial. He went on to say that he did not believe that the second defendant has what he described as the bandwidth to give instructions on the many matters of detail on which input from him is required, or to do the huge volume of work necessary to prepare for a 13-week trial as an individual defendant. It was submitted that the second defendant was a man who is used to having a fully functioning office and easy access to the necessary technology and assistance to get on with the preparation of the case, which is what he would be doing by now in the absence of the war. In short, Mr Maling said that there is no possibility of the second defendant being able to deal with the preparation for a document heavy trial, given the myriad of intricate issues that have arisen in the course of the case and the inadequate and disrupted communication system that is presently in place in Ukraine.

63. Mr Maling also said that as matters stand at present, the second defendant could not properly participate in the trial itself and could not appear whether in person or by video link to be cross examined over 5 days. Overall, Mr Maling said that this meant that any trial that proceeded in those circumstances would be unfair.

64. In explaining his view, Mr Maling looked at a number of aspects of case preparation and the trial. First, he explained the means by which he was in contact with the second defendant's representative based outside Ukraine who was authorised to relay instructions to Enyo Law. Sometimes instructions which required the second defendant's direct factual input were taken by a remote call. On other occasions, where decisions on approach and strategy were required, the second defendant's English lawyers generally travelled to Kyiv and met the second defendant in person at his offices. Mr Maling said that instructions were being taken from the second defendant via his representative on a daily basis and he or his partner, Mr Tim Elliss, travelled to Kyiv on a monthly basis.

65. Since the Russian invasion, communication with his client has been extremely limited. Nobody can travel to Ukraine and Mr Maling has had very limited communication with the second defendant. He has been told that the second defendant's London representative is in the same position. Mr Maling said that he has a growing list of factual matters that he needs to discuss with the second defendant, many of which form the basis of applications issued by the claimant returnable at the PTR, which he was unable to raise on the calls he has had with him, given what he was informed about the nature of the situation and the limited amount of time available. Mr Maling also expressed his view that it would be grossly insensitive and inappropriate to raise those matters and he was sure that he would have been unlikely to make any progress in relation to points of detail.

66. An illustration of the type of problem with which Mr Maling says he is faced arose out of the disclosure by the claimant of several thousand new documents and the potential further disclosure by the first defendant of tranches of documents received from custodians. Mr Maling says that there are also real practical difficulties in dealing with documents in Ukrainian because the members of his team reviewing those documents are themselves tied up with assisting their family and friends in Ukraine.

67. Mr Maling also said that he had expected that he and his partner would be in Kyiv for large portions of the next 3 months assisting the second defendant and advising him in relation to issues arising out of the detail of what he described as complex documents and events which covered a period of years that are relevant to these proceedings. He said that in his experience it was not possible to conduct litigation of this type without the close and active involvement of his client. He took strong issue with the suggestion of the claimant's solicitors that the litigation could be run from London and could largely be left to the lawyers.

68. As to the ability of the second defendant to participate at the trial and give evidence, Mr Maling accepted that the situation in Ukraine is fast-moving and may have changed considerably by the date of the trial or indeed the date the second defendant would be called to give evidence. However, he said that it was likely that the second defendant would not be able to leave Ukraine to attend the trial and give evidence in person, and that even if it was legally and logistically possible for him to do so, it may be

unreasonable or unrealistic to expect him to take that course in the light of his personal and business circumstances as a result of the war.

69. In theory, it is of course feasible for the second defendant to give evidence remotely from Ukraine, but Mr Maling said that this assumed that the second defendant was in a safe location where there was no risk of communication being intercepted or his location being revealed, that he had a reliable internet connection and electricity supply and that he had access to all of the documents necessary for trial. Mr Maling said that this meant that it appeared likely that if matters did not improve, the second defendant would be unable to participate in the proceedings to any meaningful extent or at all.

70. Mr Maling adopted a very similar position to the position adopted by Mr Lafferty in relation to the prospect of Enyo Law proceeding on the basis of standing instructions from the second defendant to conduct litigation in his best interests. He regarded it as incredible to suggest that his firm would be able to conduct litigation without the second defendant's specific instructions and without being able properly to advise him and confirmed that he had no such standing instructions. Given the nature and complexity of these proceedings, I do not regard this evidence as at all surprising.

71. Mr Maling also addressed the question of his client's Ukrainian law expert. It is common ground that the claimant's claims against the second defendant are governed by Ukrainian law. The expert is usually based in Kyiv and Enyo Law had had very little contact with him since the invasion began. Such contact as they have had has been by email and has for the most part been messages of support and requests to divert payment to new accounts outside Ukraine. Mr Maling understands that the expert has now managed to leave Ukraine, but that a number of those who were assisting him in his evidence remain there. The attitude of the expert is that, while he and his team think it is important to try and press on with work to support the economy and thereby the war effort, he did not as of 15 March consider that it was appropriate to work on the matter at present.

72. Mr Maling is therefore faced with a situation in which it is unclear to him when it is that the second defendant's Ukrainian law expert will be able to give further input on matters of Ukrainian law, more particularly for the purposes of preparing for the cross-examination of the claimant's expert.

73. Mr Maling has adopted a slightly different approach from Mr Lafferty to the outstanding issues in relation to the statements of case. He considers that it is inappropriate to serve draft pleadings which still have to be finalised, because there has been insufficient opportunity to discuss the draft with the second defendant or obtain his instructions. There has also been some further evidence gathering required which Mr Maling says has not been possible. The position adopted by Enyo Law has also been adopted by the solicitors for the third to eighth defendants who have stated that they have no instructions to provide a draft of their re-re-amended pleading.

74. Finally, Mr Maling addressed the significant issue of why it is not premature to consider an adjournment at this stage. There were two parts to his answer.

75. The first part is that the impossibility of taking detailed instructions from and advising his client will continue for so long as the war continues, and until peace and stability is restored in Ukraine. He said that however optimistic the court might be as to the

prospect of a peace settlement or the restoration of stability in the short term, the reality is that it will not occur before the date listed for the commencement of the trial.

76. The second part of the answer is that crucial periods of time for trial preparation have already been lost and will continue to be lost day by day. Furthermore, it will not be possible for the second defendant simply to pick up where he left off in preparation for the trial. As Mr Maling put it "the first priority for all Ukrainian citizens will be to rebuild their country." This means that there will continue to be many of the problems which the second defendant has described for some time after the war is formally at an end. Mr Maling said that in his view "the stage has already been reached when it can be said that [the second defendant] will suffer irremediable prejudice if the trial proceeds as scheduled". He also said that the second defendant had asked him to relay the following message to the court:

> "I would ask the judge to take into consideration whether in such a time it is better for me to be spending my time and energy with lawyers preparing for a hearing that may not happen; or to assist my people prepared to defend their country?"

The position of the third to eighth defendants

77. Evidence on behalf of five of the six corporate defendants was adduced from Mr Stuart McNeill, a solicitor and partner in the firm of Pinsent Masons LLP. At the time of his statement, the directors of those five defendants had been able to give instructions to apply for an adjournment. In his evidence, Mr McNeill explained that the eighth defendant's director was uncontactable, although the position changed on the morning of the hearing when Pinsent Masons wrote to the court to explain that they had had contact for the first time on Friday 25 March. In the course of that contact, the director had confirmed to Pinsent Masons his instruction for the eighth defendant to join in the adjournment application.

78. The general thrust of Mr McNeill's evidence was similar to the evidence adduced on behalf of the first defendant and second defendant, but there were a number of important differences. He explained that Pinsent Masons have been unable to obtain instructions from key individuals located in Ukraine who have, since the invasion, ceased responding to his firm's communications. He also said that the current inability of the corporate defendants to pay his firm's very substantial outstanding fees and disbursements meant that in the absence of an adjournment, they would be unable to continue acting which would mean that the corporate defendants would be unrepresented at trial.

79. Mr McNeill explained the involvement of individuals in the corporate defendants' defence as follows. His firm receives their instructions from four directors all of whom were, so he understood, located in Ukraine. They were all businessmen with their own business affairs to manage, but it is clear from his evidence that he did not have very much information about their other business interests. They are all males aged between 18 and 60 and so subject to the travel prohibitions arising out of the introduction of martial law. So far as the English companies were concerned (the third, fourth and fifth defendants), instructions were received direct from their director. So far as the BVI companies were concerned (the sixth, seventh and eighth defendants), as well as direct

from their directors, instructions were also received via the Ukrainian lawyers appointed by the directors to manage the conduct of the litigation on their behalf.

80. There is a Ukrainian English qualified lawyer (Mr Slava Tretyak) in Mr McNeill's team who is Pinsent Masons' immediate contact point with the Ukrainian instructing individuals. He has made repeated attempts to contact the directors and the Ukrainian lawyers acting as the representatives of the BVI companies by telephone call and text message and has sought to do so every other day. Some contact has been achieved with the corporate defendants' directors and the representatives of the BVI companies but the director of the eighth defendant had been uncontactable (at the time Mr McNeill's evidence was filed). The evidence is that these individuals, insofar as contact has been made with them, were initially focused on ensuring the safety of their families, friends and work colleagues as well as securing as best they could their own business interests. They are now turning to local humanitarian work and fortifying their local area in anticipation of attacks by the Russian army.

81. Some of the evidence relating to conversations between Mr Tretyak and those in Ukraine responsible for giving instructions confirms the difficulties that the second defendant said he was having with communication, including limited wi-fi access and internet difficulties. He also described how access to documentary records necessary to make progress with enquiries made by Pinsent Masons was no longer available to one of the representatives of the BVI companies who had left Kyiv for the relative safety of an area in western Ukraine.

82. Mr McNeill also gave evidence about the difficulties which he was having communicating with his clients' Ukrainian law expert and a team of three Ukrainian law consultants engaged to advise on matters of Ukrainian law in these proceedings. The corporate defendants' expert has said that he does not know when he will be able to proceed with the preparation of his supplemental report and Mr McNeill has said that he does not consider it appropriate to pressurise him to commit to any new deadline at this stage. So far as the consultants are concerned, Mr McNeill gave details of their whereabouts and their ability to work, including the difficulties that some of them have had arising out of the efforts they have had to make to ensure that they and their families were located in a safe place. Mr Tretyak has not been able to contact all of them.

83. It is the view of Mr McNeill that the difficulties he is encountering are having a very substantial impact on the ability of his firm to conduct the corporate defendants' defence and that is likely to continue to be the case until the situation in Ukraine stabilises. He does not consider that it is open to him to continue to take steps in the proceedings without the ability to communicate properly with his clients and he gave the example of an amended pleading on which he does not yet have instructions. As I have already mentioned he, like Mr Maling for the second defendant, confirmed in his evidence that he has no standing instructions to proceed as he sees fit.

84. Mr McNeill also referred to funding problems, which featured in the evidence at earlier interlocutory proceedings. He gave a very detailed explanation as to the funding difficulties which is not necessary to describe for present purposes. The upshot of this explanation is his view that, by mid-February 2022, he was reasonably optimistic that funding would be in place and secure so as to allow work to continue towards trial. It is not really possible for me to assess how realistic that optimism was, but he said that the position changed dramatically on the commencement of the invasion on 24

February 2022. A law was passed relating to the operation of the Ukrainian banking system under martial law which introduced a moratorium on cross-border foreign currency payments. Martial law has now been extended for another 30 days from 26 March 2022.

85. The immediate effect so far as Pinsent Masons is concerned is that their invoices billed in sterling will remain unpaid for an indefinite period. Mr McNeill said that it is difficult in any event for them to do what he called badgering Ukrainian individuals in respect of unpaid legal fees at a time when their country is at war, but in any event, Mr McNeill has now formed the view that they will not be discharged in the run-up to a June 2022 trial.

86. Mr McNeill has put in evidence which indicates that the debt will only increase over the period prior to the commencement of the June trial and shows the figures for April and May including counsel's brief fees and disbursements will drive up the outstanding debt to £2.38 million. The consequence of this is that, while his firm has not stopped all work, they are progressing only what he describes as the absolutely critical tasks on behalf of the corporate defendants. His evidence is clear that Pinsent Masons will come off the record if the adjournment is not granted.

The claimant's position

87. The claimant fundamentally disagrees with what is said on this application by the defendants. Thus, the impression conveyed by the evidence of what the second defendant told Mr Maling was not accepted by the claimant, whose own evidence asserted that banks were continuing to function satisfactorily, that normal life was capable of being conducted albeit in a disrupted manner and that matters in the west of the country are less serious than those in the east and the south. Although the claimant also accepts that there has been a significant reduction in its own workforce and the closure of a significant number of its branches, it said that the defendants have exaggerated the difficulties with which they are faced.

88. Much of the claimant's evidence is directed at the greater ease with which its solicitors have been able to communicate with witnesses and others assisting in the claim. But it also included first hand evidence from witnesses employed by the claimant, now located in three different parts of Ukraine, designed to demonstrate that in a number of respects life can be carried on largely as normal. The picture their evidence paints is very different from that of the defendants, although, even what they have to say confirms that they have been displaced from their original locations and have had their lives significantly disrupted. It does, however, establish that essential services continue to be provided in many parts of the country and it is possible to work with access to essentials such as the internet which in their experience functions nearly all of the time. This evidence is detailed, and it demonstrates that there are ways of leading a life, even in Dnipro and the suburbs of Kyiv, which is very much more normal than that which is conveyed by an assessment of the defendants' evidence.

89. In one sense of course, the relevance of this type of evidence is limited, because the issue is the difficulties the defendants say they are having and a presentation of selective evidence from others with experience of what has been going on in their place of work

with the claimant (and more generally) is of limited assistance. However, it is capable of being relevant to test the strength of the defendants' case and in considering whether they were not unable to prepare properly for the trial, and not unable to participate at the trial, but are simply unwilling to do so for reasons that do not flow from the Russian invasion and its consequences. As Mr Hunter stressed, the claimant's evidence carries weight both because it is recent, and because, unlike the defendants' evidence, it is first hand. It was, he said, telling that the defendants had adduced no similar first-hand evidence of their own, and that the defendants as very wealthy individuals had not relocated to places in Ukraine which were safer and where easier contact with them could be maintained than appeared to be the case. There was no reason, for example, why the first defendant could not go to his office in Dnipro and use the communication and other facilities there. Similarly, life in the west of Ukraine appeared to be relatively unaffected by the war even though air raid sirens were a regular part of everyday life. He said that it beggared belief that technological issues of the type described by the second defendant in particular could not be solved.

90. Nonetheless, I do not think that it is possible to conclude from the claimant's evidence that anything like normal life is capable of being lived in many parts of Ukraine. It casts some doubt on Mr Maling's description of what he had been told by the second defendant about a complete collapse of any form of normal existence, but it is wholly unsurprising that different individuals will have different levels of tolerance to the direct and indirect consequences of their country being invaded. It is impossible for me to conclude that the second defendant has exaggerated excessively the effect on him of living in a country that has been invaded by Russia, a state which he believes may have him on its hit list.

91. There is also other material relied on by the claimant which confirms the enormous efforts being made in many business sectors, including so far as the claimant's witnesses are concerned, the banking sector, to keep going in as normal a manner as is practicable. I accept that this is the case and indeed the fact that it is, is probably one of the many reasons why there is such widespread admiration for the way in which Ukraine has responded to the invasion. However, the point can only go so far, because the evidence from all parties is consistent with the fact that disruption has been significant and very great efforts have been required to achieve that result. In the light of this, one of the principal questions which the defendants invite me to consider is whether Ukrainians should be expected to interrupt their contribution to those efforts (including those of the many individuals involved in the proceedings on their behalf) in order to work towards maintaining this court's trial date in June.

92. Part of the claimant's response to this question is that the first defendant and the second defendant have given almost no detail of what they are in fact doing. It was submitted that simply giving second hand evidence through Mr Lafferty that the first defendant was wholly engaged in matters relating to the war effort in Ukraine, the details of which he was not at liberty to discuss, was simply not good enough. It was said that the approach of the Court of Appeal in *Bilta* made clear that much more was required to enable the court to make a proper assessment of why the defendants were unable to be ready for trial or to participate in it once it has begun.

93. To the same effect the claimant said that the third to eighth defendants gave very little detail of the identity of those who had hitherto been directly involved in giving the instructions or doing the work in Ukraine on their behalf. Nor was there anything to

explain what they were doing as part of the war effort, such as to give substance to their inability to concentrate on the preparation of these proceedings.

94. The claimant also submitted that the evidence is consistent with the first defendant being able to communicate with his lawyers if he wishes to do so. It said that the reality of the position is that he did not wish to do so. As I have no evidence to give context to what he is doing by way of contribution to the war effort, it was submitted that he has singularly failed to discharge the burden of showing either that he is unable to prepare properly for trial or that he is unwilling to do so in circumstances in which the court might regard that unwillingness as reasonably justified.

95. So far as the corporate defendants' impecuniosity was concerned, the claimant pointed out that it has been advanced before as a tactical device by those who control or are interested in their affairs and said that this was still likely to be the case. It also pointed out that special permits could be obtained from the National Bank of Ukraine (although there was no evidence as to the prospects of one being obtained) and said that it was unclear why the funding had to come from inside Ukraine.

96. There is some substance in this submission. At the hearing of the second CMC in June 2021, I was satisfied that there was material justification for the claimant's submission that the corporate defendants' funding tap is turned off and on according to the views of those behind them as to their own personal interests. I understand why the claimant makes a similar point in relation to the position that pertains now. However, now, unlike then, Pinsent Masons have said that they will come off the record if an adjournment is not granted and there is a much more detailed explanation now as to what has been going on so far as funding the corporate defendants is concerned than was available when this issue was last considered. While evidence as to the funding of the corporate defendants' defence remains quite opaque and I remain concerned that the full picture has not been disclosed, I cannot conclude on the evidence with any degree of certainty that what has happened on funding is contrived.

Conclusion

97. If the only issues were to be the ability of the defendants to attend, give evidence at, and participate in the trial, I might have been persuaded that waiting for one month would be the better course. It would then be possible to assess rather closer to the trial, whether difficulties in giving evidence or attending in person if they wish to do so, would give rise to unfairness. However, even that is subject to one important qualification. I am very sceptical that a decision made in a few weeks' time will prove to be any easier than taking the decision now. There is much to be said for grasping the nettle at this stage to limit the continuing uncertainty and mitigate the likely wastage of further cost and expense that might otherwise be incurred in the run-up to an aborted trial.

98. In any event, I have reached the clear view that, in the particular circumstances of this case, the interruption in the free flow of instructions and advice between solicitors and client, together with a concomitant interference in the defendants' ability to prepare for the trial, is fatal to the suggestion that it might still be possible to have a fair trial starting at the beginning of June. As is to be expected in a case such as this, it is not just the

defendants themselves but also their assistants and lawyers on the ground in Ukraine (who have participated in the conduct of the proceedings to date), who are also affected in their ability to continue to assist in the preparations for the trial by the many consequences of the invasion.

99. In reaching that conclusion, I think that there is substance in what each of the three senior litigation partners at Fieldfisher, Enyo Law and Pinsent Masons have said about their inability to prepare for a fair trial in the interests of their clients in the light of the significant interruptions to normal life which have already occurred by reason of the Russian invasion. Of course, the answer is ultimately a matter for the court, but if I am satisfied that there are reasonable grounds for thinking that the difficulties in which the English solicitors find themselves arise out of an inability to communicate properly with their clients itself caused by circumstances in which it is not reasonably practical for their clients to do so, their views about the impact of these events on their ability to prepare a fair trial will carry real weight.

100. In my view the claimant does not give sufficient weight to the impact of the war on the defendants' ability to participate in preparing their cases at this critical pre-trial stage. The claimant made detailed submissions on the extent to which it could be expected that the defendants would themselves be participating in the process given the nature of their defences, but I think that these submissions underplayed the extent to which both they and other members of their team have been affected in their ability to participate. Of course, it may be said in due course and with the benefit of hindsight that the response of each defendant to the invasion was inappropriate, but I think it likely that the court would pause long before reaching that conclusion in the context of an invasion of their country by an aggressive foreign power and the impact it has had on the conduct of normal life in Ukraine.

101. One example of this was the claimant's reliance on the fact that the second defendant reviewed a very limited number of documents for the purposes of his own witness statement. That is right, but I agree with Mr Maling's response to the effect that the second defendant is not only a potential factual witness in these proceedings, but he is also an individual who is being sued for several billion dollars for his alleged role in a fraud. He needs to be in constant contact with his lawyers in both England and the Ukraine in the run-up to the trial. This will include taking instructions from him and ensuring that he is familiar with late disclosure and any further information and documentation being provided by other parties to the proceedings. As Ms Montgomery put it, time for study and reflection is therefore required both to give accurate evidence of the events which occurred some time ago and to ensure that he is properly informed in giving the regular instructions required in the lead up to the trial.

102. Furthermore, the comparison the claimant has sought to draw with its own position is not compelling. The claimant is a corporate entity and the individuals concerned in the conduct of its claim and giving evidence on its behalf are not exposed to personal liability for enormous sums of money in the same way that the first and second defendants are. I also do not think that it is possible for the claimant to rely on what it assumes would have been the extent of the defendants' involvement in case preparation if the invasion had not occurred. The evidence of the three solicitors who explained what they anticipated their clients' position would have been is inconsistent with that being the case. In my view, the claimant's submissions on this issue relied too heavily on the fact that the defendants have only advanced a positive case in limited respects

and an assumption that their understanding of the role the first and second defendants had played hitherto in the conduct of the litigation would continue as the matter comes closer to trial.

103. There is no doubt that it is in the public interest, as well as the interest of those seeking to enforce their rights that trial dates should if at all possible be maintained. Nonetheless, it has always been recognised that there are circumstances beyond the control of the litigants which mean that it is not reasonable to expect a party to continue with preparing a case for trial with the consequence that, if the trial were to commence, it would be unfair. As *Bilta* makes plain, any such situation will be compelling grounds for an adjournment.

104. Initially, I had some concern about the paucity of the first defendant's evidence as to what he was actually doing as part of the war effort in Ukraine, and why it was that whatever it was should take priority over this litigation. Likewise, none of the defendants put in their own first-hand evidence. These considerations were also fastened on by Mr Hunter who submitted that one of the reasons why I should not decide to adjourn the trial now was because the first defendant's evidence on this point was simply not good enough. Much more needed to be said and, so it was submitted, could more satisfactorily be said in a month's time.

105. However, on reflection, I think that Mr Howard was right to say that, unless challenged in evidence from the claimant (wholly owned as it is by the state of Ukraine) putting in issue the first defendant's assertion that he is fully engaged in the war effort, it would be wrong to say that his evidence required greater particularisation before accepting it at face value at this stage. I accept that, in the light of (a) the history of his relationship with President Putin and the Russian state and (b) the current state of Russian invasion, it was reasonable for a man in the position of the first defendant to take what Mr Howard called extensive measures to protect his security and not to give details of where he is or precisely what it is that he is doing. In the absence of an evidence-based challenge from the claimant, it is my view that further particularisation was not required.

106. The question which then arises is whether the way in which the defendants (and indeed others in Ukraine who assist them) have sought to prioritise their time is a reasonable response to the situation in which they find themselves. This consideration was encapsulated by the question asked by the second defendant that I have cited above. While it can be expected that the position will change relatively soon even if the war drags on, it seems to me that (anyway in what can accurately be described as a Ukrainian case), the English court should tread very carefully before concluding that devoting substantial time to litigation here in England should take priority over the wishes of Ukrainian citizens to assist the war effort in Ukraine.

107. Of less immediate impact, but ultimately of great significance is the effect of the war on the ability of the first and second defendants to participate in the trial through attendance and giving evidence. As matters stand, they are both unable to leave Ukraine, because of the existence of martial law and the foreign travel restrictions imposed on males between the ages of 18 and 60. It follows that, unless the position improves, any evidence would have to be given remotely. This of course is feasible in theory so far as this court is concerned, although there would be significant logistical difficulties arising out of the need for stable internet connections and the normal

requirement for lawyers from other firms to be present in the room when the evidence is being given.

108. I am of course conscious that the claimant relied on the fact that the defendants have not as yet committed to give oral evidence and submit themselves to cross examination. This is said to be another reason why the court should be less concerned about their ability to travel to and attend a trial in London. I do not agree with this approach. In a case in which serious allegations of fraud are made against the defendants, the court should be slow to countenance a trial in which there is a genuine difficulty in enabling the defendants to attend if they otherwise wish to do so. They cannot be required to commit to giving evidence in their own defence at this stage, and I must proceed on the basis that there is every prospect that they will wish to do so.

109. The claimant also asserted that it would suffer prejudice in the form that I outlined at the beginning of this judgment, and I accept that what is said is a material consideration of real significance. There are very large sums of money at stake and, if the claimant is entitled to make recovery from the defendants, the effect of an adjournment is to delay its recovery by a further 12 months.

110. However, whatever the use to which the proceeds of any recovery may be put, and the claimant's real point is that it will be put to the noble cause of rebuilding Ukraine when the war is over, it is at the end of the day a money judgment that the claimant seeks and it has the protection of a worldwide freezing order against each of the defendants, which will doubtless continue if appropriate until it is satisfied. It said, however, that there is a dispute as to its entitlement to interest arising out of the application of Ukrainian law to the underlying cause of action and so, to that extent, the greater the delay, the greater the loss it might eventually suffer as a result of being kept out of its money.

111. If that were to prove to be the case (and I was not shown the detail of the Ukrainian law argument on the point), I accept that there is a risk of a tangible prejudice to the claimant flowing from the delay. However, it does not seem to me that this is prejudice of a quality which is capable of giving rise to injustice of the quality contemplated by Nugee LJ in para [30] of his judgment in *Bilta*. Even if it was, I do not consider that it outweighs the unfairness which in my view can now be seen to arise in the conduct of any trial of these proceedings commencing in June.

112. If there were to be no disadvantage in waiting longer before making the decision, I might have concluded that this was the way forward, because no harm might be done. As I have said, the claimant has suggested that a revisiting of the state of play at a further PTR in May is the right course. But there are a number of reasons why I do not agree with this submission:

    i) The first (to which I have already alluded) is that, having reached the conclusion that the damage has already been done and is continuing day by day, it would be wrong not to recognise the reality of the position, and plan accordingly.

    ii) The second flows from the first. Disruption to the courts system and the needs of other court users will be exacerbated if a wait and see approach is taken in a case such as the present.

iii) The third is that material further additional cost and expense will be incurred, some or indeed much of which may well be wasted. The claimant is I am sure correct that some of the expense will relate to work which will have to be done in any event. But much will not.

iv) The fourth is that, if an adjournment is granted now, there is a respectable prospect of the court being able to refix the trial for June next year. From the court's perspective, that is currently achievable. If the re-listing has to wait until the beginning of May, there is a material risk that the trial will not be able to start until the end of next year or even the beginning of 2024.

v) The fifth is that there is no real answer to Ms Montgomery's rhetorical question: "the real problem with postponing until May is … What are the defendants supposed to be doing in that period?" She said that there would, effectively, be a phony trial preparation, devoid of an opportunity to either save costs or change direction, where the lawyers would have to do their best to guess what their instructions might be or to get instructions that are partly truncated and garbled and get on with it. That would, she said, be to contemplate a continuing injustice in the preparation of this case. I agree.

113. Deciding on the date to which the trial should be adjourned is not entirely straightforward. For practical reasons, a 12-month adjournment works from the court's perspective and does, as I understand it, mean that the defendants, and the claimant, can continue to be represented by broadly the same team of counsel. (In the light of what was said during the course of the hearing, I do not, however, think that when the matter is relisted, counsel's convenience should be taken into account by the listing officer.)

114. I conclude by saying this. Although nothing is certain, there is no reason why an adjournment to June 2023 should not enable the case to be fully prepared by then. Even if Ukraine were still to be a war zone or occupied by a Russian invading force, it is most unlikely that that will be insufficient time for the defendants to prepare in a way which will ensure that the trial can proceed. If the war turns into a war of attrition, lasting much longer than everyone hopes, it is most unlikely that there will continue to be a justification for an inability to be ready for trial based on the present very great difficulties flowing from the unexpected, and in some respects chaotic, consequences of the initial Russian invasion. By then the war will have been going on for over a year and there is every prospect that that court will conclude that the defendants should have made detailed arrangements to mitigate against the risks of the need for any further delay attendant on the war or its consequences. If any further adjournment were to be sought, the court would be likely to require a full explanation, supported by evidence from the defendants themselves, of what has been done to that end.