Neutral Citation Number: [2020] EWHC 1225 (Comm)

Case No: CL-2013-000366

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/2020

Before :

CHRISTOPHER HANCOCK QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

RP EXPLORER LIMITED	**Claimant**
(formerly RP EXPLORER MASTER FUND)	
- and -	
(1) SANJAY MALHOTRA	**Defendant**
(2) GAGAN RASTOGI	

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- -

Anna Dilnot (instructed by **Farrer & Co LLP)** for the **Claimant**
No one appeared for the Defendants

Hearing dates: 13th November 2019.

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am 4th June 2020.

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CHRISTOPHER HANCOCK QC

Christopher Hancock QC :

Introduction: the position of the Defendants.

1. By this Action RP, a company incorporated in the Cayman Islands whose business is the investment of its own money and that of others in businesses on both a long and a short-term basis, seeks damages against Mr Malhotra and Mr Rastogi for conspiracy and deceit. The claim arises out of RP's purchase, on 20 December 2007 and for US$77,501,325, of global depository receipts ("**GDRs**") issued by an Indian listed company, CALs Refineries Pvt Ltd ("**CALs**"), in order to raise finance for the acquisition and installation of a second-hand oil refinery in Haldia, India to produce petroleum products for the Indian domestic market ("**the Refinery Project**").

2. Mr Malhotra and Mr Rastogi are alleged to have been 'promoters' of the 'Spice Energy Group' ("**Spice**"), a loose collection of individuals certain of whom pursued the Refinery Project and GDR issue. RP alleges that Malhotra and Rastogi conspired between themselves and with others to use false representations to induce RP to acquire the GDRs.

3. While RP believed that CALs had successfully raised US$200 million from investors by way of the GDR issue on 12 December 2007, it alleges that no capital had, in fact been raised. Unknown to RP, the entire GDR issue had been subscribed for by a BVI entity owned and controlled by Malhotra, Honor Finance Limited ("**Honor**") on the basis of a loan from the former 15th Defendant, Banco Efisa ("**Efisa**"). Further, because CALs had granted Efisa security over the US$200 million ostensibly raised by the GDR issue, CALs was not able to use any part of that money for the Refinery Project unless and until Honor repaid a commensurate amount of the loan. Thus, while RP believed that CALs had successfully raised US$200 million for the Refinery Project, in fact it was alleged that CALs had not.

4. As and when Honor sold GDRs to third parties such as RP, it repaid part of the Efisa loan thereby allowing CALs to use some of the proceeds. However, it is alleged that it also paid substantial sums to or for the benefit of Malhotra and his co-conspirators, including by way of sham contracts with CALs.

5. There has already been one trial (and appeal) in relation to the security granted by Spice and the former second Defendant ("**Chilukuri**") to RP in respect of its acquisition of GDRs in CALs. The earlier proceedings took place between July 2010 and May 2013[1] ("**the First Proceedings**")[2]. By those proceedings, RP sought damages for breach of contract arising out of Chilukuri's failure to honour the security arrangements. At that stage, RP proceeded only as against Chilukuri (and a related shell company) and only for damages for breach of contract because it says that it did not know of the material facts alleged in these proceedings. RP says that it only acquired that knowledge following the issue of a report by the Securities Exchange Board of India ("**SEBI**") in October 2013.

[1] The time of the first instance trial.
[2] While the first instance Judge Leslie Blohm QC awarded RP substantial damages, that order was overturned on appeal. His findings that Chilukuri had acted in breach of contract were not challenged on appeal.

6. RP has settled with 7 of the original 16 Defendants (with a further 7 having been removed from the claim prior to service of the Particulars of Claim), leaving only Malhotra and Rastogi. While the conduct of those former Defendants remains relevant to the allegations of conspiracy and deceit, RP does not seek to establish liability against them.

7. Mr Rastogi obtained an anti-suit injunction against RP in India on 8 December 2014. While RP applied to set aside that injunction some years ago, the hearing of it has been adjourned on numerous occasions and has still not been determined. That being the case and because RP does not wish to breach the Indian injunction, at this trial it did not seek any order against Mr Rastogi. Rather, RP requests that the claim against him remain stayed (the claim against him having been stayed since the Order of Cockerill J dated 4 December 2017).

The position of Mr Malhotra.

8. Mr Malhotra did not participate at the trial before me because he is in prison in Dubai and has been since 12 September 2017. Indeed, Mr Malhotra has not participated to any material degree in the proceedings until a very late stage, despite the fact that he had been served with the proceedings (following permission to serve out). He has not served a defence nor taken any other step to defend the proceedings. He was originally served in Dubai on 16 July 2016 by alternative means pursuant to the Order of Phillips J dated 27 November 2015. Once it was discovered that he was in prison in Dubai, all relevant documents were served on him by post at the prison in Dubai pursuant to an Order of Butcher J dated 6 June 2018.

9. Prior to this trial, certain of the documents sent to Mr Malhotra in prison were returned to RP's solicitors undelivered. Given that Mr Malhotra had not participated in the proceedings, RP obtained an Order from Phillips J dated 8 October 2019 dispensing with further service of documents on him on condition that RP use all reasonable endeavours to deliver to Malhotra a letter notifying him of the trial date, and update the trial judge as to the outcome of those efforts.

10. Further to enquiries made by RP's UAE lawyers, Hadef & Partners ("Hadef"), that letter was delivered directly to Mr Malhotra in person in prison in Dubai on 10 October 2019. Mr Malhotra apparently stated (as Hadef say) that he was aware of the English proceedings and that he had English lawyers acting for him in relation to them.

11. Finally, very shortly before the trial, I received an email which appeared to have been either dictated or approved by Mr Malhotra, in which he said that:

    a) He has been detained by the Dubai police since 7 September 2017;

    b) Since that time his personal interaction with outside persons is restricted to a few minutes per week;

    c) He has not received service of any documents relating to the case;

    d) Due to his circumstances he is not in any position to defend himself or instruct lawyers to do so; and

e) He does not submit to the jurisdiction of the English Court.

The initial application for an adjournment.

12. I took this letter to be, in effect, an application for an adjournment of the hearing. RP submitted that it was not necessary or just to adjourn the trial for a number of reasons.

13. First, they said that Mr Malhotra is aware of these proceedings and has been since mid 2016 when he was served. He was served with these proceedings as long ago as 17 July 2016, ie over a year before he was incarcerated. He was served at his home address (which had been verified by RP in advance via third party investigators) by courier, a method of service which was permitted by the Order of Holroyde J dated 15 July 2016. Subsequent deliveries of documents to his home address by courier were also successful.

14. Secondly, Mr Malhotra instructed Indian lawyers to deal with these proceedings and they sent a number of letters to Farrer & Co between 26 August 2017 (ie before Mr Malhotra was imprisoned) and 9 October 2017. Mr Malhotra's lawyers stated that Malhotra was unaware of the details of RP's claim but that it had come to Malhotra's knowledge that RP was trying to serve him. It is difficult to see how Mr Malhotra could have acquired that knowledge without sight of what he was being served with. In any event, Farrer & Co sent all of the relevant documents to Mr Malhotra's solicitors on 15 September 2017. In response, Mr Malhotra's solicitors stated on 9 October 2017 that their client's intention was to dispute the jurisdiction of the English Court and apply in that respect to the Indian court (it is assumed for an anti-suit injunction). Thereafter, Mr Malhotra's solicitors stopped writing to Farrer & Co.

15. Thirdly, Mr Malhotra has been provided with all of the relevant documents since that point and in accordance with the various orders made by the Court.

16. Fourthly, following Mr Malhotra's imprisonment, RP was advised by its UAE lawyers, Hadef, that Mr Malhotra could receive documents in prison by post, and had access to independent counsel. Accordingly, on 6 June 2018 Butcher J granted RP permission to serve any documents in these proceedings on Malhotra by post care of the Dubai police authorities.

17. Since that point and until earlier this year, RP had been serving documents on Mr Malhotra by post via the Dubai police authority. Those documents were delivered to the authorities successfully and not returned. However, earlier this year, the documents started to be returned to Farrer & Co undelivered. Given Mr Malhotra's lack of participation in the proceedings, RP applied for an order dispensing with service of further documents. That order was granted by Phillips J on 8 October 2019 but on the condition that RP attempt to get a letter to Malhotra informing him of the trial date and undertaking to update the trial judge of the position.

18. On 10 October 2019 (or shortly thereafter), Hadef visited Mr Malhotra in prison in Dubai. The attending lawyer from Hadef informed Mr Malhotra of the contents of the letter, including the trial date. Hadef have confirmed that Mr Malhotra read the letter, although he refused to sign or keep it. Mr Malhotra told the lawyer from Hadef that: "*he was aware of the case in England and referred to the matter being an old case from*

2013. Mr Malhotra also stated that he has a lawyer following up on his case in the UK on his behalf." This is recorded in the letter from Hadef dated 15 October 2019.

19. The letter which was handed to Mr Malhotra informed him of the trial date. It also said that if he wished to make any representations to the court, including any request for an adjournment, he or his representatives should attend or make representations in writing.

20. RP submitted that the statements made by Malhotra to Hadef when they met him in prison are the best evidence of the state of his knowledge. Had he not received any of the documents or been unable to instruct a lawyer, he would have said so at that point (rather than expressly stating that he was aware of the case against him in England). Moreover and given that Malhotra instructed solicitors back in 2017, it is not reasonable to suppose that he was unaware of the claims made by RP or that he could not have made contact or otherwise participated in some way before now.

21. Further, Hadef were then told that Malhotra's imprisonment has been extended by the Dubai authorities for 30 days until 6 December 2019 (his imprisonment is extended on a rolling basis, and appears to have been extended in this way repeatedly since 2017, and so the extension does not mean he will be released on that date). RP has no knowledge of when Malhotra's term of imprisonment might end. Accordingly, if the Court were to adjourn the trial, the length of that adjournment would be highly uncertain.

22. In RP's submission, having commenced these proceedings in December 2013 and done everything it can to bring them to Mr Malhotra's attention and keep him updated, thus affording him every opportunity to participate, it would not be appropriate or fair to adjourn at this stage on the basis of a brief note from Mr Malhotra which, RP submits, is not truthful, but simply an attempt at this very late stage to avoid a judgment against him.

23. I was also referred to a further witness statement, on the second day of the hearing, from Hadef, in which issue was taken as to certain of the contentions put forward by Mr Malhotra. In particular, it was said he could have access to lawyers, albeit that this might be for limited periods.

24. At the outset of the trial, I indicated that I would continue but on the basis that this was without prejudice to the question of whether I should in fact proceed to judgment. In addition, I indicated that I would require to be addressed as to the human rights implications of proceeding to judgment in the absence of the Defendant.

25. Ms Dilnot (who was appearing for RP) therefore addressed me as to the obligations both of the Claimant and the Court in these circumstances, both at the hearing and, at my request, following the hearing, on this topic.

26. Finally, I received a letter from Farrer and Co on 2 April 2020, in which they provided me with an update on what they said the position was. In that letter they say that

    a) The first hearing in Mr Malhotra's Dubai criminal case had been scheduled for 20 May 2020.

b) He was now charged with various offences relating to bribery of public officials, taking advantage of a public employee, facilitating the taking of money of a public entity and being an accessory to divulging of secrets relating to a public entity.

c) It was now not possible to visit incarcerated persons due to the COVID-19 situation.

d) This would lead to further prolonged delay if it was necessary to serve any further documentation on Mr Malhotra so as to enable him to take a further part in these current proceedings.

27. Accordingly, the question for me is whether, in these circumstances, I should proceed to judgment or whether I should make some alternative directions and, if so, what.

The Claimant's submissions as to the relevant legal principles.

28. First, I should record my gratitude to Ms Dilnot for her detailed and helpful submissions on this point.

The Claimant's submissions in outline.

29. She submitted, in outline, as follows:

a) Malhotra's lack of personal presence at trial does not violate his Article 6(1) rights. Although, within the rubric of the relevant ECtHR authorities, the case involves his 'personal experience' and would ordinarily require his attendance, he has not expressed any wish to attend the trial.

b) Secondly, and in any event, he has by his conduct waived his right to be in attendance at the trial by his deliberate and informed failure to engage with these proceedings despite knowledge of them.

The application of Article 6 ECHR to incarcerated parties to civil proceedings

30. In civil proceedings generally, it was submitted that "art. 6 does not guarantee the right to personal presence before a civil court; there is only the general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side" (Practitioner's Guide to the European Convention on Human Rights, Karen Reid, §24-006).

> *[35] The Court observes that Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights (see Steel and Morris v. the United Kingdom, no. 68416/01, §§ 59-60, ECHR 2005-II). […]*

> *[36] Thus the questions of personal presence, the form of the proceedings (oral or written), legal representation, etc. should be analysed in the broader context of the "fair trial" guarantee of Article 6. The Court should verify whether the applicant – party to the civil proceedings – had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent (see Krčmář and Others v. the Czech Republic, no. 35376/97, § 39, 3 March 2000, and Dombo Beheer B.V. v. the Netherlands, 27 October 1993, § 33, Series A no. 274).*

31. Accordingly, it is not the lack of *personal presence* in Court which indicates a breach of the ECHR. Rather, Article 6 will be violated where a party is placed at a substantial disadvantage vis-à-vis their opponent because of a lack of opportunity to present a case, or a lack of knowledge of—or opportunity to respond to—a case made by another party (see also *Krčmář and Others v the Czech Republic* (app no. 35376/97) (ECtHR 3 March 2000), [39]).

32. The ECtHR has applied this general principle to factual scenarios involving non-attendance at a civil hearing as a result of incarceration, albeit the incarceration has been in the same country as the civil proceedings. In particular, the ECtHR has found in many cases against Russia that its failure to allow prisoners to attend their civil hearings, or to otherwise ensure their effective participation, was a violation of Article 6(1).

33. In those cases, the ECtHR has asked whether the nature of the case is such that the applicant's *personal presence* at trial was required—in contrast to the usual position under Article 6(1)—to guarantee their rights. If it was, the Court expects that suitable ameliorative measures are taken to ensure that the incarcerated party can effectively participate notwithstanding their imprisonment.

34. RP has been unable to find any ECtHR cases which deal with the issue in relation to a detainee in a foreign prison.[3] The majority of the relevant ECtHR cases (and those cited in Chapter 24 of *Reid*) concern Russian detainees attempting to appear before Russian courts in civil actions.

35. In *Kovalev v Russia* (app no. 78145/01) (ECtHR 10 May 2007) ("***Kovalev***"), Mr Kovalev's wife brought a civil suit on his behalf alleging unlawful arrest and ill-treatment at the hands of the police. Mr Kovalev's wife requested that he be summoned from prison to participate, but the Russian courts refused. The ECtHR accepted that there had been a violation of Mr Kovalev's rights:

> *[35]: The Court observes that the applicant intended to defend in person the claim that he had been ill-treated while in police custody. His participation, however, was considered*

[3] The case of *FCB v Italy* (app no. 12151/86) (ECtHR 28 August 1991), cited at §24-004 of *Reid* is inapposite here. It concerned a criminal trial, not a civil trial, in Italy from which Mr F.C.B. was absent due to his incarceration in the Netherlands.

> *unnecessary, firstly on the ground that he had already made an oral statement on the subject of ill-treatment before the tribunal trying him on criminal charges and, secondly, because the claim of ill-treatment was not substantiated by any evidence.*
>
> *[36]: The Court cannot accept either line of the domestic courts' reasoning. On the first point, it notes that during the criminal trial the applicant made allegations of ill-treatment in an attempt to have his initial confession to a robbery excluded from the case file as evidence obtained under duress […]*
>
> *[37]: Concerning the second point, the Court notes a certain contradiction between the courts' finding the complaint unsubstantiated and their reluctance to hear the applicant's statement. In any event, the exercise of the guarantees inherent in the right to a fair trial cannot depend on the court's giving a preliminary assessment of the claim as potentially successful. A distinction must be made, in this respect, between claims that are not genuine and serious (see Skorobogatykh v. Russia, cited above, and the Court's finding in paragraphs 28 and 29 above) and claims that are unlikely to succeed for lack of evidence. Given that the applicant's claim was, by its nature, largely based on his personal experience, his statement would have been an important part of the plaintiff's presentation of the case, and virtually the only way to ensure adversarial proceedings. In refusing to order his attendance, the domestic courts therefore failed to ensure a fair hearing of the applicant's claim (emphasis added).*

36. Thus, as Mr Kovalev's personal presence was necessary to ensure adversarial proceedings, conducting the hearing in his absence was a violation of Article 6(1).

37. The ECtHR has ruled on a number of similar cases against the Russian Federation. A summary of the effect of the authorities, and of the position that national courts must generally adopt when dealing with incarcerated parties in civil cases, was given by the ECtHR in *Yevdokimov and others v Russia* (app nos. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12) (ECtHR, 16 February 2016). That approach is summarised below:

a) Domestic courts must first undertake an examination of whether the type of case is such as to require the incarcerated litigant's personal testimony in court, and whether the party has expressed a wish to attend the proceedings, irrespective of whether or not they are represented ([36]). The ECtHR continued at [36] (emphasis added):

> *It is therefore incumbent on the domestic courts, once they have become aware of the fact that one of the litigants is in custody and unable to attend the hearings independent of his or her wishes, to verify, prior to embarking on the examination of the merits, whether the nature of the case is such as to require the incarcerated litigant's personal testimony and whether he or she*

> *has expressed a wish to attend. If the domestic courts contemplate dispensing with the litigant's presence, they must provide specific reasons why they believe that the absence of the party from the hearing will not be prejudicial for the fairness of the proceedings as a whole. It falls to them to examine all the arguments for and against holding hearings in the absence of one of the parties, taking into account, in particular, the Court's case-law in similar cases and the nature of the contentious issues, and to apprise the incarcerated litigant in good time of their decision on the matter and the reasons for it (see the resolution by the Russian Supreme Court in paragraph 15 above). The decision must be communicated to the litigant sufficiently in advance so that he or she may dispose of adequate time for deciding on a further course of action for the defence of his or her rights.*[4]

b) The Court must then examine whether procedural requirements should be introduced with a view to upholding the fairness of the proceedings and guaranteeing that incarcerated litigants can effectively participate in proceedings ([39]-[41]);

c) Where a claim is based on the detainee's personal experience, their personal participation may be "*virtually the only way to ensure adversarial proceedings*" ([42]);

d) Where personal participation is required, methods by which an incarcerated party's Article 6(1) rights may be secured can include: video link ([43]) or the taking of evidence on commission ([45]); however

e) Where personal presence is not required, participation may be guaranteed by representation ([46]).

38. In many of the Russian cases, it is assumed that transporting the prisoner to the Courtroom would be a feasible option. In *Vasilyev v Russia* (app no. 28370/05) (ECtHR, 10 January 2012), however, the facts were slightly different. Mr Vasilyev brought proceedings in the Komi Republic of Russia, whilst he was serving his prison term in another region of Russia ([81]). Bearing in mind the difficulties in transporting Mr Vasilyev across regions, the ECtHR considered:

> *[84]: Bearing in mind that there could be practical difficulties in ensuring the applicant's own presence at the civil hearing before the Ukhtinskiy District Court (see paragraph 81 above), the Court reiterates that Article 6 of the Convention does not guarantee the right to be heard in person at a civil court, but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means*

[4] Although RP submits that this approach is **not required** where an incarcerated party has *waived* their right to participate.

> *to be used in guaranteeing litigants these rights (see Steel and Morris, cited above, §§ 59 and 60). For instance, as a way of securing the applicant's participation in the proceedings, the national authorities could have held a session by way of a video link or in the detention facility, in so far as it was possible under the rules on court jurisdiction (see paragraph 42 above, and, for the relevant principles, Riepan v. Austria, no. 35115/97, §§ 27-42, ECHR 2000-XII, and Marcello Viola v. Italy, no. 45106/04, § 49 et seq., ECHR 2006-XI (extracts)). However, these options were not considered.*

39. As the ECtHR considered that Mr Vasilyev's claim would have been based on his personal experience ([88]), the Russian courts' refusal to allow Mr Vasilyev's personal participation violated his Article 6(1) rights.

Application to the facts

40. The principles distilled from these cases have been developed in the particular context of Russian civil procedure. As the ECtHR noted at [30] of *Yevdokimov*, Russian civil procedure requires an oral hearing in *all* classes of claim, and does not provide for the dispensation of oral hearings, no matter how small the claim. Furthermore, Russian civil procedure does not provide a process by which incarcerated parties can appear before civil trials. In the earlier *Larin* decision, the ECtHR described the jurisprudence as "*specific to Russia*" (at [37] and the heading after [36]). Nevertheless, in *Yevdokimov* (decided in 2016) the ECtHR appeared to consider those principles to be of general application, and those principles have been applied in cases against other States.[5]

41. The ECtHR in *Yevdokimov* considered at [36] that the domestic court must consider two factors:

    a) First, whether the nature of the case is such that the incarcerated party's personal testimony would be required; and

    b) Secondly, whether the incarcerated party had expressed a wish to attend.

42. RP accepted that any defence mounted by Malhotra would largely be based on his personal experience given he would have first-hand knowledge of many of the matters alleged and given the nature of the claims made against him: unlawful means conspiracy and deceit. In particular, the claim in deceit requires RP to prove that Malhotra knew that the relevant representations were made falsely or recklessly. As that requires an assessment of what Malhotra did and did not know (*cf Kovalev*, a claim for ill-treatment at the hands of the police), his personal testimony would ordinarily be required.

43. However, although Malhotra's personal presence would ordinarily be required, RP submits that he has never expressed a wish to participate in the proceedings or to attend the trial and, therefore, the Court is entitled to proceed in his absence. In all cases in relation to civil claims made by/against incarcerated parties, consideration of how best

[5] See for example *Insanov v Azerbaijan* (app no. 16133/08) (ECtHR 14 March 2013); *Margaretić v Croatia* (app no. 16115/13) (5 June 2014).

to facilitate that party's Article 6(1) rights is predicated on that party's **expressed wish** to actually attend the trial despite their incarceration (*see*, by way of example, *Kovalev*, [35]; *Yevdokimov*, [36]; *Larin*, [14], [37]; *Insanov*, [145]; *Shilbergs v Russia* (app no. 20075/03) (ECtHR 17 December 2009), [108]; *Dmitriyev v Russia* (app no. 40044/12) (ECtHR 24 October 2013)).[6] Thus, when summarising the effect of the authorities on this point, the ECtHR considered in *Yevdokimov* at [32]:

> *The Court has found a violation of Article 6 in a large number of cases in which Russian courts refused to secure attendance of imprisoned applicants **wishing to take part** in the hearing on their civil claims. [emphasis added]*

44. In the present case, however, Malhotra has never expressed a wish to attend his trial, despite being fully appraised of it, and he has refrained from taking any active part in the proceedings, despite having full knowledge thereof. Even the note of 11 November 2019 (the contents of which should be rejected in any event) expresses no wish to attend trial or participate in the proceedings by e.g. seeking an adjournment.

45. In those circumstances, RP submits there is no violation of his Article 6(1) rights, even taking into account the high standards imposed by ECtHR authority.

Waiver

46. Further and in any event, RP submits that Malhotra has, by his conduct, waived his right to participate in the proceedings and attend the trial.

47. Article 6(1) rights are capable of being waived where the waiver is unequivocal and attended by the minimum safeguards commensurate with the importance of the right (*Reid*, §24-004; *Hermi v Italy* (app no. 18114/02) (ECtHR 18 October 2006), [73])[7]. This also applies to the rights of parties to civil proceedings who are incarcerated: *Yevdokimov* at [30]. Waiver of Article 6(1) rights is usually established by a failure to participate in proceedings, despite having knowledge of them.

48. In *Kozlov v Russia* (app no. 30782/03) (ECtHR, 17 September 2009),[8] Mr Kozlov was in police custody, accused of murder. Concurrently, he was being sued in the civil courts for a housing matter and did not appear in those hearings. In the ECtHR, the Russian Federation argued that Mr Kozlov had failed to appoint legal counsel to represent him, denouncing the services of a former lawyer and failing to appoint another, despite having knowledge of the initiation of civil proceedings against him ([32]).

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[6] There are several other examples in cases against the Russian Federation. See, for example, the cases cited in *Yevdokimov* at [32] and *Insanov* at [143].

[7] In *Hermi* the ECtHR considered at [73]: Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Poitrimol*, cited above). In addition, it must not run counter to any important public interest (see *Sejdovic*, cited above, § 86, and *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A).

[8] *Kozlov* is only available in French. A translation was provided to me in the authorities bundle accompanying PR's submissions.

49. The ECtHR noted (at [39]-[41]) that Mr Kozlov: (1) was offered an opportunity to follow the proceedings, and to present his case by legal counsel after his arrest; (2) had the possibility to make his position known to the court by challenging the submissions of the opposing party, and by calling witnesses; and (3) was able to follow the proceedings, having received all documents relating thereto, in good time to allow him to prepare a defence.

50. However, Mr Kozlov refused to appoint a lawyer to represent him, and refused to submit any documents to the domestic court ([42]-[43]). As a result, the ECtHR found that there was no violation of Article 6(1) in conducting Mr Kozlov's hearing in his absence. Although the ECtHR considered that Mr Kozlov's case (a housing matter) did not require his personal testimony (and so the decision should be viewed in that context), it also decided that Mr Kozlov had, by his conduct, waived his Article 6(1) right to provide written explanations in the absence of his personal presence at the domestic court (at [47]).

51. Furthermore, in *Gladkiy v Russia* (app no. 3242/03), Mr Gladkiy had participated in his civil tort proceedings against his detention facility at a first instance hearing despite his incarceration. At a re-hearing of his appeal, he chose to be represented by a legal counsel team, did not apply to attend in person, and asked for the hearing to be determined in the absence of the legal team if they failed to attend ([25]). The ECtHR considered (at [108]-[109]):

> *[…] the applicant in the instant case voluntarily and unequivocally chose to defend his interests at the appeal stage through the services of legal representatives. It has not been disputed, and the Court finds it established, that the applicant was sufficiently aware of his procedural rights, including the right to seek leave to appear before the Regional Court. In fact, he effectively exercised that right before the Tsentralniy District Court, which held every hearing in his presence (see, by contrast, Shilbergs v. Russia, no. 20075/03, §§ 108-110, 17 December 2009). However, the Court does not find it surprising that the applicant opted for legal representation on appeal, as his personal attendance was no longer crucial at that stage of the proceedings. The Court is convinced that the applicant made informed decisions in appointing representatives and asking the Regional Court to examine the action in their absence if they failed to appear. It was open to him to make an additional provision for his personal attendance when he instructed the Regional Court regarding the consequences of his representatives' failure to attend. Furthermore, having been apprised of the date of the appeal hearing in May 2002, the applicant could have responded by lodging a separate application for leave to attend. However, he did not make use of either of those avenues. The Court does not doubt that the applicant fully understood that, in the absence of an explicit request to attend on his part, his choice of legal representation, and his consent to the examination of the action should his*

> *representatives fail to appear, implied the waiver of his right to attend the appeal hearing.*
>
> *Consequently, the Court concludes that the applicant, through his conduct, implicitly waived his right of personal attendance. In the circumstances of the case, there is no reason to consider that the applicant was not sufficiently aware of the consequences of his decision not to seek leave to appear. Furthermore, the materials before the Court do not disclose any circumstance which would lead it to consider that the Regional Court, on its own initiative, should have taken steps to ensure the applicant's presence.*

52. Turning to the application of these principles to the facts, RP accepts that if the contents of this note were true (i.e. if Malhotra was genuinely willing but unable to participate in these proceedings, unable to instruct lawyers or to appreciate properly the case against him) the Court would have no choice but to adjourn, bearing in mind the effect of the authorities cited below. Indeed, RP accepted as much at the trial. In the present case, RP submits that Malhotra's actions are however demonstrative of an unequivocal waiver of his right to personal attendance:[9]

    a) Malhotra was fully aware of the proceedings, having been served before his incarceration;

    b) Malhotra has been provided with all relevant documents in accordance with the various orders made by the Court. One of the procedural safeguards put in place by Mr Justice Phillips in his order of 15 October 2019 was that a letter was to be sent to Malhotra to inform him of the trial dates and his ability to make representations, including to seek to adjourn (which letter was delivered personally by Hadef). Malhotra would therefore have been well aware of the allegations made against him and the trial date, and would have been able to follow the proceedings;

    c) Malhotra was also provided with and read, but refused to accept possession of that letter from Hadef informing him of the proceedings, the trial date and that if he wished to make representations, including any request for an adjournment, he or his legal representatives should attend the hearing or make written representations;

    d) Malhotra has previously instructed lawyers to deal with these proceedings, and has informed Hadef on 10 October 2019 that he had instructed a lawyer to deal with these proceedings in the UK;

    e) Malhotra told Hadef he was aware of the proceedings and Mr al Boausaibah (of Hadef) said Malhotra appeared familiar with them. That is consistent with RP having served all of the documents in the proceedings (i) at his home address (ii) upon his Indian lawyers

[9] Bearing in mind, of course, that whilst Mr Gladkiy would have had to apply for leave to appear, Malhotra would not have needed to do the same (there being no application necessary for attendance before the Commercial Court).

instructed before his incarceration to represent him in these English proceedings and (iii) at the prison itself following advice from Hadef that documents could be received by prisoners by post. Further, in order for him to have been in a position to send his note, he must have been aware of the trial;

f) Hadef's evidence is that Malhotra is able to retain legal counsel from prison if he so chooses;

g) Despite all of this, Malhotra made no attempt to engage with the proceedings until two days before his trial. Even then he failed to communicate in any meaningful way: he did not seek an adjournment (despite Hadef's letter explaining he could do so) or state that he wished to participate in the proceedings or attend trial. While Malhotra's brief message was conveyed via a third party to give the impression that he was being denied access to legal counsel or the outside world, in circumstances where Hadef were able to make an appointment at the prison to see him without any real difficulty, and given Hadef's comments on the (un)likelihood of difficulties actually arising, it is improbable that Malhotra was only able to communicate in the way he did.

53. In those circumstances, RP submitted that Malhotra's failure to engage amounts to a deliberate, informed decision not to participate in the proceedings. He could have informed the Court or RP of difficulties with his participation at any point over the past two and a half years, but did not do so.

54. Further, having been apprised of the hearing date, Malhotra could have responded by informing the Court that he wished to attend but could not, or at least by enquiring whether there were any planned measures to allow him to follow the proceedings. He did not.

55. Accordingly, assuming that the Court considers Malhotra had an Article 6(1) right to personally attend the trial (given the nature of the claims made against him), he has nevertheless waived that right by his conduct.

56. RP submits that where a party has waived their right to participate in proceedings and/or attend trial, there is no need to follow the procedure identified in ***Yevdokimov,*** which is set out above. That case was concerned with the scenario where personal attendance of a party is required and that party wants to attend but cannot.

57. Where a party has waived, there is no purpose in the Court notifying them of the decision to proceed in their absence so as to allow that party an opportunity to decide what further steps to take to protect their position. Indeed, the ***Yevdokimov*** procedure was not followed by the Russian courts in ***Gladkiy***.

58. There may, conceivably, be an intermediate position where the Court *is not* satisfied that the incarcerated party has waived their Art 6(1) rights but *is satisfied* that they have not expressed a wish to attend despite having received notice of the proceedings and trial date. In that situation, it is submitted that the better approach is for the ***Yevdokimov***

procedure to be followed i.e. the party is notified of the Court's decision and given a further opportunity to respond.

My conclusions.

59. In the light of these submissions, I turn to consider the position in this case.

a) First, I conclude that because this is a case of fraud, this is a case in which the Defendant's personal presence is required in order to enable a fair trial to take place. I consider below what is meant by personal presence; in essence, I take the view that the Defendant should be in a position to put his side of the story, albeit that it may not be necessary for this to be done in person.

b) Secondly, I have concluded that, notwithstanding the failure of the Defendant to engage with the proceedings at an earlier stage, he did, in his later letter, indicate a wish to be involved in the proceedings, and an inability to do so. There is clearly a dispute as to whether his evidence as to inability should be believed; but that is a separate issue from the question of whether he wishes to be involved. I also have doubts as to whether, if a fair trial requires the presence of the Defendant, in the sense identified above, it is right to say that such a trial will only be necessary in a case in which the Defendant has positively indicated such a desire; but in the light of my conclusion on the facts I do not need to consider this further.

c) Thirdly, I have concluded that it follows that there has been no waiver of the right to rely on Article 6. It is clear that, in the light of the importance of this right, any such waiver must be clear and unequivocal. I take the view that there has been no such clear and unequivocal waiver in this case.

The Way Forward from here.

60. The question arises as to the appropriate way forward from this point. RP submitted that the Court should proceed to issue a decision on whether:

a) Malhotra's Article 6(1) rights require his personal presence before the Court;

b) Malhotra has expressed a wish to attend; and

c) Even if Malhotra's personal attendance at trial would ordinarily be required, Malhotra has waived his right to attend.

61. I have dealt above with each of these issues.

62. RP then submitted that if the Court decides that there has been no waiver but that Malhotra has not expressed a wish to attend such that it is appropriate to proceed in his absence, the Court should produce a ruling to that effect which should be delivered to Malhotra, via any appropriate delivery method.

63. As I have noted above, it seems to me that Mr Malhotra has indicated a wish to attend.

64. RP then submitted that if I were to conclude that Mr Malhotra's presence at trial would ordinarily be required and he has expressed a wish to participate and attend, the trial and judgment will have to be adjourned to allow the Court and RP to consider what additional steps can be taken to ensure his participation, or establish the fact he has no intention of participating even though in a position to do so.

65. I agree with this submission. Accordingly, directions will have to be given to ensure that the Court can determine, by reference, if at all possible, to independent evidence, the extent to which Mr Malhotra wishes to instruct lawyers, and the extent to which he can, and the extent to which he wishes to participate in the trial and the means by which this can be achieved. This description of what needs to be dealt with at the directions hearing is not intended to be exhaustive.

66. My conclusion on this is not affected by the matters set out in Farrers' letter of 2 April 2020. That is because I take the view that the right to a fair trial cannot be lost by virtue of the practical difficulties, even for a potentially unlimited period, caused by a worldwide pandemic such as the current one. Certainly, I would require to hear far more detailed submissions than those that I have currently received on this point.

67. I would invite the Claimants to arrange a short further hearing at which further directions can be discussed and ordered.