Neutral Citation Number: [2020] EWHC 85 (QB)

Claim No. QB-2018-001043

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd January 2020

Before :

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

- -

Between :

VADIM DON BENYATOV

Claimant

- and -

CREDIT SUISSE SECURITIES (EUROPE) LTD

Defendant

- -
- -

CHARLES CIUMEI Q.C., ANDREW LEGG and NAOMI HART (instructed by **Scott+Scott UK LLP**) for the **Claimant**
PAUL GOULDING Q.C., PAUL SKINNER and EMMA FOUBISTER (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendant**

Hearing dates: 9, 10 and 11 December 2019

- -

Approved Judgment

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

Roger ter Haar Q.C.:

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1. This is the judgment on the Defendant's application under CPR 3.4(2)(a) to strike out the Claimant's claim and/or for summary judgment under CPR 24.2. In the alternative to the dismissal of the claim, the Defendant seeks a conditional order for £1.15 million and/or an order for security for costs.

2. The Claimant claims over £46 million by way of loss of earnings, following his conviction in 2013 in Romania where he worked for the Defendant. The Claimant, who is now resident in the United States of America, claims this sum by way of (i) implied or equitable indemnity; and/or (ii) damages for breach of (a) implied duties in his contract of employment; and/or (b) a duty of care to protect him from economic losses and criminal conviction arising from the performance of his duties as an employee; and/or (c) assurances of support.

3. The application before me lasted two and a half days. Over seventy cases or textbook extracts were cited to me. The length of this judgment is an indication of the difficulty of many of the issues raised. On any view, this is an unusual application for a strike out or summary judgment.

The Facts

4. The Claimant commenced employment on 15 December 1997 as an investment banker with Credit Suisse Group as Head of Russian Oil and Gas, based in Moscow.

5. In 2000 he returned to London to run European Emerging Markets Utilities for the Defendant.

6. In 2001 the Claimant started travelling to Romania for Credit Suisse business.

7. In 2005 the Claimant entered into the contract of employment in effect at all material times. His job title was "Managing Director (class of 2005)". He was to work within the European Energy Group, Corporate & Investment Banking Division.

8. According to paragraphs 27 and 28 of his witness statement the Claimant worked on the privatisation of three companies in Romania before the transaction which led to his downfall.

9. From about 2005 the Claimant began working for the Defendant on the privatisation of the Romanian state-owned S.C. Electrica Muntenia Sud SA. The Claimant and the Defendant were working for a prospective purchaser, Enel SpA, an Italian company. According to the Claimant:

> "This was a standard "buy-side" mandate where we offered support to our Italian colleagues in their work for our client, Enel, primarily by way of on the ground advice. This included, for instance, regular updates on the latest developments in the thinking at the Ministry of Energy, advice on bidding strategy and weekly phone calls to discuss the competitive landscape. In large part due to our advice, Enel won the auction, and were close to completing the purchase at the end of 2006."

10. In about May 2006 the Claimant was promoted to Head of European Emerging Markets. For further background in respect of the period up to his arrest, see paragraphs 26 to 29 of the Particulars of Claim which I have set out at paragraph **94** below.

11. The Claimant described the circumstances of his arrest and detention in paragraphs 38 to 40 of his witness statement:

> "38. In November 2006 I had travelled to Bucharest for two reasons: first to discuss the Romgas and Romtelecom privatisation mandates, and second to help Ministry of Energy officials with their presentation to the new government on the privatisation of Petrom that had taken place a few years previously.
>
> "39. I was staying in the Hilton Hotel in Bucharest. In the early hours of 22 November 2006, I awoke to knocking at my hotel room door. I got out of bed, went to look through the spyhole in the door and was shocked to see masked men with machine guns on the other side of the door. I ran to the telephone and called the operator, who sent security up to my room. Hotel security confirmed that the individuals outside my door were secret police officers with a warrant for my arrest. I put on some clothes and opened the door. I was arrested and immediately led away from the hotel in handcuffs, without having any opportunity to contact my family, colleagues or the US Embassy.
>
> "40. I was detained in a jail in Bucharest for 56 days, over the Christmas and New year period, during which time I was placed in a cell with serious criminals; two were heroin dealers and another was a serial burglar. After that I was placed under 'house arrest' – forbidden from leaving the city of Bucharest – until August 2007."

12. As set out in that passage, the Claimant was arrested on 22 November 2006. On the same day the Defendant arranged legal representation for him.

13. On 24 November 2006 the Chief Operating Officer and General Counsel of Credit Suisse wrote to the President of Romania and the Romanian Minister of Justice seeking a meeting with the Minister.[1]

14. Steps were taken by Credit Suisse to protect their and the Claimant's interests. The Claimant's case is that those steps were inadequate. These steps included the engagement of Clifford Chance Badea (the Romanian associate of the distinguished international law firm) to provide legal services to the Claimant.

15. In August 2007 the Claimant was permitted to leave Romania.

16. In September 2007 the Claimant was charged with espionage and the establishment of an organised criminal group.

17. The Claimant continued in the employment of the Defendant, moving in June 2012 into the Defendant's Fixed Income Division.

18. In November 2013 there were hearings in the Romanian Court, which led to the Claimant's conviction on 3 December 2013. He was then sentenced to 10 years' imprisonment.

19. This was rapidly followed on 5 December 2013 by the revocation by the Financial Conduct Authority in the United Kingdom of the Claimant's status as an approved person.

20. Following the conviction, the Defendant took a number of steps to try to assist the Claimant. These included the engagement of a consultancy firm founded by a former cabinet minister in the last Labour Government. It is a measure of

[1] II/tab 21/157-158

the perception of the political nature of the problems facing both the Claimant and the Defendant that a recommendation was for the Defendant to engage a US statesperson or former senior member of the US administration to engage with the Romanian government on an informal basis.[2] One of the Claimant's complaints is that this was not done.

21. On 1 December 2014 the Defendant wrote to the Claimant and a colleague of the Claimant as follows[3]:

> "We share your frustration at the process to date, your anxiety regarding the final outcome of the case, and your desire to exhaust every appropriate avenue that could enhance the chances of a positive outcome in the case.
>
> "The bank has examined a range of options to support a positive outcome, including the option you alluded to of having a prominent individual express our concerns regarding the irregularities and due process issues of the case, and the signals a decision to uphold the convictions would send regarding the business and judicial climate in Romania.
>
> "The bank has reached a settled view that this type of intervention is not appropriate in advance of a final verdict. There is significant risk that prior to the conclusion of the case, such an intervention could be misconstrued as attempting to influence the Romanian judicial process, with negative consequences for the case outcome and the reputation of the bank. The current Romanian political climate and government transition heightens this risk. Relevant diplomatic stakeholders have advised on the basis of recent events of a similar nature, that it would be unadvisable to pursue such an intervention.
>
> "However, we are exploring options for additional avenues Credit Suisse might pursue in the unfortunate event of a negative decision, such as a presidential pardon, an application to the European Court of Human Rights, and direct representations to appropriate individuals and authorities in Romania, the US, EU and elsewhere on your behalf. Following a verdict, such direct representations would not bear the same risks.

[2] I/tab 4/21/Particulars of Claim, paragraph 38
[3] II/tab 23/334

> "Please be assured that we will continue to provide support to you during these extraordinary circumstances."

22. As I explain in more detail below, the Claimant relies upon this letter as founding a case based upon variations to his contract of employment and/or collateral warranties.

23. Following hearings in December 2014, on 27 January 2015 the Romanian Supreme Court replaced his existing conviction with a new one for the instigation of disclosure of professional secrets or non-public information. The sentence of imprisonment was reduced to 4.5 years.

24. In January 2015 the Claimant moved to the United States of America.

25. On 13 June 2015 the Defendant dismissed the Claimant on grounds of redundancy.

26. On 26 June 2015 the Claimant submitted an appeal for annulment of his conviction. This was funded by the Defendant.

27. On 24 July 2015 an application was made by the Claimant to the European Court of Human Rights in respect of the trial process in Romania. This also was funded by the Defendant.

28. On 20 January 2017 the Claimant submitted a "revision application" to the Romanian court. Again this was funded by the Defendant.

29. On 8 August 2018 the Claimant submitted a further revision application to the Romanian court, again funded by the Defendant.

30. In December 2018 the Claimant submitted "several further appeals for annulment", again at the Defendant's expense.

31. As I understand the position, the appeal processes in the Romanian courts have not yet been exhausted. The application to the European Court of Human Rights has not yet been determined.

32. I should emphasise that the Claimant has at all stages protested his innocence and the Defendant has never suggested that he was wrong to do so.

33. I was told that the Defendant has spent more than £10 million on fees for representation and advice for the Claimant (and his two former colleagues in a similar position) and that the Defendant continues to pay the legal fees for the Claimant's ongoing application to the European Court of Human Rights.[4]

Procedural history in this Court

34. The proceedings were commenced on 22 January 2018.[5]

35. I return below to set out the nature of the claim put forward and the bases upon which it is advanced.

36. The Defence was served on 21 March 2018[6] accompanied by a Request for Further Information. Paragraph 4 of the Defence pleaded:

> "This Defence is without prejudice to the Defendant's contention that the Particulars of Claim, in whole or in part, are liable to be struck out as disclosing no reasonable grounds for bringing the claims therein and/or as an abuse of process, or alternatively to be dismissed as having no real prospect of success."

[4] II/tab 20/143-5
[5] I/tab 3
[6] I/tab 5

37. On 21 May 2018 an extensive Response to Defendant's Part 18 Request for Further Information of the Claim Form and Particulars of Claim made on 21 March 2018 was served. This Response ran to some 34 pages.[7]

38. On 29 May 2018 the Claimant served a Reply.[8]

39. On 5 October 2018 the Claimant served a Response to Defendant's Part 18 Request for Further Information of the Claimant's RRFI dated 21 May 2018 and Reply dated 29 May 2018.

40. On 22 March 2019 there was a Case Management Conference. In preparation for that CMC counsel for the Defendant submitted a skeleton argument. This made no suggestion of any application to strike out the claim. On the contrary the proposals contained in the skeleton argument clearly contemplated the case proceeding to trial:

(1) The introduction recorded in paragraph 1 that[9]:

> "There is a significant measure of agreement between the parties as to the directions that are necessary at this stage for the management of this litigation …. "

(2) Section D dealt with the scope of expert evidence. It contained the following (emphasis added)[10]:

> "28. The parties are agreed that this case will require expert evidence, but do not agree in relation to the scope of such evidence:
>
> "28.1 The risks of doing business in Romania between 1 January 2005 to 22 November 2006, in particular the risk of covert surveillance, the risks of wrongful and politically

[7] I/tab 6
[8] I/tab 7
[9] II/tab 23/241
[10] II/tab 23/249

> motivated criminal proceedings being brought against foreign businessmen and the extent to which any such risks were publicly known, reasonably discoverable and could be mitigated by businessmen and/or their employers working in Romania during this period;
>
> "28.2 The steps that could effectively be taken in Romania from 22 November 2006 (the Claimant's arrest) to date to have an investigation or criminal proceedings discontinued, overturned or otherwise nullified.
>
> "28.3 The remuneration of senior finance professionals.
>
> "29. **The parties agree that expert evidence will be required in respect of the first of these (albeit) the Claimant seeks to elide the first and second topics** and thereby extend the time in relation to which the first topic would need to be addressed). The Defendant submits that expert evidence is not reasonably required to resolve the proceedings on either the second or third of these topics".

41. I am told that at the end of the hearing leading counsel then appearing for the Defendant gave some warning that a strike out application might be made.

42. The Master gave permission to adduce expert evidence in accordance with paragraph 28.1 of the Defendant's counsel's skeleton argument[11]. Directions were given towards a trial with a trial window opening on 2 June 2020[12].

43. At the end of the March CMC there were various matters left outstanding, including issues as to the parties' costs budgets. Accordingly a Costs and Case Management Conference was listed for 3 July 2019.

44. On 10 June 2019, the Defendant filed and served the application which I am currently considering. That application having been filed, Master Davison released the hearing of the application to a Judge and indicated that any other case management issues should not be dealt with before the application.

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[11] I/tab 14/125
[12] I/tab 14/126

45. On 9 October 2019 Moulder J. directed (amongst other directions) that the trial date should be vacated.[13]

46. Counsel for the Claimant have helpfully set out in detail the principles applicable to strike out and summary judgment, and I gratefully accept and adopt that exegesis.

Summary judgment

Proper approach and legal test

47. The Defendant's Application Notice[14] seeks an order for summary judgment pursuant to CPR 24.2, which provides as follows:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
>
> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; …
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.
>
> (Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim.)"

48. CPR 24 is supplemented by CPR PD24, which includes further procedural requirements applicable to summary judgment applications in paragraph 2. Sub paragraph (3) thereof provides as follows:

> "(3) The application notice or the evidence contained or referred to in it or served with it must -

[13] I/tab 18/137
[14] I/tab 1/1

(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial."

49. The burden of proof rests on the applicant, see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [9] and White Book 2019 at 24.2.5, by reference to CPR PD24 para 2(3).

Meaning of "No real prospect of succeeding"

50. The Court of Appeal confirmed in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24] that the proper approach to be taken by the Court on summary judgment application is conveniently summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. Relevant considerations include the following:

(1) The court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

(2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

(3) In reaching its conclusion the Court must not conduct a "mini-trial": *Swain v Hillman*;

(4) In reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

(5) If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success.

51. Complex claims, cases relying on complex inferences of fact, and cases with issues involving mixed questions of law and fact where the law is complex are likely to be inappropriate for summary judgment: see *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 (HL) at [95] *per* Lord Hope. A trial "can often produce unexpected insights" and "a judge will often find that his first impression of a case, when reading into it, is not the same as his final conclusion": see *Playboy Club London Ltd v Banca Nazionale del Lavora SpA* [2019] EWHC 303 (Comm) at [26].

52. Further, the general rule (which can be called the "*Altimo*" principle", based on *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [2012] 1 WLR 1804, see [84] and the authorities there cited) is that it is not normally appropriate in a summary procedure such as an application to strike out or for summary judgment to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be

found so that any further development of the law should be on the basis of actual and not hypothetical facts. Further, a summary procedure ought not to be applied to an action involving serious investigation of ancient law and questions of general importance. Where the law is not settled but is in a state of development it is normally inappropriate to decide novel questions on hypothetical facts.

53. Where disputed issues are such that their conclusion largely depends upon the expert evidence relied on by each side, an application for summary judgment will usually be inappropriate particularly where the exchange of experts' reports has not yet occurred and joint statements of the experts have not yet been produced: see *Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB) [45]-[50].

54. When deciding whether the respondent has some real prospect of success the Court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented: see *Royal Brompton Hospital NHS Trust v Hammond (No.5),* [2001] EWCA Civ 550 [18] and [82] *per* Aldous L.J. and [109] *per* Clarke L.J.. Indeed, "nothing like a probability of success" is required: see *Playboy Club London Ltd v Banca Nazionale del Lavora SpA* [2019] EWHC 303 (Comm) at [13].

Meaning of "No other compelling reason [for] a trial"

55. The word "compelling" was added in July 2000, although the White Book 2019 at para 24.2.4 confirms that "Although the inclusion adds clarity to the ambit of summary judgment it does not appear to alter it in substance". The

rule gives the Court discretion to consider whether the particular reasons in the case justify a trial where one otherwise may not be considered appropriate.

56. Where the case has or may have wider ramifications beyond its particular facts that can provide a compelling reason for a trial. In *A C Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [35], the Court of Appeal upheld a refusal to rule upon a short point of construction of the terms of an insurance contract where those terms were said to be standard terms which were widely used in the insurance market (amongst other reasons for rejecting the submission that there was no prospect of success).

Strike out

57. As a preliminary matter, the Court of Appeal explained in *Partco Group Ltd v Wragg* [2002] EWCA Civ 594 at [28] that:

> "If an application involves prolonged serious argument, the court should, as a rule, decline to proceed to the argument unless it harbours doubt about the soundness of the statement of case and is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of the trial itself".

58. The Defendant's Application Notice seeks an order to strike out the claim under CPR 3.4(1)(a) and (b), but presumably it means under CPR 3.4(2)(a) and (b), which provide as follows:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;"

59. These principles are expounded further in CPR PD3A, paras 1.4 and 1.5 of which provide as follows:

> "1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):
>
> (1) those which set out no facts indicating what the claim is about, for example "Money owed £5,000",
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
>
> 1.5 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded."

No reasonable grounds for bringing the claim

60. The following principles are relevant to this head of CPR 3.4(2):

(1) In *Biguzzi v Rank Leisure Plc* [1999] 1 W.L.R. 1926 at 1932-1933 *per* Lord Woolf MR, the Court of Appeal referred to strike out as a "draconian" step: the striking out of a valid claim should only be taken as a last resort.

(2) In a strike-out application the proportionality of the sanction is very much in issue; see *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 at [44].

(3) If the Court is able to say that a case is "unwinnable" such that continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides it may be struck

out: see *Harris v Bolt Burdon* [2000] C.P. Rep. 70; [2000] C.P.L.R. 9 at [27].

(4) An application to strike out the claim should not be granted where there are significant disputes of fact between the parties going to the existence and scope of an alleged duty of care unless the court is "*certain*" (emphasis in original) that the claim is bound to fail: see *Hughes v Colin Richards & Co* [2004] EWCA Civ 266; [2004] P.N.L.R. 35 at [22].

(5) Where "the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or is in any way sensitive to the facts, an order to strike out should not be made": per Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 694B.

(6) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways*, The Times, 26 January 2000, CA at [42] referring to *Barrett v Enfield BC* [2001] AC 550 (see 557) and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at page 741.

(7) A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence: see *Bridgeman v McAlpine-Brown* 19 January 2000, unrep (CA) at [24].

Abuse of process or otherwise likely to obstruct just disposal

61. Paragraph 3.4.3 of the White Book 2019 says: "Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use" (*Attorney General v Barker* [2000] 1 F.L.R. 759, DC, per Lord Bingham of Cornhill, Lord Chief Justice)."

62. Examples of abuse of process arguments are given in paragraph 3.4.3 of the White Book 2019, but none of them have any relevance to the present case, for example where litigation is conducted in a manner designed to undermine the object of a fair trial (such as relying on forged documents and perjured evidence), or where matters are already *res judicata*, or the claim involves a collateral attack on a previous decision or is of such limited value to the Claimant that "the game is not worth the candle". None of these have any relevance to the present case.

Overlap between summary judgment and strike out

63. A statement of case which discloses no reasonable grounds may also be an abuse of the court's process, and may also justify summary judgment. As seen from the above discussion of the relevant legal principles, there is no exact dividing line between strike out and summary judgment, and some similar considerations apply to both, although there are different considerations relevant to each.

Timing of any such application

64. As to the timing of any such application, pursuant to para 2.7 of CPR PD 23A generally, "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it".

65. The timing of summary judgment or strike out applications are dealt with specifically in CPR 26PD, para 5.3(1), and CPR PD 3A para 5.1, which provide respectively that:

> "5.3 (1) A party intending to make such an application [under CPR 3.4 or 24] should do so before or when filing his directions questionnaire."
>
> and
>
> "Applications for orders under rule 3.4(2)
>
> 5.1 Attention is drawn to Part 23 (General Rules about Applications) and to Practice Direction 23A. The practice direction requires all applications to be made as soon as possible and before allocation if possible."

Procedural objections to the application to strike out and for summary judgment

66. Before turning to the substance of the applications before me, I should deal first with some procedural matters raised by the Claimant.

67. Firstly, it is said that contrary to the requirements of CPR PD24, there is no concise statement of any point of law or provision in a document on which the applicant relies or other grounds in support of its summary judgment/strike out application.

68. As to this point, it seems to me that the witness statement of Ms. Maria Banks which accompanied the application sufficiently set out the nature of the applications and the grounds for the applications.

69. Further, by the time that the matters were argued before me it was clear that the Claimant's counsel fully understood the way in which the applications were being put. Accordingly, there is no strength in this objection.

70. Secondly, it is said that the application is Delphic in brevity and that the only parts of the Particulars of Claim to which Ms Banks specifically took objection were addressed in the Claimant's application to amend.

71. As a matter of procedure, I think that this objection has some substance. However, I am satisfied that by the time the hearing took place, the Claimant's counsel well understood what was being sought and were well able to respond to the application.

72. Thirdly, it is said that the applications were made after undue and wholly unexplained delay.

73. As paragraphs 64 and 65 above record, the CPR require applications such as these to be made promptly, and certainly by the date of any Case Management Conference.

74. There were undoubtedly significant delays in this matter. Mr Goulding attempted to explain these delays by reference to the Requests for Further Information and steps concerning cost budgeting[15], but I did not find those explanations convincing or sufficient.

75. I note that in the witness statements of Ms Banks which were placed before me there was no explanation of the delay in making the present applications.

[15] See for example Transcript Day 3/pages 126-127

76. I have drawn attention at paragraph 40 above to the information placed before the court on the CMC indicating agreement that there should be expert evidence (albeit that the scope of that evidence was in some measure disputed) and that the window for the hearing of the case should be fixed.

77. None of this was consistent with an intention at that stage for applications for summary judgment or strike out being made. At that stage Mr. Goulding was not acting for the Defendant, but the Defendant was represented by leading and junior counsel of great distinction.

78. Mr. Goulding referred me to one authority as to the approach of the court where there has been delay in making an application for summary judgment.

79. The case relied upon was *Brinks Ltd v Abu-Saleh* [1995] 1 W.L.R. 1478. In that case Jacob J. said (at pages 1480H -1481H):

> "What then is the rule as regards delay and Order 14? It is said that the plaintiffs have delayed so much, and the case is so close to trial, that I should regard the application as an abuse of process. Now it is true that normally plaintiffs use Order 14 shortly after they commence proceedings, normally, but not always, before a defence is filed. But there is nothing in the rules precluding an application at a later stage in the proceedings. I do not see why delay, of itself, should be a relevant matter. If there is no "defence to the claim" or the defendant cannot show that there is an "issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim" then delay can make no difference. Of course in some circumstances delay in proceeding summarily, coupled with an adoption of the procedures for full trial, may well suggest a weakness in the plaintiff's case or may even suggest some other reason for trial. But it would be that weakness or reason, not the delay itself, which led to refusal of the application. Moreover the plaintiff may well, having indicated an intention to go to full trial and then having incurred his own costs and caused the defendant to incur his in going down that route, have to suffer a penalty in costs if he brings his Order 14 application late. But otherwise I can see no objection to a late application for judgment under

> Order 14. Indeed, in some cases, and I think this is one, its use may be commendable as saving both the extra costs and time involved in a full trial. If these defendants truly have no defence it is worse than pointless for them to be present at the trial, which will be complex enough without them. The plaintiffs are right to clear the decks as far as possible before trial."

80. That case was under the old, pre CPR, rules. Mr Goulding told me that he had not been able to find any equivalent dictum in any case under the new rules.[16]

81. In my view I should approach the application of that case to the present with some caution since, as set out at paragraphs 64 and 65 above, the CPR now contain specific provisions which require such applications to be made promptly.

82. However, there appear to me to be points in that judgment which are still relevant.

83. Firstly, if a judge on applications such as those now before me forms the view either that there is no defence to a claim (the position being considered by Jacob J.) or that a claim has no realistic chance of success (the argument before me) then court time should not be wasted on hearing the evidence nor should costs of trial be incurred unnecessarily.

84. Secondly, in many cases a late application may result in an adverse costs order being made against the applicant, even if otherwise successful.

85. But, thirdly, the fact that an application is made late may be telling as to the true view of the applicant as to the merits of the application being made.

[16] Transcript/day 3/page 126

86. There is another point not made by Jacob J., particularly where the target of an application for summary judgment is an individual litigant rather than a corporation, namely that a court should be reluctant to deny that litigant his or her day in court when the other party's conduct has caused that litigant to believe that there would be a day in court.

87. In this case the Defendant, with all the resources of one of the world's most distinguished financial corporations at its disposal, and advised and represented by counsel and solicitors at the top of their professions, waited without any adequate explanation before making its applications. By its actions it led any reasonable observer (and the Court when giving directions at the CMC on 29 March 2019[17]) to believe that a trial would take place at which expert evidence would be heard.

88. Those actions are inconsistent with a firmly held belief that there was no part of the claim made which should go to trial.

89. In those circumstances it seems to me that I should be particularly circumspect about accepting submissions that the case should not go forward to trial.

90. That said, as set out below, I have come to the conclusion that there are parts of the case as presently pleaded which should not be permitted to go to a full trial on the evidence.

Mandatory injunction and specific performance

91. The Particulars of Claim as presently drafted contain at paragraph 59 a claim for a mandatory injunction and specific performance.

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[17] I/tab 14

92. The Claimant accepts that these claims will not be pursued.

The Pleaded Causes of Action

93. The Particulars of Claim presents the claim under the following heads:

(1) Obligations under the contract of employment with the Defendant;

(2) Obligations under the letter dated 1 December 2014;

(3) Obligations arising from oral assurances;

(4) Duties of Care in tort.

94. The following background facts are pleaded in paragraphs 26 to 29 of the Particulars of Claim which seem to me to be relevant to all the ways in which the case is put forward:[18]

> "26. At all material times, Mr. Benyatov was an employee in good standing with the Defendant who faithfully and diligently served the Defendant. In particular:
>
> "26.1 It has never been suggested by the Defendant that in relation to his work in Romania he acted otherwise than within the limit of his instructions and authority at all times.
>
> "26.2 He was paid his salary in accordance with Clause 3; and received bonuses until 2011 in accordance with Clause 4.
>
> "27. From about 2001 onwards, Mr. Benyatov was required by the Defendant to visit and carry out work in Romania pursuant to clauses 8 and 9 of the Contract. He was involved on behalf of the Defendant in providing advisory services and access to capital in respect of various substantial transactions in Romania, including in particular privatisations of Petrom and Distrigaz (which were state-owned energy companies).
>
> "28. From about 2005, Mr. Benyatov worked for the Defendant on the proposed privatisation of another Romanian state-owned company: S.C. Electrica Muntenia Sud SA. The

[18] I/tab 4/19-20

> Defendant was acting for the eventual purchaser, Enel SpA, an Italian Company.
>
> "29. Unknown to him at the time, during his work for the Defendant in Romania, Mr Benyatov was the subject of covert surveillance by Romanian security forces along with two other of the Defendant's employees, various Romanian officials and other non-Romanian citizens. A criminal investigation was instigated against him and others in or about 21 November 2006."

95. As I set out below, a draft amended pleading has been placed before the Court, but I consider first the pleading in its unamended form.

Obligations under the contract of employment with the Defendant

96. Paragraphs 19 to 21 of the Particulars of Claim plead:[19]

> "19 The following terms were implied into the Contract as a matter of law, fact or business efficacy. At all material times, the Defendant owed to Mr. Benyatov the following duties:
>
> "19.1 To indemnify Mr Benyatov in respect of all losses, costs, expenses and claims he has suffered arising from or in consequence of performing his duties on its behalf. This obligation continues after the termination of the Contract in respect of the duties performed by Mr Benyatov as an employee and/or agent of the Defendant.
>
> "19.2 Not, without reasonable and proper cause, to act so as to destroy or seriously damage the trust and confidence between employer and employee;
>
> "19.3 To support Mr Benyatov in the performance of his duties;
>
> "19.4 To protect and safeguard Mr Benyatov from obvious risks to his safety and well-being arising as a consequence of the performance of his duties;
>
> "19.5 To take every step to assist and support Mr. Benyatov in ameliorating the effect of any sanction imposed on him as an individual in consequence of the performance of his duties under the Contract, save in circumstances (which do not apply here) where it was terminated for gross misconduct.

[19] I/tab 4/15-16

> "19.6 Alternatively, it was an implied term that the Defendant would not terminate the Contract so as to deprive Mr. Benyatov of the benefit of the terms in the preceding paragraph 19.5[20].
>
> "19.7 To exercise any contractual discretion rationally, reasonably (i.e. not contrary to the *Wednesbury* standard) and/or giving due consideration to[21] Mr. Benyatov's legitimate expectations. For the avoidance of doubt, it is contended that this obligation applied to the exercise of any discretion about matters previously governed by or arising in consequence of the performance of the Contract even after its termination.
>
> "20. Further or alternatively, the obligation to indemnify Mr. Benyatov under paragraph 19.1 in all the circumstances arises in equity.
>
> "21. Pursuant to Section 6 of the Human Rights Act 1998, the above obligations must be interpreted and applied by the Court in a way that is compatible with Article 8 of the ECHR (respect for private and family life) and Article 1 of Protocol No. 1 (peaceful enjoyment of possessions)."

Indemnity

97. The claim at paragraph 19.1 of the Particulars of Claim is a claim to be entitled to an indemnity. The indemnity sought is set out at paragraph 55 of the Particulars of Claim as follows:[22]

> "In consequence of the foregoing breaches of contract and/or of equitable duties and/or duties of care, Mr. Benyatov has suffered and continues to suffer loss and damage, in respect of which he is entitled to indemnification and/or damages, including the following:
>
> "55.1 Lost income as a result of being unable to work as a senior finance professional since the termination of his employment on 13 June 2015 to date. Mr Benyatov's expected average earnings as a senior finance professional without having been convicted in Romania would have been on average US$3-5m, and higher if all had gone well. Using the figure of US$4m, his lost income for the two years since the end of his employment is approximately US$8m, or £6m;

[20] The pleading refers to paragraph 19.4, but this is a clear error.
[21] The original pleading says "in accordance with" Mr. Benyatov's legitimate expectations, but the Claimant has since reformulated this paragraph
[22] I/tab 4/25-26

> "55.2 Lost future income as a result of being unable to work as a senior finance professional in the future. Mr Benyatov's future loss of earnings for the next 13 years (until Mr Benyatov is 65 years old) equates to approximately US$52m, or £39m at current exchange rates;
>
> "55.3 A failed property transaction in London in September 2015, whereby Mr Benyatov was unable to obtain mortgage finance to complete purchases of Plots 46 (a 3-bed penthouse at £1.55m) and 47 (2 bed at £0.9m) Amberley Waterfront, W9 2JY, because of his convictions. Mr Benyatov lost £145,000 of the deposits paid, and costs and expenses of approximately £80,000. Mr. Benyatov had plans to develop these properties into a single unit, which would have a present value of approximately £3.5m. Accordingly, Mr. Benyatov has lost the difference in value of the purchase price and the current value of what would have been the developed property, minus development costs of approximately £100,000, resulting in a total loss of approximately £950,000."

98. In respect of the claim for an implied right to indemnity as a term of the contract, the Defence pleads at paragraph 15.1:[23]

> "As to paragraph 19.1, it is admitted that there was an implied duty on the Defendant to indemnify the Claimant in respect of expenses and liabilities reasonably incurred by him in carrying out his duties as the Defendant's employee and within the scope of his authority. Paragraph 19.1 is otherwise denied. More particularly, it is denied that the Defendant had any or any implied obligation to indemnify the Claimant in respect of losses, costs, expenses or claims incurred by him as a result of, or arising from the acts of third parties or other intervening acts, whether wrongful or otherwise, including, for the avoidance of doubt, the events in Romania complained of by the Claimant."

99. Accordingly, it is common ground that some right to indemnity was implied into the Claimant's contract of employment. The issue between the parties is, what is the extent of that indemnity?

100. Both parties referred me to textbook authority both in respect of the indemnity to which an employee is entitled and that to which an agent is entitled.

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[23] I/tab 5/33

101. In the 33rd edition of Chitty on Contracts at paragraph 40-114 the learned editors say this:

> **"Duty to indemnify the employee**
>
> "The relationship of employment imposes a duty on the employer to indemnify or reimburse the employee against all expenses, losses and liabilities incurred by the employee in the execution of his employer's instructions or within the authority granted to him by the employer, or during the reasonable performance of his employment. Thus an employer who failed to insure his vehicle in respect of third party risks was obliged to indemnify his employee who drove the vehicle in the course of his employment and who was held liable to a third party injured by his negligent driving. Nor, it was held in *Reid v Rush & Tompkins Group plc*, is the employer under any implied obligation to advise an employee working overseas to arrange his own insurance cover against accidents. But there is no general duty to keep the employee insured against all third party risks or to indemnify the employee against liability for his or her own negligence. Ancient authority suggests that if the act or omission of the employee was manifestly unlawful, he or she is not entitled to such an indemnity; but he may still be entitled to an indemnity from his employer if the act was apparently lawful or he was ignorant of the facts which made it unlawful and could not be presumed to know that the particular transaction was unlawful."

102. In that passage, the word "nor" at the beginning of the sentence dealing with the *Reid* case, to which I refer below, reads somewhat oddly, as also does the word "but" at the beginning of the next sentence. A matter for consideration raised by that passage is the overlap between an employer's obligation to indemnify and an employer's obligations in tort.

103. In the Employment section of Halsbury's Laws of England at paragraph 39 is the following statement of principle:

> "An employer is under an implied duty to indemnify or to reimburse the employee, as the case may be, against all liabilities and losses and in respect of all expenses incurred by the employee either in consequence of obedience to his orders, or incurred by him in the execution of his authority, or in the

> reasonable performance of his duties of his employment. Notwithstanding the fact that an employee was acting in the course of his employment, he may lose his right of indemnity or reimbursement where the liabilities or expenses did not arise out of the nature of the transaction which he was employed to carry out, but were solely attributable to his own default or breach of duty, or where, by reason of his conduct, he has forfeited his right to receive any remuneration for his services.
>
> "If the employer requires the employee to perform an act which, unknown to the employee, is unlawful[24], the employee is entitled to be indemnified by the employer against any damage suffered in consequence of its unlawful nature.[25], Even where the transaction is *prima facie* unlawful, he is entitled to his indemnity if he was led to believe by the employer, and was justified in believing, that in the circumstances of the case the transaction was one in which he might lawfully engage …."

104. As I have said, I was also referred to passages from textbooks relating to the position of agents. Of those references, I need only set out the following from Article 62 in the 21st Edition of Bowstead on Agency:

> **"Reimbursement of Expenses and Indemnity from Liabilities Incurred in Course of Agency**
>
> "7-057 Subject to the provisions of Article 63, every agent has a right against his principal to be reimbursed all expenses and to be indemnified against all losses and liabilities incurred by him in the execution of his authority: and where the agent is sued for money due to his principal, he has a right to set off the amount of any such expenses, losses or liabilities, unless the money due to the principal is held on trust. There is, it seems, no implied indemnity in respect of loss suffered by an agent

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[24] At this point, footnote 3 to the passage in Halsbury says:

> "It is an implied term of the contract of employment that the employer will not order the employee to do an unlawful act …."

[25] At this point, footnote 4 to the passage in Halsbury says:

> "*Gregory v Ford* [1951] 1 All ER 121 (employer required employee to drive vehicle not covered by third party insurance; third party injured by employee's negligence; implied term in contract of employment that employer would comply with statutory provisions as to motor vehicle insurance; employee entitled to recover from employer damages and costs which he was liable to pay to third party; employer not entitled to indemnity from employee). See also *Coulson v News Group Newspapers Ltd* [2012] EWCA Civ 1547; [2013] IRLR 116 (agreement following termination included clause guaranteeing indemnity for legal expenses properly incurred by employee as a result of his employment; there was nothing in the criminal nature of the judicial proceedings that did arise to have rendered it objectionable for such an indemnity to have been applied). …."

> from torts committed against him by third parties in the course of the agency.[26]
>
> **“Comment**
>
> “7-058 The rule here given is normally stated in such general terms, but its juristic basis may require attention. In the nineteenth century, actions at law were based on the common count for money paid, and it was not often necessary to distinguish between contractual and what would now be called restitutionary claims. At the present day it could matter how the claim was classified in a particular case.
>
> **“Contract**
>
> “7-059 Where the agency agreement is contractual, the agreement to reimburse and indemnify in return for what had been requested, if not express, can be regarded as an implied term of the contract that operates unless clearly excluded. There is thus no difficulty in such cases in holding that the principal is liable to reimburse and indemnify the agent for all payments made and liabilities incurred within the agent’s express or implied authority. This would include not only payments that the principal is legally bound to make, but also payments which the agent is legally bound to make though the principal would not be liable for them, cases where the agent is bound by the usage of a market, cases where the agent makes an authorised but gratuitous payment on the principal’s behalf, cases where the agent makes a payment which could not have been enforced but which there is a strong and legitimate pressure to make, cases where the agent, though under a liability, has as yet not had to meet it, and cases where a payment is reasonably but mistakenly made by the agent. Cases where the agent acts beyond his instructions, or interferes without request, would not however be included.”

105. As is said in paragraph 7-058 of that passage, “the rule here given is normally stated in such general terms”. The issues in the case before me require the Court to drill down to see what limits the law places upon the right to indemnity. This is not easy on the authorities.

106. For the Defendant, Mr. Goulding Q.C. puts forward seven propositions:

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[26] This sentence ends with footnote 356 which cites the decision of the New South Wales Court of Appeal in *National Roads and Motorists’ Association v Whitlam* [2007] NSWCA 81 as authority.

(1) There is an indemnity implied in law into contracts of employment or agency unless expressly excluded;

(2) This implied indemnity imposes on an employer or principal a duty to indemnify the employee or agent in respect of expenses and liabilities reasonably incurred by him in carrying out duties within the scope of his employment or agency;

(3) It covers payments made or to be made to third parties, but does not cover consequential financial losses of the type claimed by the Claimant. In particular, it does not cover financial losses caused by the acts of third parties, wrongful or otherwise;

(4) Where there is an indemnity implied as a matter of law into the contract, there is no scope for a wider indemnity implied in fact;

(5) Alternatively, any indemnity implied in fact would have to satisfy the test for implication of terms into a contract, which is laid down in *Marks & Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742, where there are three conditions for implication: (i) that the term is reasonable and equitable; (ii) that it is necessary to give business efficacy or so obvious that it goes without saying; and (iii) that it is capable of clear expression;

(6) An indemnity in equity may arise from particular relationships, but there is no scope for it where the parties are in a contractual relationship, and an indemnity is implied in the contract;

(7) Even if there was scope for an equitable indemnity where the parties are in a contractual relationship, the scope and content of that indemnity would be governed by the contract.

107. Of these seven propositions: (1) and (2) are not in dispute; (3) is very much in dispute, and requires detailed consideration; I accept proposition (5), which qualifies proposition (4); and I agree with propositions (6) and (7).

108. In support of proposition (3), Mr. Goulding does not refer to any English authority relating to indemnities, although he does refer to an Australian decision, to which I return below. He does, however, rely upon three English cases as to the scope of the duty of care owed by an employer to an employee.

109. The first is *Reid v Rush & Tompkins Group plc* [1990] 1 W.L.R. 212 ("*Reid"*). In that case, whilst driving his employer's Land Rover in Ethiopia in the course of his employment, the plaintiff suffered severe injuries in a collision caused solely by the negligence of the driver of the other vehicle, whose identity was not known. Having been unable to recover any compensation for his injuries, the plaintiff brought an action against the defendant for damages in respect of the economic loss which he had suffered in being unable to recover such compensation, alleging that the defendant had been (i) in breach of implied terms of the contract of employment that it would take out appropriate indemnity insurance cover for the plaintiff, or alternatively that it would, prior to his departure for Ethiopia, advise the plaintiff of any special risks and that he should obtain such insurance cover; and (ii) negligent in failing to discharge its duty of care as employer to protect the plaintiff's economic welfare by providing appropriate insurance cover or advising him to

obtain such cover, and in failing to discharge the responsibility which it had undertaken by virtue of the relationship between them so to advise the plaintiff. The claim was struck out by a Master as disclosing no reasonable cause of action. That decision was upheld on appeal first by a deputy High Court Judge and then on appeal by the Court of Appeal.

110. Ralph Gibson L.J. gave the leading judgment, held at page 227D-228F that neither of the implied terms alleged were to be implied. He also rejected the claim based upon alleged duties of care in tort, saying at page 221F-H:

> "The position is, accordingly, that although the duty of a master to his servant may extend to warning him of unavoidable risks of physical injury, it has not hitherto been extended to the taking of reasonable care to protect the servant from economic loss. Apart from *Deyong v Shenburn* [1946] K.B. 227 and *Edwards v West Herts Group Hospital Management Committee* [1957] 1 W.L.R. 415, which were mentioned in argument, we were not referred to any case in which the court has considered and rejected any such claim and no doubt the reason for that is not only the limitation of the duty, as stated, to personal safety but also the fact that it must be rare for any matter of economic loss to have been arguably caused by a breach of duty of the master without it being a breach of contract. If a servant is to have a claim in tort against his employer in respect of economic loss it must be based upon some special factor in the circumstances or in the relationship between them which justifies the extension of the scope of the duty to cover such a claim or upon a separate principle of the law of tort which imposes such a duty."

111. He also rejected the suggestion that the employer had voluntarily assumed responsibility going beyond the normal relationship of employer and employee, and continued by considering the general duty of the defendant as employer, concluding at page 231E-F:

> "I have had much difficulty in concluding that the general duty at common law upon a master to take care for the protection of his servant's physical well being cannot be extended by decision of the courts to include protection for the financial

> well being of his servant in special circumstances where the foreseeable financial loss arises from foreseeable physical injury suffered in the course of the employment and the duty would extend only to a warning of a special risk. If this view be right the only way in which an employer's general duty of care – and I emphasise that I am referring only to the general duty of care which arises out of the relationship – will be capable of extension to cover financial loss will be by legislation, or by a contractual term, express or implied on the particular facts, or by a term which the court is able to say must be implied by law."

112. At page 232C-F Ralph Gibson L.J. emphasised the difficulty of holding a duty of care to exist where such a duty was not contained in any express or implied term of the contract of employment.

113. It is important to note that the decision in *Reid* arose in the context of alleged obligations to warn about lack of insurance. That context is emphasised in the passage of Ralph Gibson L.J.'s judgment at page 223G-H:

> "….it is not necessary to decide whether …the plaintiff would have demonstrated an arguable case for showing that it would be just and reasonable to impose the new duty necessary for the plaintiff's case. There are, I think, substantial difficulties when consideration is given to the current legislation to which I have already referred. In a number of contexts Parliament has legislated to protect people from the risks of uncompensated injury. Compulsory employer's liability insurance has been imposed. Save for certain limited exceptions that duty does not extend to employment out of this country. Even in the limited and modest terms of a duty to warn it might be difficult to impose by judicial decision a duty on employers in respect of their servants working abroad, which relates to loss through injuries suffered where the employer is not responsible, having regard to the fact that Parliament has not imposed an obligation to insure even in respect of injuries for which the employer would be liable."

114. Next, Mr. Goulding referred to the decision of the Court of Appeal in *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408; [2016] 1 W.L.R. 4487 ("*Greenway*"). The first question was whether on the facts of the case the claimants had suffered physical injury in a case where the claimants were

employed by the defendant at chemical plants on processes resulting in their exposure to platinum salts to a greater extent than they should have been. Medical evidence was that an individual who had been sensitised to platinum salts was not limited in any way in the course of his life, except that he had to avoid circumstances for further exposure with the risk of progressing to full blown platinum allergy. The Court of Appeal held that there was no actionable physical injury. The Supreme Court later overruled the Court of Appeal on that issue ([2018] UKSC 18; [2019] A.C. 403). For Mr. Goulding's purposes, what matters is what the Court of Appeal decided upon the basis that there had not been any physical injury.

115. At paragraph [37] Sales L.J. said:

> "… The classic formulation of the duty owed by an employer to an employee is focused on protection of the employee from physical injury, not protection from economic harm (albeit if there is physical injury then damages may be recovered for consequential loss of earnings), and this is true in both contract and in tort … Having regard to the general policy reasons which inform the analysis of whether a standard term or duty of care should be implied into a contract of employment, in my view the proposed term or duty to hold the employee harmless from economic loss should not be taken to be implied."

116. He rejected submissions that certain terms should be implied (see paragraphs [38] and [39]) and said, at paragraph [49]:

> "Where the nexus between parties is founded in a contractual relationship, as here, it is the contract which they have made with each other which is the primary source and reference point for the rights they have and the obligations they owe each other. Although a duty of care in tort may run in parallel with the contractual duty and have the same content, it is difficult to see how the law of tort could impose obligations in this area which are more extensive than those given by interpretation of the contract which the parties have made for themselves. The usual rule is that freedom of contract is paramount, and if the parties have agreed terms to govern their relationship which do

> not involve the assumption of responsibility for some particular risk, the general law of tort will not operate to impose on the employer an obligation which is more extensive than that which they agreed."

117. Mr. Goulding also referred to the decision of the Supreme Court in *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40; [2018] ICR 1353 ("*James-Bowen*"). I shall return to this case in other contexts below, but I did not find it of assistance in determining the scope of the implied right to indemnity.

118. Mr. Goulding's short point on these three cases is that if there is an implied right of indemnity of the width contended for by the Claimant, the reasoning in all of these cases would be otiose, since in each case the Claimant(s) could simply have claimed an indemnity for losses arising out of their employment, without having to seek to establish an implied term or duty to take care to avoid financial loss.

119. That tension emerges clearly from the decision of the New South Wales Court of Appeal in *National Roads and Motorists' Association v Whitlam* [2007] NSWCA 81 ("*Whitlam*"): this is the case which I have referred to at footnote 26 above as being the authority cited by Bowstead for the proposition that "there is, it seems, no implied indemnity in respect of loss suffered by an agent from torts committed against him by third parties in the course of the agency."

120. In that case the respondent, Mr. Whitlam, had been President of the appellant association. In the course of his duties as President, Mr. Whitlam participated in a recorded television interview with Mr. John Lyons, a journalist from Channel Nine. The recording of the interview was not transmitted in its entirety. Rather, it was edited, and Mr. Whitlam's words were interspersed

among statements and comments by other people. Mr. Whitlam took the view that the programme that went to air changed the meaning of what he had said, and was defamatory of him. The alleged defamatory remarks were later repeated on Channel Nine and on a radio station, 2GB.

121. Mr. Whitlam sued both 2GB and Channel Nine for defamation. In those proceedings he incurred legal expenses. In the proceedings with the association Mr. Whitlam was claiming an indemnity in respect of those legal expenses.

122. There was an express indemnity in his contract. The provisions were quite complicated, but put shortly the issue for the Court was whether there was a "liability" which was defined as "any loss, liability, cost, charge or expense".

123. The submission which the court had to consider was that damage to reputation and consequential loss of earning capacity and injury to feelings were the type of "loss" that fell within the indemnity.

124. The reasoning of the court led it to consider the scope of an indemnity under the general law. It was the submission of counsel for Mr. Whitlam that there is a general principle of law that a person acting on behalf of another is entitled to be indemnified for loss that they may suffer as a result of so acting.

125. The court referred to the following statement of Earl of Halsbury LC in *Sheffield Corporation v Barclay* [1905] AC 393 at 397:

> "It is a general principle of law that when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the right of a third party,

> the person doing it is entitled to an indemnity from him who requested that it should be done."

The court then commented (at [86]):

> "As so expressed, that principle does not assist Mr Whitlam. What he did at the expense of NRMA, relevantly for present purposes, was to give the interview. His giving the interview did not turn out to be injurious to the rights of a third party – rather, as the interview was used, it turned out to be injurious to his own interests."

126. At paragraph [89] the court considered the case of *Famatina Development Corporation Ltd* [1914] 2 Ch 271 ("*Famatina*"):

> "[Famatina] concerned an employee who was engaged to make a report for the company that engaged him. When that report was presented, and orally elaborated on to the board, a company director who was unfavourably commented on in the report sued the employee for libel and slander. That action did not succeed, but the employee incurred costs in defending it. He was held entitled to recover those costs from the company, upon the basis, expressed by Lord Cozens-Hardy MR at 292, that.
>
> > "an agent had a right against his principal, founded upon an implied contract, to be indemnified against losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority."
>
> "That case is, it seems to me, merely an example of the principle stated in *Sheffield Corporation v Barclay."*

127. Finally, I should refer to paragraphs [93] and [94]:

> "93. Mr Gleeson submits that, while the case law so far has all been concerned with a situation where an indemnity applies to a legal liability incurred to a third person, or to an action taken in the actual performance of an office, there are *"no reasons to think that the operation of the general principle should be limited to that narrow class of loss"*.
>
> "94. In my view, there are good reasons of principle why the right of indemnity does not extend as far as Mr Gleeson submits it should. If the general principle stated by Bowstead & Reynolds were applied so that *"losses"* included losses of types that can be compensable by action in tort at the suit of the

> person who suffered the loss, the civil law would be very different to what it in fact is. If, for instance, *"losses"* included the type of damage that is remediable by an action seeking damages for personal injury, the mere fact that A had requested B to do a task, and B was injured in the course of performing it, would mean that B was entitled to be indemnified by A for the injury he had suffered. Any such entitlement would sweep aside those aspects of the law of tort that require there to have been a recognised tort committed by A before B is entitled to be compensated by A for his injury. It would mean that, in the paradigm case in which worker's compensation payments are made, where a worker in the course of carrying on his duties is injured, the worker would have had a right of indemnity under the general law from his employer just because the employer had requested him to do the task in the course of which he was injured, quite independently of any obligation created by the worker's compensation legislation, and the indemnity would be to provide a full indemnity, not merely the limited scale of benefits conferred by workers' compensation legislation. I do not believe that a general principle of law that alters the civil law in such radical ways, exists but has hitherto gone unrecognised."

128. Unsurprisingly, Mr. Goulding relies upon paragraph [94] of that judgment, which echoes his submissions in respect of the trio of UK cases to which he referred as set out above.

129. So far as counsel's researches have revealed, *Whitlam* has not been the subject of comment or consideration in any English case, textbook or article.

130. At the conclusion of the hearing before me, Mr. Ciumei Q.C., who appeared for the Claimant, drew my attention to an article written by counsel for Mr. Whitlam (Justin Gleeson S.C. and Nicholas Owens): *Dissolving Fictions: What to Do with the Implied Indemnity?* (2009) 25 Journal of Contract Law.

131. It became apparent that not only had Mr. Goulding not had an opportunity to consider that article, but neither had Mr. Ciumei save in a most cursory way. Accordingly I invited further submissions on *Whitlam* and on the article. This resulted in two further rounds of written submissions.

132. Both in his oral submissions and in his written submissions, Mr. Ciumei relied upon older authority as to the scope of the indemnity implied into contracts of agency and of employment.

133. First, *Fletcher v Harcot* (1622) (20 Jac. 1) Hutton's Sep 55; 123 E.R. 1097. In that case Fletcher (an innkeeper) complied with a request from Harcot (a sheriff) to hold Batersby as a prisoner at his inn. Batersby subsequently brought an action for wrongful imprisonment against Fletcher, which he spent £10 defending. Fletcher was held to be entitled to that sum from Harcot. The case report is short.

134. In *Adamson v Jarvis* (1827) 4 Bing. 66; 130 E.R. 693 the plaintiff was an auctioneer. He was the subject of a successful claim by the true owner of goods sold by him in good faith on the instructions of Jarvis. He was held to be entitled to an indemnity from Jarvis in respect of the damages claim brought by the true owner of the goods (£1,195) and the sum of £500 "in and about defending the same action so brought against him as last aforesaid, and in and about taking and pursuing other necessary proceedings made incumbent upon him in consequence of the said sale and the said recovery". In his judgment, Best C.J. said (at page 695 in the English Reports):

> "The Defendant, who had induced the Plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the Plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the Plaintiff, supposing, from the Defendant's false representations, he had an authority which he had not, and, acting as the Defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages

> and costs, whilst the Defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.
>
> "It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent: Agreed: every man who employs another to do an act which the employer appears to have a right to authorise him to do undertakes to indemnify him for all acts which would be lawful if the employer had the authority he pretends to have. A contrary doctrine would create great alarm."

135. In *Frixione v Tagliaferro* (1856) 10 Moo. 175 PC, the plaintiff entered into a contract with a third party as agent for the defendant. The third party sued the plaintiff successfully. It was held that the plaintiff was entitled to be reimbursed the judgment sum under an implied warranty and was awarded interest for being kept out of his money. In the opinion of the Rt. Hon. Pemberton Leigh is the following statement of principle (at p. 196):

> "In order to entitle an agent to recover from his principal … he must show, first, that the loss arose from the fact of his agency; secondly, that he was acting within the scope of his authority; and thirdly, that the fault was not attributable to any fault or laches on his part. If the Appellant can establish these facts, it is plain that he is entitled to recover …."

136. In *The James Seddon* (1866) LR 1 A&E 62, the master of a ship, whilst at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted but was bound over in the sum of £10 to prosecute the two men for perjury. He forfeited the £10 in order to return with the vessel to England.

137. He was held to be entitled to recover both the expenses of his defence and the £10 from the owner of the ship. Dr. Lushington in his judgment held that:

> "the causing these men to be censured and chastised for their insubordination was part of the bounden duty of the master.

> Having fulfilled this duty, out of the performance of it comes manufactured a false charge. I differ entirely from the argument of Mr. Brett, that this is a remote and not a direct cause. The very cause which originated the charge against the master was the performance of his own duty in correcting these very men for their misconduct, and the false charge emanated instantly from it, and there were no intervening circumstances whatsoever which would cause it to be considered remote."

138. In *Lacey v Hill* (1874) L.R. 18 Eq. 182 the question was whether a stockbroker who had purchased stock on behalf of a principal was entitled to sell the stock when the principal proved to be insolvent. Part of the argument before the court was a suggestion that an agent's right to indemnity did not arise in the absence of an actual payment in respect of which the indemnity is claimed. Sir George Jessel M.R. said (at page 191):

> "Last of all it is said this is a liability as distinguished from an actual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary) it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity."

139. *The James Seddon* was considered at first instance in *Famatina*. As already summarised in *Whitlam* (see paragraph 126 above), that case concerned an employee who was engaged to make a report for the company that engaged him. When that report was presented, and orally elaborated on to the board, a company director who was unfavourably commented on in the report sued the employee for libel and slander. That action did not succeed, but the employee incurred costs in defending it. At first instance, Sargent J. said this:

> "The further question then arises whether there is, as contended by counsel for Mr. O'Driscoll, a common law principle under which a servant is entitled to be indemnified by his employer for any loss occasioned to him in the performance of anything which it may be his duty to do. The law as stated in Macdonell on Master and Servant, 2nd ed. p. 144, is this: "A master is

> bound to indemnify his servant for all expenses incurred or loss sustained in obeying his lawful orders," That is a far more limited proposition, and one which could only be applicable, if at all, to the present case if I had found as a matter of fact that the company ordered Mr. O'Driscoll to make a report with reference to the conduct of Mr. Pape. As I have already said, I come to the conclusion that the company never did order Mr. O'Driscoll to do anything of the sort. I cannot find that the right of indemnity extends, as alleged on behalf of Mr. O'Driscoll, to indemnify a servant from the consequences of doing anything that it may be his duty to do. If that were so, I think there would have been ample authority to be found in the books, because it frequently happens that it is the duty of one servant to report a breach of duty on the part of some other servant, and if there had been any principle under which the person making the report was entitled to be indemnified by the employer against the consequences of that report, such as a libel or slander action, I think there would have been instances to be found in reported cases."

He concluded (at page 281):

> "In the present case it is in my opinion quite impossible to say that Mr. O'Driscoll was defending an action on behalf of his principals; he was defending, and it turned out successfully defending, an action on his own behalf which originated out of reports made by him in the execution of a duty which he owed to his employers but not in direct obedience to their orders; and I cannot find that any case has gone the length of deciding that a servant is entitled to be indemnified by his master against expenses of that character."

140. The Court of Appeal allowed an appeal. The entirety of the reported judgment of Lord Cozens-Hardy M.R. is as follows:

> "LORD COZENS-HARDY M.R. said that Mr. O'Driscoll was much more than a servant of the company and the duties imposed upon him were far wider than those of a consulting engineer. He was undoubtedly appointed to be the agent of the company for many purposes and all he had done was done in pursuance of his duties as agent. Therefore he came within the well settled rule that an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority."

141. In *Whitlam*, the New South Wales Court of Appeal held that this case was merely an example of the principle stated in *Sheffield Corporation v Barclay* [1905] AC 392, namely that it was an example of an indemnity granted in respect of an act carried out by one party at the request of another "which turns out to be injurious to a third party". As the article referred to above suggests, and as the Claimant submits in this case:

> "*Famatina* is actually an extension to the formulation of the indemnity set out earlier by Campbell JA in his judgment in *Whitlam* (derived from *Sheffield Corporation v Barclay*), in that the actions of the claimant (as agent of Famatina) were not in fact injurious to the third party (the managing director). So the indemnity covers situations where the third-party interaction does not result in injury to the third party, but only loss to the person entitled to be indemnified."

142. It is also significant that the Court of Appeal in *Famatina* did not accept the first instance judge's restriction of the scope of the implied indemnity.

143. Next, reference was made to the House of Lords decision in *Lister v Romford Ice and Cold Storage Co. Ltd* [1957] A.C. 55. In that case Lord Tucker said, at page 595:

> "It has always been an implied term that the master will indemnify the servant from liability arising out of an unlawful enterprise upon which he has been required to embark without knowing that it was unlawful."

144. It is noticeable in this review of authority how little discussion there is of the extent of the scope of the right to indemnity implied between employer and employee or between principal and agent.

145. It is clear that the underlying principle is that set out in the pithy judgment of the Court of Appeal in *Famatina* (see paragraph 140 above), namely that there is a

> "well settled rule that an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority."

146. That formulation distinguishes between, on the one hand, indemnity against losses and liabilities, and, on the other, reimbursement of expenses.

147. Much reliance has been placed by the Defendant upon the *Whitlam* case. Insofar as that case holds that under the general law of indemnity Mr. Whitlam was not entitled to be indemnified against his legal expenses, I have some difficulty in reconciling it with the English cases of *Fletcher v Harcot*, *Adamson v Jarvis*, *Frixione v Tagliaferro* and *The James Seddon*, none of which were cited to the NSW court. It also seems to me difficult to reconcile its interpretation of *Famatina* with that case itself. Accordingly, I question whether an English court would come to the same conclusion on the facts.

148. On the other hand, paragraph [94] of the judgment of the NSW Court of Appeal seems to me to raise a real problem as to the interrelation of the right to indemnity as formulated in the cases and in the textbooks with the law of tort as to circumstances in which an employee can recover damages against an employer.

149. In their post-hearing submissions counsel for the Claimant contended that the "relevant limiting factor [to the right to indemnity] is that the loss or liability has to arise as a result of interaction with a third party."

150. For their part, counsel for the Defendant contended that there is no implied indemnity in respect of loss suffered as a result of acts done by third parties, where that loss is not an amount paid or to be paid to third parties. They

conclude in their submissions served on 18 December 2019 that in light of (a) the total absence of any authority in which losses other than sums paid or payable to third parties were recoverable, and (b) the good reasons set out in *Whitlam* why they should not be, it is clear that the lost earnings and other losses claimed are irrecoverable as a matter of law under the indemnity implied into the Claimant's employment contract.

151. The Defendant's applications before me lasted two and a half days. As this judgment shows, there were many and difficult issues raised. Whilst I had a considerable body of authority cited to me, in the event the Claimant's formulation of the limits to the right to indemnity only came after the conclusion of the oral argument.

152. There can be no doubt that any ruling on the scope of the right to indemnity would be a matter of considerable importance in the law of employment and of agency. The review of authority above shows that there has been no recent English exploration of the scope of the right to indemnity, and the older authority does not set out with any clarity what are the limits on that scope.

153. The Defendant's formulation of the limit on the principle is arguably inconsistent with the dictum of Lord Cozens-Hardy MR set out at paragraph 140 above and with the cases where an employee or agent has recovered his own losses in the form of legal defence costs.

154. As set out above, I am required to consider whether the claim has a "realistic" as opposed to a "fanciful" prospect of success – see *Swain v Hillman* [2001] 1 All E.R. 91. I find myself unable to say that the Claimant's relatively recent

argument as to the scope of the right to indemnity has only fanciful prospects of success.

155. In my view, the arguments illustrate that this case falls within the *"Altimo"* principle (see paragraph 52 above), since any decision as to the scope of the right to indemnity would itself be a decision on a controversial question of law in what would then be a developing area.

156. Further, this seems to me be a case in which it is desirable for the facts to be found first. In the Response to the Defendant's Part 18 Request for Further Information of the Claim Form and Particulars of Claim served on 21 May 2018, lengthy particulars are given of the case under paragraph 19.1 of the Particulars of Claim[27]. In my view, it is arguable that if the trial judge were to accept the factual matters there set out, which overlap to a considerable extent with other aspects of the case as to what the Defendant knew or should have known about the potential risks to the Claimant of working on privatisations in Romania, the court might be willing to find that on those facts a right to indemnity exists, either because the right to indemnity comes within the general principle of indemnity or because the Claimant is entitled to an indemnity on the particular facts of this case – i.e. an indemnity implied in fact applying principle (5) of Mr. Goulding's principles which I have set out at paragraph 106 above.

157. In coming to the conclusion in the previous paragraph, I have in mind that on the Claimant's case the Claimant, although innocent of any crime, has already been imprisoned and is at risk of lengthy further imprisonment; in the event,

[27] I/tab 6/52-54

he has lost the ability to earn his living in the career in which it appears he had already experienced considerable success.

158. For these reasons, with one significant exception, I do not think it is appropriate to strike out the claim based upon an implied indemnity. The exception is the claim pleaded at paragraph 55.3 of the Particulars of Claim[28] in respect of a failed property transaction. In my judgment the loss there alleged is too remote from the Claimant's employment to be the subject of the implied indemnity.

Obligation of Trust and Confidence

159. As set out above, paragraph 19.2 of the Particulars of Claim alleges that the Defendant owed to the Claimant a duty not, without reasonable and proper cause, to act so as to destroy or seriously damage the trust and confidence between employer and employee.[29]

160. The existence of the term is admitted in paragraph 15.2 of the Defence.[30]

161. The breaches of this term are pleaded at paragraphs 47.1 to 47.8 of the Particulars of Claim.[31]

162. Paragraph 47.1 simply pleads a failure to indemnify, and in that sense adds nothing to the claim for an indemnity which I have already considered. It seems to me unlikely that a claim for an indemnity on this basis would succeed if the claim based upon an implied indemnity were to fail.

[28] I/tab 4/25-26
[29] I/tab 4/15
[30] I/tab 5/33
[31] I/tab 4/23

163. Paragraphs 47.2 to 47.8 are all concerned with the steps taken by, or not taken by, the Defendant once the Claimant had been arrested.

164. In answering this claim, Mr. Goulding again refers to the quartet of cases to which he had also referred in respect of the indemnity claim: *Reid*; *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293; [2004] ICR 1615 ("*Crossley*"); *Greenway*; and *James-Bowen*. He pointed out that in each of the last three of these cases an attempt to use the implied duty of trust and confidence as the basis of a more specific alleged duty was rejected.

165. For this purpose it is sufficient for me to refer to the last in the series, the *James-Bowen* case. In the judgment of Lord Lloyd-Jones JSC at paragraphs [16] to [20] he reviewed the authorities:

> "16. The mutual obligation of employer and employee not, without reasonable and proper cause, to engage in conduct likely to destroy or seriously damage the relationship of trust and confidence required between employer and employee is a standardised term implied by law into all contracts of employment rather than a term implied from the particular provisions of a particular employment contract: *Mahmud v Bank of Credit and Commerce International SA*…….. It was described by Lord Nicholls of Birkenhead in *Mahmud*… as a portmanteau concept. In that case the House of Lords considered it the source of a more specific implied obligation on the part of the employer bank not to conduct its business in a dishonest and corrupt manner, the breach of which gave rise to a cause of action for damage to the economic and reputational interests of its employees. Similarly, in *Eastwood v Magnox Electric plc* [2004] ICR 1064; [2005] 1 AC 503 the House of Lords recognised an obligation on an employer, in the conduct of his business and in the treatment of his employees, to act responsibly and in good faith ….
>
> "17. ….
>
> "18. Although in *Mahmud*…. the House of Lords derived from the mutual implied contractual obligations of trust and confidence an implied obligation owed by the bank to its employees not to conduct a dishonest or corrupt business and

> held that damage to reputation resulting from breach sounded in damages, this is at a considerable remove from a duty to exercise care in the conduct of business so as to avoid economic or reputational damage to employees. This point was, in fact, emphasised by Lord Nicholls in a cautionary footnote, at p 618:
>
> > "there are many circumstances in which an employee's reputation may suffer from his having been associated with an unsuccessful business, or an unsuccessful department within a business. In the ordinary way this will not found a claim of the nature made in the present case, even if the business or department was run with gross incompetence. A key feature in the present case is the assumed fact that the business was dishonest or corrupt.
>
> "19. [Referring to *Scally v Southern Health and Social Services Board* [1991] ICR 771; [1992] 1 AC 294] … It is significant that the House of Lords did not base its decision on a more general duty of care owed by an employer to protect the economic interests of employees.
>
> "20. Similarly, in *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615 the Court of Appeal refused to derive from the mutual duty of trust and confidence a standard obligation, implied by law as a term of all contracts of employment, which requires an employer to take reasonable care for the economic well-being of his employers….."

166. Mr. Goulding also referred to the lengthy analysis at paragraphs [28] to [33] in the same judgment to the significance of the possibility of conflicting interests. At paragraph [28] Lord Lloyd-Jones said that "the fact that a duty of care may give rise to conflicting interests will often be a weighty consideration against its imposition" and at paragraph [30] that "the interests of an employer who is sued on the basis that he is vicariously liable for the tortious conduct of his employees differ fundamentally from the interests of those employees. The financial, commercial and reputational standing of the employer may be at stake."

167. Whilst those passages were contained in a section of the judgment primarily concerned with whether a duty of care was owed by the employer in tort, in

my judgment similar concerns are engaged in deciding whether to extend the "portmanteau" obligation of trust and confidence into a new area.

168. In my view, insofar as the implied term as to trust and confidence is deployed so as to attack the Defendant's actions or lack of actions after the Claimant was arrested, it would in my view represent a considerable extension of the law in a manner which would be against the trend of the authorities referred to above. In this case, examination of the Defendant's conduct after the arrest involves considerations of great sensitivity involving, as the evidence before me shows, contacts and possible contacts at very high levels within governments and diplomatically. Those contacts were particularly sensitive because there was a legitimate concern that the Defendant should not be seen to attempt to interfere with the integrity of the Romanian court processes.

169. It might be that if the Defendant had taken no steps whatever to protect the Claimant's interests once he had been arrested a different case might have been available: I need not speculate further on that, because on any view the Defendant made considerable efforts to assist including the expenditure of large sums supporting the defence of the Claimant and his colleagues.

170. For these reasons, the breaches alleged at paragraphs 47.2 to 47.8 should not be allowed to proceed further.

171. However, in a draft amendment to the Particulars of Claim, a proposed amendment was placed before me to plead the following in paragraph 19.2:[32]

> "Further, as a particular incident of this implied term, the Defendant owed to Mr. Benyatov the following duties:

[32] II/tab G35/632

> "19.2.1 that it would not conduct business in Romania in a way that risked being determined as unlawful (i.e. contrary to Romanian law);
>
> "19.2.2 not to require him to embark on any such unlawful enterprise or potentially unlawful enterprise;
>
> "19.2.3 that it would not conduct a business that placed him (and/or any other employee) at risk of criminal conviction in consequence of faithfully, diligently or properly carrying out his (or their) duties; and/or
>
> "19.2.4 not to expose him to criminal conviction in consequence of faithfully, diligently or properly performing his duties for the Defendant."

172. Associated with that proposed amendment are extensive amendments in the form of new paragraphs 47.9 to 47.15 concentrating on the pre-arrest period.

173. If permission were to be given to make these amendments or similar amendments, it could only be on the basis that they disclose a realistic case suitable to go forward to trial. As will be seen below, Mr. Cuimei has in effect withdrawn these amendments for the moment. My conclusion is that the case as presently pleaded in respect of the alleged breaches of the implied term of trust and confidence is unsustainable.

Paragraphs 19.3 to 19.6 of the Particulars of Claim

174. To reiterate, paragraphs 19.3 to 19.6 of the Particulars of Claim allege:

> "19.3 To support Mr Benyatov in the performance of his duties;
>
> "19.4 To protect and safeguard Mr Benyatov from obvious risks to his safety and well-being arising as a consequence of the performance of his duties;
>
> "19.5 To take every step to assist and support Mr. Benyatov in ameliorating the effect of any sanction imposed on him as an individual in consequence of the performance of his duties

> under the Contract, save in circumstances (which do not apply here) where it was terminated for gross misconduct.
>
> "19.6 Alternatively, it was an implied term that the Defendant would not terminate the Contract so as to deprive Mr. Benyatov of the benefit of the terms in the preceding paragraph 19.5."

175. The breaches of paragraphs 19.3 to 19.5 are the same as those alleged of paragraph 19.2.

176. In respect of paragraphs 19.3 to 19.5, the Defence pleads at paragraph 15.3:[33]

> "Paragraphs 19.3-19.5 are denied as free standing implied terms, save that it is admitted and averred that there was an implied obligation on the Defendant to take reasonable care not to expose the Claimant to risks of personal and psychiatric injury which were reasonably foreseeable and which the Defendant could guard against by proportionate measures. This obligation ceased on the termination of the Claimant's contract of employment."

177. Insofar as the pleaded case seeks to attack the post-arrest actions or inactions of the Defendant, in my judgment it fails for the same reasons as the case under the implied term of trust and confidence. In substance, the terms alleged at paragraphs 19.3 to 19.5 are best regarded as allegations of particular aspects of the portmanteau term: in this respect I agree with the first sentence of paragraph 15.3 of the Defence.

178. If the case under paragraph 19.5 fails, so also must the parasitical claim under paragraph 19.6. Accordingly, I do not need to consider the effect of the House of Lords decision in *Johnson v Unisys Limited* [2001] UKHL 13, [2003] 1 AC 518 on this part of the Claimant's case.

[33] I/tab 4/33

Paragraph 19.7 of the Particulars of Claim

179. As set out above, this pleads as follows:

> "19.7 To exercise any contractual discretion rationally, reasonably (i.e. not contrary to the *Wednesbury* standard) and/or giving due consideration to[34] Mr. Benyatov's legitimate expectations. For the avoidance of doubt, it is contended that this obligation applied to the exercise of any discretion about matters previously governed by or arising in consequence of the performance of the Contract even after its termination."

180. There is limited acceptance of this term in paragraph 15.5 of the Defence:[35]

> "As to paragraph 19.7:
>
> "15.5.1 It is admitted that, in principle, if the Defendant was required by the terms of the Claimant's contract of employment to exercise a discretion, it was an implied term that the Defendant would not do so capriciously, irrationally or perversely;
>
> "15.5.2 No admission is made as to the relevance of this implied term, however, given that there was no relevant term of the Claimant's contract in relation to the matters complained of; and
>
> "15.5.3 It is denied that it was an implied term that the Defendant would exercise any contractual discretion in accordance with the Claimant's legitimate expectations. As a matter of law, any legitimate expectations on the part of the Claimant (as to which no admission is made) are no more than relevant factors in the exercise of any contractual discretion, alongside, *inter alia*, the Defendant's own interests and any other relevant matters."

181. The point raised in paragraph 15.5.3 has been accepted by the Claimant and reflected in the change to paragraph 19.7 which I have footnoted.

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[34] The original pleading says "in accordance with" Mr. Benyatov's legitimate expectations, but the Claimant has since reformulated this paragraph

[35] I/tab 5/34

182. In line with the Defence, the Defendant's attack on this part of the Claimant's case has focussed on the alleged breaches of this term, which are set out in paragraphs 50 to 52 of the Particulars of Claim.[36] First, paragraph 50:

> "50. Further or in the further alternative, and in the circumstances of this case, the appointment of a prominent individual as set forth above and the cost of the same is within the scope of the implied obligation at paragraph 19.1 above and/or is and would have been the proper application of any discretion in respect thereof on the principles set out in paragraph 19.7 above. Accordingly, the failure to appoint and pay for the appointment of such an individual is a breach of the said implied obligation by the Defendant."

183. The context of this allegation is that, as set out at paragraph 38 of the pleading, the Defendant had received advice from international strategic consultants that "the step most likely to be effective was for the Defendant (and not an individual) to engage a US statesperson or former senior member of the US administration (Colin Powell was one suggestion) to engage with the Romanian government on an informal basis."[37]

184. To continue with paragraphs 51 and 52:[38]

> "51. Further, on each and every occasion that the Defendant exercised a discretion as to whether or not to take any of the steps set forth above and decided not to, that discretion was exercised irrationally, unreasonably and in breach of Mr Benyatov's legitimate expectations and in breach of the implied term set forth at paragraph 19.7 above. The legitimate expectation of Mr Benyatov that the Defendant would support him to the fullest extent possible and in accordance with any external advice was reinforced by the contents of the letter dated 1 December 2014 from Mr de Boissard and the oral assurances provided to Mr Benyatov on behalf of the Defendant by Mr Philip, Mr Kyriakos-Saad, Mr Mazzucchelli and Mr Granetz.

[36] I/tab 4/24
[37] I/tab 4/21
[38] I/tab 4/24

> "52. In particular, the following exercises of discretion fall within the scope of the breach stated in the preceding paragraph:
>
> "52.1 The decision of the Defendant in or about 1 December 2014 to do nothing further at that stage to help Mr Benyatov;
>
> "52.2 The decision or decisions of the Defendant in Q2 2016."

185. Paragraphs 51 and 52 reflect paragraphs 23 and 24 of the Particulars of Claim set out below.

186. What paragraphs 50 to 52 do is to select various possible courses of action which the Defendant might have chosen to pursue and allege that any decision by the Defendant not to do so was irrational or unreasonable.

187. In my view this is not a permissible approach. In each case, the steps open to the Defendant had pros and cons. There is nothing in the pleaded case which supports a case that the only rational or reasonable course to take was the particular identified course.

188. Further, I have already decided above that the Claimant's case under the implied term of trust and confidence must fail in respect of the allegations related to the Defendant's post-arrest actions or lack of action. In my judgment the Claimant cannot sidestep those difficulties through the term pleaded at paragraph 19.7.

Obligations under the contract of employment with the Defendant: conclusions

189. For the reasons set out above, I do not accept that the claim pleaded in respect of the implied indemnity should be struck out. However, I do accept that the other ways in which the claims are presently put forward under the contract of

employment should be struck out, subject to the possibility of being rescued by amendment.

190. Even if I had reached a different conclusion in respect of paragraphs 19.2 and following as presently pleaded, those claims would present substantial difficulties in respect of causation, as explained below.

Obligations arising under the letter dated 1 December 2014

191. Paragraph 23 of the Particulars of Claim pleads:[39]

> "On 1 December 2014 Gaël de Boissard ("Mr de Boissard") wrote on behalf of the Defendant. The following terms of the letter took effect as variations of the Contract and/or as a collateral contract with the Defendant with the Defendant in consideration of which Mr. Benyatov remained in the service of the Defendant, namely that the Defendant:
>
> "23.1 Would engage a prominent individual to express the Defendant's concerns regarding the irregularities and due process issues of the criminal case in Romania against Mr. Benyatov directly to the Romanian authorities after a final verdict;
>
> "23.2 Would explore options for additional avenues that might be pursued in the unfortunate event of a negative decision in the criminal case in Romania against Mr. Benyatov, such as having the prosecution and/or conviction withdrawn or otherwise nullified, an application to the European Court of Human Rights, and direct representations to appropriate individuals and authorities in Romania, the USA, EU and elsewhere on his behalf;
>
> "23.3 Would exhaust every appropriate avenue that could enhance the chances of a positive outcome for Mr. Benyatov in relation to the Romanian criminal case against him;
>
> "23.4 Would continue to provide support to Mr Benyatov during these extraordinary circumstances."

[39] I/tab 5/17

192. Paragraph 23 of the Particulars of Claim lifts the contents of the Defendant's letter of 1 December 2014[40] and taking references from that letter contends that those terms of the letter took effect as variations of the contract of employment or as a collateral contract.

193. This is, in my judgment, a case which has no realistic prospects of success.

194. Firstly, as Mr. Goulding pointed out, the pleading does not accurately reflect the contents of the letter.

195. Secondly, it is only the fourth paragraph that expresses any view as to any course to be adopted in the future – and that only talks of "exploring options".

196. Thirdly, and connected with the second point, the letter is not in terms which, objectively viewed, could be regarded as a contractual offer capable of acceptance – nor is there any pleaded case of acceptance of the terms.

197. Finally, whilst I accept the Claimant's argument by reference to *Hershaw v Sheffield City Council* UKEAT/0033/14/BA (16 July 2014) that there can be cases where sufficient consideration can be given for a variation to a contract of employment such as a change in salary by the employee continuing in employment, it is difficult to elevate that to a general principle that mere continuance in employment will in all cases amount to sufficient consideration.

198. In my view, the last three elements which I have identified must all be considered together: was what is said to be a variation of the contract of a nature which viewed objectively would be regarded as a variation, rather than

[40]See paragraph 21 above and II/tab 23/334

a continuation of the existing relationship between the parties? Was there a clear offer capable of acceptance, and was there a clear acceptance? And, finally, can any consideration for the variation be discerned?

199. Taking all these elements together, I find it impossible to see an arguable case either for a variation to the contract of employment or for a collateral contract. However there can be no objection to paragraph 23 remaining in some form in the pleading as a statement of the history of what happened to the Claimant.

Obligations arising from oral assurances

200. Paragraph 24 of the Particulars of Claim pleads:[41]

> "Mr Benyatov was given binding oral assurances in terms that the Defendant would take all steps necessary to ensure a satisfactory resolution to the events in Romania. These assurances took effect as variations of the Contract and/or as collateral contracts with the Defendant in consideration of which Mr Benyatov remained in the service of the Defendant. These assurances were given by the following four senior managers of the Defendant:
>
> "24.1 Michael Philipp (then CEO of Europe) gave the oral assurances when he visited Mr Benyatov in Romania in 2006. He also made clear that the Defendant took Mr Benyatov's situation very seriously. In addition, he assured Mr Benyatov that his job was safe.
>
> "24.2 Fawzi Kyriakos-Saad (who replaced Mr Philipp as CEO of Europe) also visited Mr Benyatov in Romania. On a number of occasions he gave assurances that the Defendant would do everything it could to help him.
>
> "24.3 Marco Mazzucchellli (Head of Investment Banking Europe, and Mr Benyatov's direct manager) met with Mr Benyatov when he returned from Romania and assured him that the Defendant understood the gravity of the situation and that Mr Benyatov could count on the Defendant's full support.

[41] I/tab 4/18

> "24.4 Marc Granetz (co-head of Investment Banking) visited Mr Benyatov in Romania and also met him after he had left Romania in or around early 2008, and offered him assurances of the Defendant's support."

201. For present purposes, the factual matters alleged are accepted as factually accurate.

202. In my view, paragraph 24 suffers from the same deficiencies as paragraph 23. However, as in respect of paragraph 23, there can be no objection to paragraph 24 remaining in some form in the pleading as a statement of the history of what happened to the Claimant.

203. Further, as set out below, both paragraphs 23 and 24 face considerable causation problems.

Duties of care in tort

204. Paragraph 25 of the Particulars of Claim pleads:[42]

> "Mr Benyatov was owed a duty of care in tort by the Defendant to protect him from economic losses arising from the performance of his duties. Further or alternatively, the Defendant owed Mr. Benyatov a duty of care not to expose him to criminal conviction in the performance of his duties for the Defendant. In particular, the Defendant had a duty:
>
> "25.1 to perform an adequate risk assessment in relation to the risks faced by Mr Benyatov performing his duties on behalf of the Defendant in Romania;
>
> "25.2 to advise him of risks in relation to covert surveillance in Romania;
>
> "25.3 to intervene adequately in Romania to demonstrate Mr Benyatov's innocence to:
>
> "25.3.1 the relevant prosecutorial and/or judicial authorities, and/or

[42] I/tab 4/18-19

> "25.3.2 to individuals or political authorities with power to withdraw the prosecution against Mr Benyatov due to the lack of any meritorious claim against him; and
>
> "25.4 generally to take reasonable care to protect him from criminal convictions and the resulting financial losses."

205. The Defendant's starting point is that an employer owes no duty (a) to protect an employee from economic loss; or (b) to inform an employee of the risk of loss, caused by a third party, when working abroad.

206. There is a considerable overlap between the Defendant's arguments on the implied term of trust and confidence and its arguments on duty of care. In particular, at the heart of the Defendant's submissions are the decisions to which reference has already been made of *Reid; Crossley*; and *James-Bowen*.

207. Reference was also made to *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736. The submission made was that in that case the Supreme Court emphasised two important points:

(1) In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable: [29].

(2) Generally, a person does not owe a duty of care to prevent another from being harmed by the conduct of third parties: [37].

208. The Defendant contends that the Claimant's claim is, in substance, a claim to recover damages for breach of an alleged duty owed by the Defendant of a responsibility to protect the Claimant from economic losses. It submits that the claim has no real prospect of success for the following reasons:

(1) The duty of care in tort is unsustainable as it is not alleged to arise under the contract;

(2) The duty to advise and protect the Claimant in respect of the risk of financial loss from working abroad is contrary to binding authority, namely *Reid*;

(3) The courts have consistently rejected a duty on an employer to protect an employee from economic losses;

(4) The duties are concerned with the prevention of harm to the Claimant by third parties: the courts have drawn an important distinction between harming another and taking steps to prevent another being harmed by a third party. A duty of care is far less likely to arise in the latter case;

(5) The factual matrix militates against the alleged duties: as at the date of the contract in 2005, the Claimant had worked in Russia as Head of Russian Oil and Gas (1997-2000); run the Defendant's European Emerging Market Utilities (from 2000); and provided advisory services and access to capital in respect of various substantial transactions in

Romania for 4 years (2001-2005), including in particular the privatisations of state-owned companies. The contract expressly provided that he may be required by the Defendant to work overseas. There is nothing in this factual matrix or the Claimant's pleaded case to support an assumption by the Defendant to protect him from economic losses arising from, or not to expose him to criminal conviction in, the performance of his duties;

(6) The limit of the Defendant's liability following dismissal is governed by express contractual terms;

(7) An extension of the duties owed by the Defendant would not be fair, just or reasonable:

a) The duties for which the Claimant contends are far reaching. For a global institution such as the Defendant they would impose onerous burdens in respect of large numbers of employees, who routinely work in many foreign countries and for which they are highly remunerated. They could potentially expose such institutions to huge liabilities for loss of earnings to many employees stretching many years into the future. As such, the damages sought by the Claimant of over £46 million could be multiplied many times over if the floodgates were opened;

b) Moreover, the duties contended for once criminal proceedings are commenced overseas are invidious and unworkable. It is alleged, for example, that the Defendant had a duty to intervene

adequately in Romania to demonstrate the Claimant's innocence to the prosecutorial and/or judicial authorities. It would not be fair, just or reasonable to put the Defendant in the position of having to intervene in the criminal justice process of a sovereign foreign country, in this case an EU Member State, especially in circumstances where the Defendant conducts business through other employees in that country.

209. The Claimant's submissions start from examination of the position as to whether there is an implied indemnity of sufficiently wide scope and as to the application of the implied term of trust and confidence. Specifically in respect of the claim in relation to tortious duties of care, the Claimant contends that there are a number of areas of factual dispute which will require a trial hearing factual and expert evidence. The factual disputes include the following:

(1) Whether the Defendant carried out any (or any meaningful or adequate) risk assessment prior to sending the Claimant to Romania. The Claimant's evidence will be that it did not;

(2) Whether the Defendant perceived, or reasonably could have perceived, certain risks that its employees (and, more specifically, the Claimant) may have faced when carrying out the 2005-2006 Electrica Muntenia Sud SA privatisation in Romania. The parties already have permission to call expert evidence on the existence and foreseeability of the risks of that transaction, as well as steps that the Defendant should have taken to mitigate those risks. This expert evidence is crucial to the claim. Note that the need for expert evidence was agreed between the

parties and the only dispute at the CMC was as to the scope of that evidence. In view of the relevance of this evidence not only to the claims for breaches of duties of care, but also to the scope of the admitted indemnity and contractual duties as applicable to this case, this is fatal to the Defendant's applications for summary judgment and strike out. Factual evidence on this topic from employees of the Defendant other than the Claimant, including senior executives responsible for managing risks to the Defendant and its employees, will also be required;

(3) What steps the Defendant took in response to the Claimant's arrest, detention, prosecution and conviction;

(4) Whether the steps taken by the Defendant following the Claimant's arrest were likely to be effective in ameliorating his situation. Answering this question will require evidence from someone with expertise in Romanian security and political lobbying;

(5) What was said to the Claimant by various senior employees of the Defendant when they visited him in Romania while he was under arrest.

210. Paragraph (2) above sets out in full the Claimant's argument in paragraph 47.2 of his counsel's skeleton argument as I regard the matters set out therein to be of particular significance. See in this regard paragraphs 72 to 90 of this judgment above.

211. Paragraphs 25.1, 25.2 and (in part) 25.4 are particularly concerned with the obligations upon the Defendant prior to arrest. Lengthy supporting particulars are given at I/tab 6/65-68 and there is substantial overlap with the particulars given in respect of paragraph 19.1 at I/tab 6/52-54 to which I have referred at paragraph 156 above.

212. Mr. Goulding is right to submit that there is clear authority that an employer is under no general duty to prevent an employee suffering economic loss. See for example per Ralph Gibson L.J. in *Reid* at page 221H and 231E; per Dyson L.J. in *Crossley* at [33]; and per Sales L.J. in *Greenway* at [37] and [39].

213. However, Mr. Ciumei submits firmly that he is not relying upon any such general duty. In that respect it seems to me that the first sentence of paragraph 25 of the Particulars of Claim goes too far.

214. However, it is clear that in certain limited circumstances a duty of care is imposed by the law upon an employer to protect an employee against economic loss.

215. There are two leading cases in this regard. The first is the House of Lords decision in *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294. In that case the issue was whether an employer was under a duty to bring to the attention of employees important terms of the employees' contracts of employment. The House of Lords answered the issues raised in favour of the employees, but Lord Bridge of Harwich, who gave the leading speech, emphasised that the starting point was an analysis of the relevant contracts of employment.

216. The second case is *Spring v Guardian Assurance Plc* [1994] ICR 596. In that case the issue was whether an employer owed a duty of care to its employee in giving a reference to another potential employer. In his speech, Lord Woolf said, at page 636 B-C:

> "The relationship between the plaintiff and the defendants could hardly be closer. Subject to what I have to say hereafter, it also appears to be uncontroversial that if an employer, or former employer, by his failure to make proper inquiries, causes loss to an employee, it is fair just and reasonable that he should be under an obligation to compensate that employee for the consequences. This is the position if an employer injures his employee physically by failing to exercise reasonable care for his safety and I find it impossible to justify taking a different view where an employer, by giving an inaccurate reference about his employee, deprives an employee, possibly for a considerable period, of the means of earning his livelihood. The consequences of the employer's carelessness can be as great in the long term as causing the employee a serious injury."

217. In my view, the appropriate course for this court to take on this strike out application is to ask whether the Claimant has established an arguable case for the existence of a duty of care applying the well established three limb test set out by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at pages 617-618:

> "in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of a given scope upon the one party for the benefit of the other."

218. As to foreseeability, the Claimant's pleaded case in the Response to the Defendant's Request for Further Information includes allegations that if the Defendant had carried out appropriate risk assessments, it would or should have known of the political risks which the Claimant would or might face in

Romania (see for example I/tab 6/67-68). In particular, the central allegation is that a risk assessment should have been carried out before the Claimant was deployed to Romania, and that if such an assessment had been carried out, it would have revealed[43]

> "that Romania was a high risk market in relation to political risk, deep issues of corruption and a poorly functioning judiciary, with a concomitant risk of political exposure in deal-making, particularly in respect of privatisation, and in circumstances where individuals exploited the internal security and police forces and/or the legal system and processes and/or the judiciary to target competitors and political/business adversaries, with the risk that Mr Benyatov might be caught up in such matters, the Defendant had a duty of care to perform an adequate risk assessment in relation to the risks faced by Mr Benyatov."

219. If those allegations are made out, then foreseeability is highly likely to be established.

220. As to proximity, given that the relationship between the Claimant and the Defendant was that of employee and employer, and if the allegations of foreseeability set out above are proved, then it will not be difficult for the Claimant to establish proximity.

221. Accordingly, the real issue appears to me to be whether the Claimant has a case with sufficiently arguable prospects to clear the relatively low hurdle which must be cleared to avoid a strike out, that it is fair, just and reasonable to impose the duties of care which the Claimant alleges the Defendant owed.

222. In considering whether the imposition of the duties alleged is fair, just and reasonable, it is necessary to consider the points raised by the Defendant set out at paragraph 208 above.

[43] I/tab 6/67-68/Answer 15.4

223. Firstly, it is suggested that the duty of care in tort is unsustainable as it is not alleged to arise under the contract. As to this, I do not accept that it is necessary that the duty arose under the contract – in *Spring* the giving of a reference did not arise under the contract. In any event, as I have already noted, the Claimant placed before me a draft Amended Particulars of Claim which would align the Claimant's case in respect of the implied term of trust and confidence with the case in tort.

224. Secondly, it is said that the claim is contrary to binding authority, namely *Reid*. There is strength in this, but there have been significant decisions in the House of Lords since *Reid* was decided: first, *Caparo*; then *Scally* and *Spring*. Moreover the decision in *Reid* appears to me to have been driven at least in part by the fact that the employer had no obligation to insure even in respect of injuries to an employee working overseas for which the employer would be liable. Next, it is to be noted that Ralph Gibson L.J. indicated that deciding whether a duty of care existed would have been better made on the evidence after trial (at page 233A). Finally, the facts of the present case if the pleaded case be made out are very different from the facts in *Reid*.

225. For those reasons, the Claimant has prospects which are more than fanciful of establishing that the court is not bound by *Reid* to hold that no duty of care existed.

226. Thirdly, it is said that the courts have consistently rejected a duty on an employer to protect an employee from economic losses. I accept this as a general proposition, but, as pointed out above, there are exceptions to this.

227. Fourthly, it is said that a duty of care is less likely to arise to prevent a person being harmed by a third party. I accept this also as a general proposition, but there are exceptions, of which *Dorset Yacht Co. Ltd v Home Office* [1970] A.C. 1004 may be the best known example. Further, the closer the connection or proximity between the parties, the more likely it is that a duty may arise – the close proximity of an employer to an employee is likely to make it easier for a court to find that there is an exception to the general rule.

228. Fifthly, it is submitted that the factual matrix militates against the alleged duties. This submission takes some but not all of the facts which a court might regard as material: in my view this submission on the part of the Defendant strengthens the Claimant's submission that the decision as to whether a duty of care exists should be taken after trial on the evidence.

229. All of the above factors seem to me to be matters which a court would need to consider under the third limb of the *Caparo* approach, although it may be that other lawyers would approach the analysis differently.

230. I turn now to the two matters relied upon by the Defendant as showing that an extension of the duties owed by the Defendant would not be fair, just or reasonable.

231. It is said that the duties for which the Claimant contends are far reaching. The liabilities upon institutions such as the Defendant could be enormous.

232. At this stage it is not possible to assess just how significant for the Defendant and other banks the imposition of a duty would be, but I accept that it would have a very significant potential. Equally, at this stage it is impossible for the

court to assess how onerous it would be for the Defendant or other financial institutions to carry out appropriate risk assessments. However onerous the effect of the imposition of a duty upon the Defendant would be, the claim made in these proceedings, if made out at trial, illustrates how disastrous for an individual the failure to comply with such a duty can be. The advantages and disadvantages to both employer and employee seem to me to be matters which are relevant to deciding whether it is fair, just and reasonable to impose the duties alleged, and those seem to me matters best assessed by a judge who has heard such evidence, including expert evidence, as the parties wish to put before the court.

233. There is, however, greater merit in the proposition that the duties contended for once criminal proceedings are commenced overseas are invidious and unworkable. There is considerable authority for the proposition that a duty will not be imposed where it may create a conflict between the interests of an employer and employee. See for example paragraph [44] of the judgment of Dyson L.J. in *Crossley*, and more importantly the analysis in the judgment of Lord Lloyd-Jones JSC in *James-Bowen* at paragraphs [28] to [33]. In particular at paragraph [32] he said:

> "These stark differences between the interests of employer and employee strongly suggest that it would not be fair, just or reasonable to impose on an employer a duty of care to defend legal proceedings so as to protect the economic or reputational interests of his employee."

234. These policy considerations are strengthened in this case where the steps which it is suggested should have been but were not taken are steps of great political and diplomatic sensitivity. I have difficulty seeing how a court can

sensibly investigate allegations of the type set out in paragraph 54.3 which alleges that the Defendant

> "failed to intervene adequately in Romania to demonstrate Mr Benyatov's innocence to the relevant prosecutorial and/or judicial authorities, and/or to individuals or political authorities with power to withdraw the prosecution against Mr. Benyatov due to the lack of any meritorious claim against him."

235. This allegation goes much further than an allegation that the Defendant should have taken steps to defend or engage lawyers to defend the Claimant. As I have said, the evidence before me is that the Defendant did that, and continues to do that, at great expense. The allegation goes much further and asserts that the Defendant had a duty to attempt to intervene politically in the prosecution system of a sovereign nation.

236. Further, any such case must be a claim for loss of a chance. That is not how it is pleaded at present, and no indication was given to me as to how an English court could assess, for example, the likely response of the Romanian government to an informal approach by a retired American Secretary of State.

237. In my judgment it would not be fair, just or reasonable to impose such a duty.

238. Accordingly paragraphs 25.3 and 54.3 should be struck out as should be paragraph 25.4 insofar as it relates to alleged duties after arrest.

239. On this basis paragraphs 25.1 and 25.2 survive. However, for the reasons given above in respect of the indemnity claim, in my judgment the loss in respect of a failed property transaction pleaded in paragraph 55.3 is too remote in law to be recoverable.

Breach

240. The Defendant contends that the Claimant has no real prospect of establishing breach of any relevant duty.

241. This case is set out at paragraphs 44 and 45 of the Defendant's skeleton argument. I understand that the target of this attack is upon the Defendant's conduct after the Claimant's arrest. Given the conclusions which I have reached on that part of the case, the issue as to whether the case on breach can be made out does not arise, although the points raised add strength to my conclusions in that regard.

Causation

242. The Defendant puts forward three inter-related propositions:

(1) That the breaches, if established, were not the effective or dominant cause of the Claimant's loss;

(2) That liability will not be imposed for a breach of duty where the act of a third party amounts to a novus actus;

(3) That the dominant and effective cause of the Claimant's loss was the conviction.

243. In approaching these submissions, the context is the view I have taken about which parts of the case on liability should go forward, namely that only the case reliant upon matters prior to the Claimant's arrest should proceed.

244. If that case succeeds on liability, I do not envisage the case on causation to present particular problems since the consequence of the case on liability inherently assumes that the Claimant's arrest and consequent conviction are matters falling within the Defendant's obligation to indemnify and/or are the consequences of the Defendant's breach of duty.

245. Accordingly, I reject the submission that there is any part of the Claimant's case which should be struck out by reference to difficulties of causation which would not otherwise fall to be struck out.

246. However, in respect of the claims relating to the Defendant's actions and inactions post arrest, my conclusions above are (as I have indicated) underpinned by my perception that those claims fail to address and surmount considerable difficulties as to causation.

247. In respect of the pre-arrest allegations, I understand the Claimant's case to be that if he had been properly advised he would not have embarked upon advisory work in respect of privatisations in Romania. That is a perfectly intelligible all or nothing case which the court can assess having heard the evidence.

248. However, the post arrest case is very different. That case must be a loss of a chance case, although it is not pleaded in those terms. As I have indicated, I do not understand how it is said that the court can assess (for example) what the Romanian government would have done had a distinguished retired United States Secretary of State approached it informally. Other examples come to mind.

249. Accordingly, in respect of allegations relating to post arrest events, had I not been minded to strike those out on other grounds, I would have been minded to strike them out on this basis.

Remoteness

250. As set out above, I accept that paragraph 55.3 of the Particulars of Claim should be struck out on the basis that the claim there put forward is too remote.

251. Paragraph 56 of the Particulars of Claim claims for the cost of mitigating the Claimant's losses through entering into unsuccessful business ventures. I understand that the Claimant no longer seeks to pursue this part of his claim.

Proposed Amendment

252. In paragraphs 78 and 79 of the Claimant's counsel's skeleton argument, it was said:

> "An amendment is sought pursuant to CPR 17.1(2)(a) and/or (b). In addition to the responsive amendments prefigured in VB1 §9 [2/22/201], the reasons for the amendments are in addition to the responsive points referred to at §9 VB1 are:
>
> "78.1 Correcting the typos and wrong cross-references as highlighted by the Defendant in their RFIs;
>
> "78.2 Seeking to address Master Davison's point that a lack of particularisation informed his decision not to allow expert evidence in relation to the Defendant's conduct after the arrest of the Claimant;
>
> "78.3 Clarification and particularisation of the existing claims, including in the light of expert evidence currently under preparation (as ordered by Master Davison).
>
> "79. As to the latter points, the Claimant notes that exchange of expert reports was due on 13 March 2020. It is therefore,

> unhelpful to have to make amendments before that evidence is closer to finalisation. The Claimant would have preferred to do so in an orderly fashion once that was done. Nevertheless, in response to the Defendant's application, that process has been accelerated at the risk of detriment to the Claimant in order that the Court at this hearing has a fuller appreciation of the impact that such evidence is likely to have on the contours of this litigation and in particular as to the existence and scope of the implied duties and indemnity and in relation to causation."

253. Paragraph 9 of Mr Benyatov's statement which is referred to in paragraph 78 of that skeleton argument deals with two matters: the abandonment of the claim for an injunction and/or specific performance and an amendment to increase the amount claimed by way of lost earnings.[44]

254. During the course of the hearing before me, a draft Amended Particulars of Claim was placed before me. Mr. Goulding indicated that he had objections to the proposed amendment.

255. At the end of the hearing Mr. Ciumei indicated that he no longer pursued the application in that form:[45]

> "So what I would like to do in amendment is as follows: we haven't made a formal application to amend, and we have explained, when we provided this document, that it was to fulfil several purposes.
>
> One, to deal with the points that we promised we would deal with. We promised when they made their application we would drop the injunction point and that we would take the information on quantum in the schedule and we would put it in the pleading so that there was no longer an inconsistent case, one case.
>
> I obviously stand by that, so I seek permission to do that. I ought to have permission to do that, (1) because making the case consistent I can't see how they

[44] II/tab 22/201
[45] Transcript/day 3/pages 90 to 92

could ever object to us putting the quantum case in, and dropping a whole head of relief, again they can hardly object to that, so that ought to stand.

Beyond that, with one exception which I will come to, the rest of our proposed amendments were put forward on the basis, and we explain this in correspondence, that we wanted to have a draft available at this hearing to be able to show how, in our view, the case was developed by having access to some preliminary expert evidence.

We said we're not terribly happy about doing that, because we haven't finalised the evidence, so it is not an ideal way forward, but the amendments we put forward were directed, at least in part, to that end.

We also wanted to, basically, beef up our particulars so we could support the application for additional expert evidence that in my submission the Master had suggested, if we wanted to go that route, we really needed to do that.

So those are all things we would like to do, but we don't formally have to do them right now, because they are not necessary responses to this strike-out application.

If our case were to be found wanting, if it is defective, then your Lordship will appreciate, it is well understood, and there is a reference in the White Book to an authority confirming this, it is in the White Book, page 82, paragraph 3.4.2, a party should have the opportunity to fix their case facing a strike-out, and if they can't then they get struck out. In my submission we are not in that territory.

The two bits that do fall away on account of the strike-out application, it's the injunction, well we are dropping that, and then putting the quantum information in, we have done that.

The rest is really what we would like to do. And since I don't have a formal application, my suggestion

> is I don't deal with that now. What we do is, if we do survive this strike-out, if there isn't a summary disposal, we will do that at the CMC.
>
> I have listened to my learned friend's complaints about the lack of particularity he says still exists. I will do my best to fix that if I get the opportunity, if this case is still going after this hearing."

256. As set out above, it does seem to me that there are parts of the case which could be rescued by amendment. However, although Mr. Goulding has made some submissions on the draft which he (and the Court) had been provided with, I do not think he had said everything he would have wished to say.

257. Moreover, in the passage set out above, Mr. Ciumei accepted that there could be further particularisation.

258. In principle, it seems to me that the Claimant should have an opportunity to draft an amendment in the light of this judgment, upon which the Defendant should have an opportunity to make submissions.

259. I will invite submissions from the parties as to how they propose the court should proceed.

Strike out and Summary Judgment: Conclusions

260. For the above reasons, subject to the parties' submissions on the precise form of the order which I should make:

(1) I decline to strike out the claim for an indemnity;

(2) The claim in paragraphs 19.2 which I understand at present to be connected to post-arrest actions or inactions on the part of the

Defendant will be struck out, subject to any permission granted hereafter to amend;

(3) Paragraphs 19.3 to 19.7 will be struck out;

(4) Paragraphs 23 and 24 may stay in the pleading as a record of events, but subject to amendment to reflect my view that neither paragraph raises a sustainable cause of action additional to those pleaded or, subject to amendment, to be pleaded under paragraphs 19.1 and 19.2;

(5) The first sentence of paragraph 25 will be struck out;

(6) Paragraph 25.3 will be struck out;

(7) I will consider any amendment proposed to paragraph 25.4 to reflect the conclusions in this judgment;

(8) Paragraphs 47.2 to 53 will be struck out;

(9) Paragraph 54.3 will be struck out;

(10) I will consider any amendment proposed to paragraph 54.4 to reflect the conclusions in this judgment;

(11) Paragraphs 55.3 and the third sentence of paragraph 56 will be struck out;

(12) Paragraph 59 will be struck out.

261. It seems to me that paragraph 58 will also fall away, but I invite the parties' submissions on this point.

Conditional Order

262. In the alternative to its application for a strike out or summary judgment, the Defendant applies for a conditional order under CPR 3.1(3) and paragraph 5.2 of Practice Direction 24.

263. Under the old rules prior to the CPR it was a familiar course for the court to adopt to order a defendant to pay money into court in the alternative to summary judgment being entered in the plaintiff or claimant's favour.

264. The CPR now enable such an order to be made in the alternative to summary judgment being entered in favour of a defendant: under paragraph 4 of PD24, where the Court considers that a claim may succeed but it is improbable it will do so, it may consider making a conditional order. By virtue of paragraph 5.2 of PD24, such a conditional order may require the claimant to pay a sum of money into court. This is the order sought by the Defendant.

265. Applications for a conditional order made by a defendant against a claimant are unusual. Researches by counsel have revealed 5 examples of such orders being made: *Olatawara v Abiloye* [2002] EWCA Civ 998; [2003] 1 W.L.R. 275; *Jones v Ricoh UK Ltd* [2010] EWHC 1743 (Ch); *Allen v Bloomsbury Publishing Plc* [2011] EWCA Civ 943; *Belgrave International SA v Nomura International plc* [2000] CP Rep 5; *Ningbo Jiangdong Jiemao and Export Company Ltd v Universal Garments International Ltd* (Unreported, 28 November 2017).

266. In the 2019 case of *Gama Aviation (UK) Ltd v Taleveras Petroluem Trading DMCC* [2019] EWCA Civ 119, the Court of Appeal provided important

clarification of the Court's power to make conditional orders under PD24. As summarised in the Claimant's counsel's skeleton argument, Males L.J. set out the following principles (with which Dame Elizabeth Gloster and Hamblen L.J.J. agreed):

(1) "[T]he court must not impose a condition requiring payment into court or the provision of security with which it is likely to be impossible for the defendant to comply", a principle that had been reaffirmed by the Supreme Court in *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2017] UKSC 57, [2017] 1 WLR 3014, [12] (see [45]);

(2) The respondent bears the burden of establishing on the balance of probabilities that it would be unable to comply with a proposed conditional order, and in doing so "*must show, not only that it does not itself have the necessary funds, but that no such funds would be made available to it*" (see [46]–[47]);

(3) Males L.J. cited (at [53]) a passage from *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWCA Civ 198, in which Brooke L.J. had stated that, where an applicant for summary judgment applied in the alternative for a conditional order, this may be considered to be "*a sign of weakness*" in the summary judgment application as the purpose of the application "*is to persuade the court that the defendant has no real defence*", whereas a conditional order presupposes that there is a reasonable prospect of success. The same passage (also cited by Males L.J.) stated that an application for a conditional order of £1 million was "*out of the ordinary*".

(4) Males L.J. also cited with approval another Court of Appeal decision, *Huscroft v P & O Ferries Ltd* [2010] EWCA Civ 1483, [2011] 1 WLR 939. In that case, the defendant sought a conditional order for payment into the Court by the claimant. Moore-Bick L.J., citing the previous case of *Olatawura v Abiloye* [2002] EWCA Civ 998, [2003] 1 WLR 275, warned against encouraging defendants to make "exorbitant applications in misguided attempts to obtaining a conditional order for security for costs" (at [14]). In particular, he stated that the Court's power to make a conditional order should not be treated "*as providing a convenient means of circumventing the requirements of Part 25 and thereby of providing a less demanding route to obtaining security for costs*", and that the Court when considering whether to make a conditional order "*should bear in mind the principles underlying rules 25.12 and 25.13*" (at [14]). Moore-Bick L.J. proceeded (at [15]) to cite a passage from the judgment of Clarke L.J. in *Ali v Hudson* [2003] EWCA Civ 1793, [2004] CP Rep 15, which stated that the "*correct general approach*" was as follows:

> "(i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim; …
>
> (ii) in any event
>
> > (a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise be demonstrating a want of good faith; good faith being understood to consist … of a will to litigate a genuine claim … as economically and expeditiously as reasonably possible in accordance with the overriding objective; and

> (b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding."

267. I approach this application having decided that significant parts of the Particulars of Claim should be struck out but other parts of the claim have realistic rather than fanciful prospects of success.

268. A conditional order would only be made in respect of the surviving claims. There is a clear conflict between deciding that a claim has realistic prospects of success and considering that it is improbable that the claim may succeed. Such a conclusion might be more easily reached if the claim turned entirely upon a claimant's evidence, but this is not such a case: here most of the primary facts appear not to be the subject of much if any dispute. The case is likely to turn upon conclusions of law informed by expert evidence.

269. In those circumstances, in my judgment this is not a case in which it is improbable that those parts of the claim which survive will succeed.

270. Accordingly, I decline to make the conditional order sought.

Security for Costs

271. The Defendant seeks an order that the Claimant should provide security for the Defendant's costs in the sum of £1.15 million, which the Defendant says is half of the Defendant's costs of the proceedings.

272. The Claimant submits that the following are the applicable principles:

    (1) A primary factor is whether an order to pay security for costs will be oppressive in that it will stifle a genuine claim;

(2) The court must consider whether the Claimant's want of means has been brought about by any conduct by the Defendant;

(3) The court must consider whether, and, if so, to what extent the Defendant will in fact be hindered in enforcing a costs order against the Claimant;

(4) That the first application for security for costs should be made no later than the first case management conference. Delay is a factor that can affect whether to grant security.

273. I accept that based upon the authorities cited by the Claimant, these are all material factors.

274. In the judgment of Hamblen L.J. in *Danilina v Chernukhin* [2018] EWCA Civ 1802; [2019] 1 W.L.R. 758 at paragraphs [51] and [52] there is the following summary of the principles which a court should apply in an application for security for costs:

> "51. Having regard to the guidance provided by these authorities, the position may be summarised as follows:
>
> "(1) For jurisdiction under CPR r 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.
>
> "(2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR r 25.13(1) if "it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order".
>
> "(3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of articles 6 and 14 of the Convention: see the *Bestfort* case [2017] CP Rep 9, paras 50-51.

> "(4) This requires "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned": see *Nasser's* case [2002] 1 WLR 1868, para 61 and the *Bestfort* case at para 51.
>
> "(5) Such grounds exist where there is a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay: see the *Bestfort* case at para 77.
>
> "(6) The order for security should generally be tailored to cater for the relevant risk: see *Nasser's* case at para 64.
>
> "(7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings: see, for example, the orders in *De Beer's* case [2003] 1 WLR 38 and the *Bestfort* case.
>
> "(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement: see for example, the order in *Nasser's* case.
>
> "52. I would add the following observations:
>
> "(1) The relevant risks are of (i) non-enforcement and/or (ii) additional burdens of enforcement. A real risk of either will suffice to meet the "threshold" test.
>
> "(2) Some of the authorities refer to difficulties of enforcement. Mere difficulty of enforcement in itself is not enough (save in so far as it results in additional costs and therefore an extra burden of enforcement). The relevant risk is non-enforcement, not difficulty in enforcement and this is the risk to which the test of "substantial obstacles" is directed. The obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement. Difficulties may, however, be evidence of the "substantial obstacles" required for there to be a real risk of non-enforcement.
>
> "(3) Delay is mentioned as a relevant additional burden of enforcement, but it is difficult to see how this can be quantified in terms of security unless it is likely to result in some additional cost or interest burden."

275. In that summary, Hamblen L.J. referred to the Court of Appeal decision in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 W.L.R.

1868. It is material to cite two passages from the judgment of Mance L.J. in that case:

> "61. Returning to rules 25.15(1) and 25.13(1) and (2)(a) and (b), if the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned. The former principle was that, once the power to order security arose because of foreign residence, impecuniosity became one along with other material factors: see the *Thune* case [1990] 1 WLR 562 cited above. This principle cannot, in my judgment, survive in an era which no longer permits discrimination on grounds of national origin. Insolvent or impecunious companies present a different situation, since the power under CPR 3 25.13(2)(c) applies to companies wherever incorporated and resident and is not discriminatory."

And

> "67. The risk against which the present defendants are entitled to protection is thus not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored in amount to reflect the nature and size of the risk against which it is designed to protect."

276. There is no dispute that the Claimant is resident in the United States of America and that therefore the formal requirements of CPR r 25.13(2)(a) are satisfied.

277. The Defendant's case in support of the application is not based particularly upon difficulties of enforcing an award of costs in the Claimant's place of residence, but rather on the circumstances of the Claimant himself. Four points are made by Mr Goulding:

(1) The Claimant would be unable to satisfy any award of costs made against him;

(2) The Claimant has every reason to try to put his assets out of the Defendant's reach;

(3) The Claimant has a history of using complex and unusual ownership in relation to his assets; and

(4) The Claimant is in the process of converting one of his major assets, a house, into cash and has not provided any detail as to what he plans to do with that money.

278. In a second witness statement dated 5 December 2019, Mr Benyatov set out his assets:[46]

> "… My assets are as follows:
>
> "11.1 approximately $1m in an account in the United States with Fidelity. This account is what is known as a "401k" account, which is a US private pension account (similar to what in the UK would be known as a Self Invested Personal Pension or SIPP). As this is a pension account, removing funds from it – for example to deposit with the court as security for the Defendant's costs – would incur punitive tax penalties which would significantly reduce the amount available. While I am not an accountant, I understand that, were I to remove funds from this account, I would have to pay approximately 40-50% of the total sums removed in tax;
>
> "11.2 two houses, owned jointly by my wife and I …. These houses are the real estate development I referred to at paragraph 97 of my First Statement. I purchased the land in May 2016, and, together with a mortgage for $1.03m, used my liquid assets to pay for the costs of building the houses, with construction beginning in early 2018. Whilst these houses were being built, I lived in rented accommodation in Los Angeles. Since completion, to save on rent, and as my family has now

[46] II/tab 25A/583C-583D

> joined me in Los Angeles, I have moved into one of the houses. The other was marketed for sale, and I have recently accepted an offer of $1.935m in relation to it (given that the two houses are similar I believe that the value of the house that I live in with my family will also be around $2m). I expect to complete the sale of the first property in January 2020 and, after tax and professional fees, to receive approximately £1.75m. …..
>
> "11.3 an account with Lloyds Bank in the UK, containing about £300,000. I have a certain level of residual expenses in the UK (for instance, the fees associated with a storage unit which I cannot empty as that would require me to travel to London, which I cannot do), which I fund from this account. When my wife and son return to Europe (returning to Europe to recharge and reconnect is very important for my wife, who has left her life there to come and live with me in a place which is culturally quite different, and where she has few friends), their expenses are also funded from this account. In addition, this is the account from which I have funded, and continue to fund, my expenses in this litigation (for example, counsel and expert fees). I expect it to be entirely depleted as a result of funding my own costs of this litigation; and
>
> "11.4 residual amounts in certain private equity funds, which total no more than $20,000. I have no control over when these funds are distributed."

279. I have no reason to doubt the accuracy of that statement of the Claimant's assets.

280. As I have said, the amount which the Defendant seeks by way of security is £1.15 million.

281. I have not seen a detailed breakdown of the Defendant's projected costs, but have no reason to doubt that the estimate of £2,289,474 put forward in paragraph 7 of Ms. Banks's First Witness Statement[47] is of the likely order of spending by the Defendant. Of that £1,813,870 was then yet to be spent.

282. In my view there has been unexplained delay in this application for security for costs being made. The appropriate way of dealing with that delay, in my

[47] II/20/141

judgment, is to consider only making any order for security for costs in respect of costs yet to be spent, thus in respect of £1,813,870.

283. The amount sought by way of security is 50% of the projected costs: accordingly the amount which I consider as the amount which might be secured is in round terms £900,000. It is against that sum that I consider the grounds relied upon in support of the application.

284. The authorities to which I have referred make it clear that security is to be ordered against the risk of non-enforcement.

285. I am not satisfied that the Defendant has established that there is a risk of non-enforcement of a cost award in the amount of £900,000. I reach that conclusion for the following reasons:

(1) I would be reluctant at this stage to force the Claimant to realise the monies in his 401k account because of the tax implications of so doing, but it seems to me realistic to suppose that at the time of any adverse order for costs a sum of around US $500,000 (i.e. the sum of $1m less tax at 50%) would be available – about £378,000 at current rates of exchange;

(2) The Claimant is the half owner of a house which he says is worth $2 million. I am not clear whether the mortgage of $1.03m is still outstanding – if it is, then the net equity is about $1m, of which half is his – thus another £378,000 would be available;

(3) This leaves £144,000 to be found. I have no reason to suppose that that could not be found probably from the sale proceeds of the house which is being sold;

(4) In that regard I do not find the suggestion that there is, on the evidence, a significant risk of the Claimant dissipating his assets convincing. It is true that some years ago he owned a property through a complex structure, but that was known to the Defendant at the time, and appears to me to be no more than the sort of arrangement which an international banker such as the Claimant might adopt for fiscal reasons;

(5) It is of course right that the Claimant might be said to have every incentive to move assets, but that is a long way from establishing that he has any intention of so doing – and, in my view the greater part of the necessary assets to satisfy an award (the two sums of $500,000 referred to above) are of a nature that it is unlikely that they will be dissipated;

(6) I draw no adverse inference from the explanations given by the Claimant in respect of the use of the sales proceeds of the house to be sold. I see no reason to suppose other than that the bulk of those proceeds will remain available in one form or another.

286. For those reasons I do not accept that this is a case in which an order for security for costs should be made. However, for completeness I deal with the Claimant's grounds for opposing the application:

(1) I accept that the application is made late, and have reflected that in my approach set out above;

(2) I do not accept that making an order would stifle the claim in the sense of making it impossible for the action to come to trial: on the contrary, it seems to me that even were an order for security in the sum of £900,000 to have been made, it is likely that sufficient assets would have remained available for the action to proceed;

(3) It is difficult without prejudging the case to say that the Claimant's financial condition was caused by the Defendant. Given my other conclusions on this application, I do not to go further into this difficult area.

287. For these reasons, the application for security for costs is also refused.