[2021] EWHC 36 (Ch)

Claim No: FL-2016-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Financial List

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

Date: 10 January 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

BILTA (UK) LIMITED (in liquidation) and others

Claimants

- and -

(1) SVS SECURITIES plc
~~**(2) KULVIR SINGH VIRK**~~
~~**(3) SIMON FOX**~~
~~**(4) DEUTSCHE BANK AG**~~
(5) TRADITION FINANCIAL SERVICES LIMITED

Defendants

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Mr Christopher Parker, QC and **Mr Andrew Westwood** (instructed by **Enyo Law LLP**) for the Claimants

Mr David Scorey, QC and **Mr Laurence Emmett** (instructed by **Greenberg Traurig LLP**) for the Fifth Defendant

Hearing date: 8 January 2021

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Approved Judgment

I direct that no official note or transcription shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

1. I am the designated judge in Financial List proceedings currently listed to commence on 25 January 2021. The week commencing 18 January 2021 has been allocated for reading in. The trial itself is listed for five weeks, commencing (as I say) on 25 January 2021.

2. This is the second time the trial of this matter has been listed. It was due to have been heard early last year, but was adjourned due to the COVID-19 pandemic. The Fifth Defendant applies to adjourn the trial again. It does so for reasons directly related to the on-going COVID-19 pandemic.

3. The Fifth Defendant – Tradition Financial Services Ltd (**TFS**) – is the only active defendant in these proceedings. The Second to Fourth Defendants have negotiated an exit from these proceedings with the Claimant – Bilta (UK) Limited (**Bilta**) – and the First Defendant is not participating in these proceedings, for reasons that are immaterial.

4. The essential cause of action asserted by Bilta against TFS is that of dishonest assistance, which TFS strenuously resists. Without straying into the substance of the issues between the parties, it is clear – and I proceed on this basis – that issues of honesty and dishonesty will loom large during the course of the trial.

5. As part of its defence, TFS will rely upon the evidence of four people. Listing them in alphabetical order by surname, they are:

   (1) Mr Michael **Anderson**.

   (2) Mr Luca **Bertali**.

   (3) Ms Lucy **Mortimer**.

   (4) Mr Peter **Weston**.

   Obviously, given what I have said in paragraph 4, these witnesses (I shall generally refer to them as the **Witnesses**, although of course it is envisaged there will other testimony at trial, including expert evidence) will be centrally involved in the issues of the trial, including, in particular, in relation to the allegations of dishonesty advanced by Bilta. Not only will the Witnesses' evidence affect the outcome of the issues between Bilta and TFS, but it will affect their own reputation and future employability.

6. So, as was common ground, the stakes are very high. This is something that underpins the entirety of this ruling; and the fact that I deal with the point briefly should in no way be taken as an indication that I understate its importance.

7. All of the Witnesses want to give evidence. I do not wish to go too much into the motivation of the parties and the witnesses, but I should make the following points:

   (1) TFS wishes to call the Witnesses in order to defend the claims made against it by Bilta.

(2) Bilta – given the evidence that TFS proposes to adduce – wants to test that evidence using the engine of cross-examination. Although perhaps dated by the language of the time, and verging on the hyperbolic, in essence I accept what Wigmore said about cross-examination being "beyond any doubt the greatest legal engine ever invented for the discovery of the truth" (Wigmore, *Evidence*, 2nd ed (1923) at §1367). To be effective, cross-examination requires many conditions to be satisfied, one of which (and it is the one that I am concerned with in this application) is that the witness under examination fairly and effectively be able to give his or her evidence.

(3) Independently of TFS, the Witnesses positively wish to give evidence to vindicate themselves in light of Bilta's allegations. Obviously, on one level, the trial is only concerned with the issues as between Bilta and TFS, and the purpose of the trial is to determine those issues. But – and again this is not seriously contested by Bilta, and was positively advanced by TFS – I must bear in mind the effect of my judgment (particularly, if it is adverse) on persons apart from TFS. That includes – although it is not limited to – the Witnesses.

8. Until late December 2020, Mr Anderson, Mr Bertali and Mr Weston were all ready and willing to attend the trial in person to give evidence, despite the "Tier 4" COVID-19 restrictions prevailing at that time. Since then, to quote from paragraph 3 of TFS's written submissions:

> "Now, due to the dramatically worsening state of the pandemic, those witnesses have indicated strong reluctance to give evidence in person. Subsequent to TFS's indication of this difficulty, the concerns have been both justified and amplified by a further national 'lockdown'."

9. I should make clear that I was not provided with evidence as to the extent and effects of COVID-19 across the UK and in particular in London, where this trial is due to be heard. That would have been burdensome and unhelpful, given the changing and developing circumstances. I am taking judicial notice of these facts and matters, including both the the recent "mutation" of the virus into something much more infective and the recent "spike" in infections, hospitalisations and deaths. I am also very conscious that these things may get worse, before they get better. Again, I am not going to labour these points, but they are unsurprisingly matters that underpin the entirety of this judgment, and which I have taken very carefully into account.

10. Ms Mortimer falls into a different category to Mr Anderson, Mr Bertaili and Mr Weston:

(1) For medical reasons which I am not going to go into further, Ms Mortimer is now unable to attend the trial to give evidence. TFS notified Bilta (this was through solicitors, but I shall, in this ruling, simply refer to communications between TFS and Bilta) and the court that this was the case in early November 2020.

(2) By a "hearsay" notice under section 2 of the Civil Evidence Act 1995 and CPR rule 33.2, TFS stated that it "intends to rely on the First Witness Statement of [Ms Mortimer] dated 28 November 2019 as evidence of the truth of the matters stated". No counter-notice has been served by Bilta.

(3) The position – as matters stand – is that Ms Mortimer's evidence will be admitted into evidence at trial, but that there will be no cross-examination of her. Inevitably, this will have an effect on the weight that I can attach to her evidence.

(4) I should make clear that it is only these medical reasons that are preventing Ms Mortimer from giving evidence, and that Ms Mortimer's position is otherwise as stated in paragraph 7(3) above.

11. In terms of timing, it is relevant to note that the serving of a "hearsay" notice – and TFS's acceptance by the serving of that notice that it would have to defend itself without the benefit of Ms Mortimer's evidence in person – occurred before the change of position on the part of Mr Anderson, Mr Bertali and Mr Weston that I have described in paragraph 8 above.

12. The position of all of the Witnesseses was set out in witness statements served in support of TFS's application to adjourn the trial. As Mr Scorey, QC, leading counsel for TFS, emphasised, the content of these statements (and in particular that of Ms Mortimer) contains private material which I should be careful not to disseminate too widely. I have made clear that I am prepared to protect these statements from third party sight without TFS first being heard on the point (and, of course, I have no doubt that TFS would convey to me the position of the Witnesses in any such application). I shall (for this reason) keep my references to this evidence to the generic, and avoid (so far as possible) the mentioning of specifics.

13. However, it is necessary to say that in her evidence in support of this application, Ms Mortimer made clear that her medical issues are not, as was considered to be the case in November 2020, such as to preclude her attendance at trial whenever that trial took place. Although it is impossible (and I use that word advisedly) for Ms Mortimer to attend the trial as presently scheduled, there are excellent prospects that if I adjourned the trial, and it then took place (as it would, given the present state of the lists) in early- to mid-2022, Ms Mortimer would be able to attend to give evidence in person. That, it seems to me, is a self-standing point in favour of adjournment, which I must take into account. I will deal with it separately, and will consider first the principal reason why TFS seeks an adjournment now, which is that articulated in paragraph 8 above: namely, the "reluctance" of Mr Anderson, Mr Bertali and Mr Weston to give evidence in person at the Rolls Building, which is where this trial is scheduled to take place. In the following paragraphs, my references to the Witnesses is to these three gentlemen.

14. It is necessary to say a few matters about the conduct of litigation and the administration of justice with particular reference to proceedings (as these are) in the Business and Property Courts in the Rolls Building in London:

(1) The courts in this country are – and are designated as – an essential service that is intended to (and has) continued during the pandemic. That is not to say that there have not been adjournments because of COVID-19 – there plainly have, and indeed the trial of this case was (as I noted in paragraph 2 above) an early victim of the COVID-19 pandemic.

(2) Much more to the point there have, since the onset of COVID-19, been wide-ranging and dramatic changes in the manner in which justice has been administered in England and Wales. That has – in almost all cases – resulted in

the court staff and court users going the "extra-mile" in seeing that (despite the massive disruption occasioned by the virus) the essential work of the courts – specifically, the fair and proper resolution of disputes – has proceeded.

(3) This has meant that many of the "old" rules – that would have pertained by default prior to the pandemic – either do not apply or apply in a radically different way. That applies to: the composition, filing and service of bundles; the use of technology; and the manner and form in which hearings are conducted, observed and recorded. There has been a raft of guidance, protocols, rule revisions and rulings issued in light of the pandemic. By way of very broad summary:

(a) There has been a dramatic shift away from "in person" hearings to "remote" hearings. As a general rule of thumb – and it will be necessary to expand upon this – interlocutory hearings and other hearings not involving witnesses can, and therefore should, in light of the present prevailing circumstances, be heard remotely.

(b) On the other hand, witness actions (and other hearings involving witnesses) need to be case managed with far greater circumspection and care, because of the importance of hearing witnesses.

(c) As I have noted, there is a great of material seeking to assist judges in these circumstances. Although issued as a *Practice Note* in family proceedings, I have found the decision of the Court of Appeal in *Re A (Children)*, [2020] EWCA Civ 583 to be of considerable help, and what follows draws very considerably on *Re A*.[1]

(d) In all cases, "[t]he decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness [and] justice…An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong": *Re A* at [3(i)].

(e) Guidance – including guidance from senior judiciary – is exactly that: guidance that cannot abrogate the judge's judicial decision as to the conduct of the hearing: *Re A* at [3(ii)]. Furthermore, "[t]he temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered": *Re A* at [3(iii)].

(f) However, the guidance (in particular the message dated 9 April 2020 from the Lord Chief Justice, the Master of the Rolls and the President of the Family Division) noted, as regards witness actions (and other hearings involving witnesses), precisely the circumspection that I have adverted to

[1] I have, when quoting, omitted specific references to children and family proceedings. But, as I have said, in broad terms this decision is extremely helpful in all proceedings, and Mr Scorey relied upon the decision in this way in his submissions.

in paragraph 14(3)(b) above. Where "all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if the parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way": quoted in *Re A* at [6].

(g) The point is that even if all parties appear to be contending for a remote hearing, it is the court that is the ultimate arbiter of whether proceedings so conducted are or can be fair and proper. The position is the same where all parties are opposed to a remote hearing: this is a "very powerful factor" for the court to take into account, for reasons that are obvious. But, even such a consensus is not determinative.

(h) In this case, one party (TFS) seeks an adjournment in preference to an "in person" hearing (which, it says, cannot properly take place) and in preference to a "remote" hearing (which, it says, would be unfair). Bilta, by contrast, opposes an adjournment and is prepared to conduct the trial either in person or remotely. It would be invidious to seek to characterise TFS's objections (including those of the witnesses) as "very powerful" or merely "powerful" or to use some other descriptor of their weight. I will simply say that they are – and this is self-evident – obviously material to the decision that I have to make. How material depends upon all the facts and circumstances, judicially considered and I will not seek – in advance of such consideration – to pigeon-hole them.

(i) In [9] of *Re A*, a number of relevant factors were identified that feed into the judge's decision as to the appropriate format of the hearing of a matter. It is helpful to quote this paragraph, but I stress that I do not regard the range of relevant factors as in any way closed (as the Court of Appeal itself made clear):

> "The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:
>
> (i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
>
> (ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties.
>
> (iii) Whether the parties are legally represented.
>
> (iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters.
>
> (v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only.

(vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence.

(vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?

(viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video.

(ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology.

(x) Any safe (in terms of potential Covid-19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.

(4) The caution with which a court should approach the question of remote hearings where witnesses are to be heard reflects the importance of witness evidence in English civil procedure,[2] and the significance of cross-examination. As was noted in *R (Dutta) v. General Medical Council*, [2020] EWHC 1974 (Admin 414 at [39(iii)], "[t]he general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness". It follows from this that any form artificial intermediation interposed between the questioners of a witness and the judge hearing that witnesses evidence must be a derogation from the "gold standard". That does not mean that such a process cannot be fair or proper. But I do consider that I must approach the relative benefits of "in person" versus "remote" hearings in this light in the case of witness actions (and other hearings involving witnesses).

(5) Considerable efforts have been – and will continue to be – undertaken in the Rolls Building to render it "COVID-secure". That implies no guarantee from infection; and persons who may be safe from infection within the Rolls Building still have to get there, implying journeys and risks that might otherwise not be undertaken or assumed. In his message of 5 January 2021, the Lord Chief Justice, Lord Burnett, said this:

> "We have now entered lockdown for the third time. The courts and tribunals must continue to function. The position remains that attendance in person where necessary is permitted under the proposed new regulations. This would include jurors, witnesses, and other professionals, who count as key workers. HMCTS will continue to put in place precautionary measures in accordance with Public Health England and Public Health Wales guidelines to minimise risk. All those attending court must abide by guidance

[2] This is obviously a theme that runs through English procedure generally, but I confine myself – for obvious reasons – to civil procedure.

> concerning social distancing, hand washing, wearing masks etc. Judges and magistrates will have a role in making sure this happens.
>
> …
>
> The significant increase in the incidence of COVID-19 coupled with the increase in rates of transmission makes it all the more important that footfall in our courts is kept to a minimum. No participant in legal proceedings should be required by a judge or magistrate to attend court unless it is necessary in the interests of justice. Facilitating remote attendance of all or some of those involved in hearings is the default position in all jurisdictions, whether backed by regulations or not."
>
> This, it may be said, introduces a countervailing factor that considered in paragraph 14(4) above. Whereas the point in paragraph 14(4) is that (to paraphrase) where there is a need for cross-examination, that examination is best done in person, the point made by the Lord Chief Justice is that remote attendance should be the default, unless "necessary". There is no inconsistency here: rather, it is a reflection of the difficult decisions that fall to be made in terms of assessing the various, often countervailing, factors that go to questions of trial format and procedure (and adjournment in this context). It is precisely because those factors may, and often will, point in different directions that these decisions require careful consideration and are highly fact specific.

15. Neither party referred me, with any degree of emphasis, to the general (non-COVID) law regarding adjournments. They were right not to do so, for the courts of this country are presently faced with procedural issues that cannot be resolved by the usual tests concerning adjournments, which seem to me to be at best irrelevant and at worse unhelpful. Thus, nothing (as it seems to me) turns on:

(1) The fact that this is an adjournment application made late in the day (about a week before I begin pre-reading and just over two weeks before the trial proper begins);

(2) The fact that this is the second time an adjournment application has been made, by TFS. The first such application, as I have noted, was also COVID-related, and was successful.

(3) The fact that the first adjournment application was successful (in the sense that Bilta acceded to the adjournment sought before I needed to rule on the matter). I must consider this application on its merits, as they appear to me at this time.

It seems to me that the question of adjournment – in this context – is closely tied to the procedural guidance outlined in paragraph 14 above. If, bearing these points in mind, a trial can fairly and properly be heard, either in person or in some other way, then it should not be adjourned. On the other hand, if that is not possible, an adjournment is inevitable.

16. Turning, then, to the question of adjournment, there is one point that I should deal with at the outset, so as to dismiss it right away. During the course of his oral submissions to me, Mr Parker, QC, leading counsel for Bilta, suggested that TFS was opportunistically availing itself of its Witnesses' concerns about giving evidence in person in order to procure an adjournment. He did not press the point very hard, and rightly so, but it

seems to me that (even as elliptically put forward as it was) the point is a bad one. TFS has quite properly heard the concerns expressed by Mr Anderson, Mr Bertali and Mr Weston about giving evidence in person in the present environment, and has not felt able or been able to assuage them.[3] TFS – entirely unsurprisingly – would like these Witnesses to give evidence in person. But – particularly where some of these Witnesses are still employees, as I understand two of them to be – there is a limit as to how far a party can go in seeking to override what are the perfectly understandable concerns of the Witnesses that it wants to call.

17. I have called the concerns of Mr Anderson, Mr Bertali and Mr Weston "perfectly understandable", and so they are. In the present environment, we are all being enjoined to isolate and to consider how best to avoid contact with others. Such contact should only be invited when it is clearly necessary.

18. That brings me to the essence of TFS's application. Essentially, the basis for TFS's application is as follows:

(1) Given that the nature of the allegations made against TFS and its Witnesses are ones involving dishonesty, those allegations can only fairly and properly be resolved by an in person hearing. Whilst technically possible to conduct a cross-examination remotely (Mr Scorey conceded this), attempting to conduct such a cross-examination in the circumstances of this case (Mr Scorey was careful to make clear he was advancing no general proposition, one way or the other) was unfair and not a proper course for this court to take.

(2) As a result of concerns about attending court in the current pandemic, TFS's Witnesses were not willing to attend court. Again, it is important to be clear what Mr Scorey was, and what he was not, saying. He was not saying that the Witnesses could not lawfully attend court; nor that the court could not order a hearing in person; nor even that, if the court took such an approach, the Witnesses would not attend. Rather, what I understood him to be saying was that the circumstances were such that no judge, properly considering the circumstances of this case, could order a hearing in person. In short, the thrust of Mr Scorey's point, in this regard, was that a decision to order an in person hearing lay outside the range of reasonable ways of proceeding that were open to the court and so, therefore, would be "wrong": see paragraph 14(3)(d) above.

(3) Accordingly, there was no other option but to adjourn the trial. TFS accepted that certain, limited issues, could be heard. For the moment, however, I consider the question of adjournment in general terms. I consider the question of "partial" adjournment at the end of this ruling.

19. I have carefully considered all of the evidence before me and all of the submissions that have been made to me. I conclude, considering for the moment the position only of Mr Anderson, Mr Bertali and Mr Weston – thus leaving for further consideration the issues that arise out of Ms Mortimer's rather different case – that I should not accede to TFS's

[3] Quite rightly, I was not provided with any evidence about the discussions that had taken place between TFS's legal team and the Witnesses. Mr Scorey told me – without providing any detail – that such discussions (unsurprisingly) did take place. I accept that. It seems to me that it would be ill-advised for me to press any further on the confidential discussions that will have taken place between TFS's legal team and the Witnesses.

application and that the trial of this action will proceed, albeit subject to extremely tight case-management, as I further describe. Given the concerns of Mr Anderson, Mr Bertali and Mr Weston, and the care and cogency with which Mr Scorey's submissions were made, it is necessary that I set out my reasons in some considerable detail:

(1) As I have noted, in applications such as this, the question of adjournment is inextricably entwined in the case management questions of how – if at all – a trial is to be heard. Such questions cannot – or, at least, in my view, should not – be considered in a linear fashion, but need to be considered holistically. In other words, it is not appropriate to ask:

(a) Can an in-person hearing fairly and properly take place? If "Yes", then proceed no further. If "No" then:

(b) Can a remote hearing fairly and properly take place? If "Yes", then proceeding no further. If "No", then adjourn.

Such an approach misses the fundamentally interconnected nature of the questions under consideration. The reality is that these questions are linked and must be considered together.

(2) I am not sure whether – in ordinary times – this case (significant and weighty though it is) would require a "supercourt" within the Rolls Building. There are two parties only, and although the legal teams on both sides are appropriately large, this case could be accommodated within one of the larger courtrooms within the Rolls Building, without taking up a "supercourt". However, in light of the need for social distancing and the uncertainties of these times, space is important. I am informed (having requested one) that a "supercourt" will be made available for the trial of these proceedings.

(3) As the trial judge, I can obviously control: *(i)* the times of the hearings, *(ii)* the number of persons in court at any one time, *(iii)* the dates on which and times at which witnesses are called; and *(iv)* the manner in which a witness is introduced into court. It seems to me that I can sufficiently control the circumstances in which the witnesses give evidence so as to assuage any reasonable person's concerns about COVID-19 infection through giving evidence in person. Naturally, such concerns can never be eliminated: I know of persons who have comprehensively socially isolated/shielded, who have nevertheless been infected by the virus. I have not considered the minutiae with counsel, but it seems to me that a regime on the following lines would be appropriate:

(a) That the "supercourt" be allocated to this trial significantly before the hearing starts (48 hours at least) and that it not be used for any other purpose for the duration of the trial, other than the deep cleaning that occurs as a matter of routine in the Rolls Building.

(b) That the hearing explicitly be a hybrid hearing, and not an in person hearing. In short, I am envisaging that the public will be invited to watch remotely, and will not be encouraged to attend the Rolls Building – even if that were lawful (which I doubt). Equally, not all of the parties' legal

teams can expect to be physically present in court, and numbers present in court will be strictly limited.

(c) My understanding is that 20 persons is the absolute maximum in a supercourt in order to maintain appropriate social distancing. I have in mind a far lower number, both generally and in particular when the Witnesses give evidence.

(d) It seems to me that when Mr Anderson, Mr Bertali and Mr Weston give evidence:

(i) The witness box should be as far removed from all other persons as possible: 5 metres, or so. That remote zone will include the court usher; and the Witness will be sworn at a distance. To the extent this happens at all, paper files will not be handed to the Witness by a solicitor – as is usual – and the proceedings will have to take into account the concomitant delay.

(ii) The Witness will be permitted to be accompanied by one person from his household, if so desired. That person will (self-evidently) be able to sit within 5 metres, and will serve to reduce the Witness' sense of isolation.

(iii) There will need to be an operator in court for the electronic case management system that the parties have agreed to deploy. That person will also isolate in the manner described for the Witness. The stenographer – who usually would be in court – can (I consider) do the job of transcription remotely, and that is what I would be minded to order.

(iv) I will obviously be in court – but I see no need for an associate, usher or my clerk to be present.

(v) That leaves the parties: I would be minded when the Witnesses are giving evidence to permit each party <u>two</u> persons physically in court.

(e) Save that I would be inclined to permit the parties to have no more than <u>three</u> persons in court at <u>other</u> times (i.e., when the Witnesses are not giving evidence), the regime that I have just described should provide the basis for the hearing more generally.

(f) It will be necessary to have a much more detailed trial timetable than is normal. There is to be no waiting around of witnesses, and it seems to me that (even if this means the loss of time) witnesses should be given specific start times for their evidence, which will be adhered to.

(g) Although I anticipate that the footfall in the Rolls Building will be far lower than usual, steps will be taken to ensure that participants (including, in particular, the witnesses) access and leave the building without interaction with other people. The detail of this will need to be addressed.

Equally, it will be necessary to bespeak three "breakout rooms" accessible from the courtroom, one for the exclusive use of Bilta's team, one for the exclusive use of TFS's team and one for the exclusive use of whichever witness is presently giving evidence.

(h) It may be that the usual court hours should be adjusted, with the court sitting 8:45am to 2:15pm (more or less "Maxwell" hours), with various 5 or 10 minute breaks throughout and no departure from the Rolls Building during those hours.

(i) Transport to and from the Rolls Building will be a matter for each person attending – but will obviously have to be done using appropriate safeguards. So far as the witnesses are concerned, Mr Parker suggested COVID-secure taxis, but if a Witness wanted to drive himself to court (or be driven by his companion: see paragraph 19(3)(d)(ii) above), I have little doubt that a car parking space can be procured to avoid the anxiety of finding a place to park.

(4) This is a regime which, I consider, is sufficiently robost as a baseline or starting point so as to so as to assuage any reasonable person's concerns about COVID-19 infection through attending court in person, including for the purposes of giving evidence. As I say, it constitutes the "baseline" for the hearing, from which variations – as appropriate – can be contemplated. In mentioning the need for such variations, I have particularly in mind *(i)* the Lord Chief Justice's injunction to keep footfall to a minimum, *(ii)* his point that in person attendance at the courts should only occur where "necessary", and *(iii)* the fact that the Witnesses may – notwithstanding my view as to the arrangements I have outlined – retain their concerns about infection and exposure to risk. It seems to me that I can and should contemplate departures from the baseline so as to further minimise footfall and in person attendance, so far as this can be done consistently with fairness and a proper hearing.

(5) Thus, without in any way making a direction, but instead leaving the way open for further consideration by the parties (including, be clear, the witnesses, including expert witnesses, they are minded to call), I make the following points:

(a) It may be that given the hybrid facility that forms part of my baseline configuration for the trial, some witnesses (and I am excluding from this consideration Mr Anderson, Mr Bertali and Mr Weston – I consider their position more specifically below) may appropriately give their evidence remotely from – for example – a solicitor's offices. I advance this possibility tentatively, because it seems to me difficult to imagine a safer regime than the one I have outlined above: but I am certainly not closing out the possibility, and I will consider any and all suggestions on their merits.

(b) However, I would require considerable persuasion to permit the lead advocates on each side to appear remotely. To be clear, neither has suggested this as a possibility, but I should nevertheless make my reasoning clear. It seems to me that wherever possible the judge and the lead advocates should see the same oral evidence. Perception is

everything, and it seems to me that it would (for example) be very unsatisfactory for a lead advocate to attend remotely, whilst the witness, the other lead advocate and the judge were all in court. That is, however, an intrinsically unlikely scenario. More likely is the case where it is the witness who is giving remote evidence. In such a case, I readily acknowledge that the remote solution is "second best": there may be delays or interruptions in the transmission, or a mismatch in the video and audio feeds (to name but two problems that I have personally experienced). It is not possible to ensure that such possibilities do not arise. What is important, however, is that the judge and the lead advocates should see the same oral evidence so that when submissions as to weight of evidence come to be made, the relevant persons (the lead advocates and the judge) have seen exactly the same thing.

(c) That brings me to the Witnesses themselves: Mr Anderson, Mr Bertali and Mr Weston. I write this paragraph on the assumption that they retain the concerns that they have so clearly expressed in their witness statements and that they persist in a firm view that they are not prepared – unless ordered to do so – to attend court in person. In such circumstances:

(i) I appreciate that there is, in this case, a potential mismatch between the interests and preferences of TFS as a litigant and the interests and preferences of the witnesses TFS wishes to call.

(ii) It seems to me that, so far as possible, I must ensure that such mismatch does not compromise the important relationship that exists between a litigant and a litigant's witnesses. Of course, I appreciate that there is no property in a witness and that no litigant can (at least not properly) seek to influence the evidence of a witness. But a litigant is – to a very large extent – dependent upon the goodwill and co-operation of a witness in (for example) giving time to considering his or her evidence and/or in attending court. I do not wish the COVID-19 pandemic to affect that important relationship between TFS and the Witnesses.

(iii) TFS has expressed the very clear view that whilst the Witnesses could give remote evidence, given the allegations being made by Bilta, which would be addressed by the witnesses, an in-person hearing – the "gold standard" for taking evidence – was in effect the only standard and that if this could not be achieved, the trial had to be adjourned.

(iv) Whilst I have some sympathy with this submission, I ultimately do not accept it. I accept, of course, that an in person hearing in such cases does constitute the "gold standard" and that – particularly in this case, where honesty is at issue – giving evidence remotely ranks as second best. So far, I accept TFS's argument. But that is not the point. The point is whether a remote hearing would be fair to TFS and, indeed, fair to the witnesses. To that question, the answer is, to my mind, clear: the process would be fair. Whilst it would be inappropriate to be drawn on details that will require careful

discussion between the "stakeholders", the following points are material:

- This is a commercial trial between sophisticated parties. It is well-resourced, and the parties have already engaged Opus II to provide the technical expertise in relation to document management and remote hearing provision.

- None of the witnesses have identified any insuperable obstacles to giving evidence remotely. I accept, of course, that there will be burdens on the witnesses if (isolating at home) they feel unable to accept third party physical help in setting up a system at home. They will have to do that themselves – but they will have remote help, and the delivery of *materiel* to enable them to set up a robust and workable system. If and to the extent they need paper bundles, these can be provided. It was suggested that these burdens on the witnesses in themselves amounted to a burden that rendered the process unfair. I do not accept this submission. Giving evidence is – I am sorry to say – intrinsically stressful, as is the present COVID-19 environment. I consider that in-person evidence can fairly and properly be given in this case, and the giving of evidence remotely is only being contemplated for the reasons outlined in paragraph 19(4) above. In short, if the stresses are so great as to render the remote process unfair – which I do not accept – the alternative is ready and available.

- Because the lead advocates and the judge will receive the witnesses' testimony in exactly the same way, proper submissions as to weight of evidence can be made to reflect the fact that the witness' evidence is being given remotely and to reflect any "glitches" that occur during the process.

In these circumstances, and given the factors identified in paragraph 19(4) above, I reject TFS's contention that anything other than an in person hearing would be unfair, and I am prepared to receive the evidence of the witnesses remotely in preference to the "gold standard" that would normally pertain. I should be clear, however, that I am only doing so out of deference to the factors identified in paragraph 19(4) above: I do not do so because an in-person hearing cannot appropriately be ordered.

20. For these reasons, I reject TFS's application to adjourn the trial on the basis of the availability to give evidence of Mr Anderson, Mr Bertali and Mr Weston. I turn then, to the separate position of Ms Mortimer. Ms Mortimer – for reasons that are entirely independent of the pandemic – cannot give evidence at the trial. If the trial were to be adjourned, I am prepared to assume that she would be able to give evidence and (I hope I may say) everyone concerned wishes this assumption to be a safe one. The question is whether I should adjourn the trial for this reason:

(1) It seems to me that, as a self-standing reason, this is not sufficient to justify an adjournment of a significant trial. Mr Scorey did not – quite properly – argue TFS's application on this basis. The appropriate time for making such an application would have been in early November 2020, when the issues regarding Ms Mortimer came to the attention of TFS's solicitors. Entirely understandably, TFS's solicitors did not apply for an adjournment, but rather served a "hearsay" notice in respect of Ms Mortimer's evidence.

(2) It may be said that an application could not be made in November 2020 because Ms Mortimer's condition was considered permanent whereas it now appears to be temporary. As Mr Scorey said in submissions, an adjournment application in November 2020 would not have had any point for this reason. Considering a self-standing application to adjourn in this light, made now in light of all the evidence, I still do not consider that it could justify standing out of the list a trial of this sort, so close to hearing. Accordingly, had an application to adjourn solely on the basis of Ms Mortimer's position been made – and, I stress, this was not Mr Scorey's position – I would have refused it.

(3) The question is therefore whether – taking the prospect of Ms Mortimer's availability if I were to adjourn as a relevant and material factor in the case-management decisions that I have described in this ruling – that factor makes a difference. It does not. I have concluded – for the reasons I have given – that the trial can go ahead, and that has not been a "marginal" decision, where Ms Mortimer's presence/absence could swing the balance of my consideration. Taking fully into account Ms Mortimer's position – including her clearly expressed desire to give evidence – an adjournment nevertheless remains inappropriate.

21. TFS's application is, therefore, refused. There is one, final, point that I should mention, out of deference to Mr Scorey's submissions. He made the point – entirely fairly – that this case was "just" about money. Essentially, he is right. It is. I want to be clear that I have approached the question of adjournment on the basis that this is, indeed, the case. Unlike other cases (in the criminal or family jurisdictions, and in other civil cases), an adjournment will not have extraordinarily adverse consequences. Had this been the case, my analysis in the foregoing paragraphs would have been very different. As it is, my assessment of TFS's application has been based on the nature of the case before me and I have not had to consider the different case where an adjournment would cause difficulties of an altogether different quality.

22. It follows that the question of "partial" adjournment does not arise. Instinctively, I am cautious about splitting issues that are to be heard at a single trial, and (had I been minded to accede to TFS's application) my inclination would have been to adjourn everything. But that question does not fall for consideration, and I consider it no further.