Neutral Citation Number: [2020] EWHC 2167 (QB)

Case No: QB- 2017-002808

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2020

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HONOURABLE MRS JUSTICE ANDREWS DBE

- -

Between:

(1) ALEKSEJ GUBAREV
(2) WEBZILLA LIMITED

Claimants

- and -

(1) ORBIS BUSINESS INTELLIGENCE LIMITED
(2) CHRISTOPHER STEELE **Defendants**

-and-

In the matter of the Court's exercise of the *Hamid* jurisdiction

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- -

Mr Patrick Lawrence QC instructed by **and on behalf of McDermott Will and Emery LLP and Ms Ziva Robertson**

There was no other appearance or representation
Hearing date: 31 July 2020

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Approved Judgment

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

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Dame Victoria Sharp P.:

Introduction

1. This is the judgment of the Court.

2. On 28 July 2020 the judge presiding over the trial in this libel action, Warby J, referred to this Court for an urgent hearing under the *Hamid*[1] jurisdiction, serious issues relating to the professional conduct of the solicitors acting for the claimants, McDermott Will and Emery LLP (MWE) and Ms Ziva Robertson, a partner in that firm, which had fallen far short of the standards required of those conducting legal proceedings before the courts of England and Wales.

3. The judge found that there had been misconduct in the form of a breach of section 41 of the Criminal Justice Act 1925 and/or section 9 of the Contempt of Court Act 1981 and/or disobedience to paragraph 8 of an Order which he had made in the proceedings on 14 July 2020, in that for 3 days in July 2020 video/and or audio of the proceedings at the trial of the action was live streamed to a number of individuals outside the jurisdiction (including the United States, Cyprus and Russia) without the Court's permission and without any application being made for such permission. At that stage, the judge had been given a list of 7 people who had used a Zoom link in remote locations to access the trial, and information that possibly 2 more had done so.

4. This state of affairs is deeply worrying. The speed with which this hearing was convened to take place before the end of term, and shortly after the conduct was discovered, marks the seriousness with which we view the behaviour of those concerned.

Background

5. On 25 June 2020, following a remote hearing by telephone, Jay J gave directions for the trial of this claim to take place on a socially distanced basis. These included a direction that the persons permitted to physically enter the courtroom would be limited to (i) the judge and their clerk (ii) the parties' identified legal representatives; (iii) the parties and their witnesses; (iv) the associate and court clerk; and (v) the stenographer(s) and others providing document management and/or electronic bundling services for the trial. No other individuals were allowed to physically enter the courtroom. A second socially distanced courtroom would be reserved to enable members of the press and public who wished to observe the trial to do so via a live video feed.

6. Jay J's order, to which the parties had consented, had annexed to it a Memorandum which confirmed that these arrangements had been proposed by the defendants and agreed to by the claimants.

7. It is unnecessary for us to say anything about the subject-matter of the libel action, save that it would have been obvious to all concerned that it was likely to excite a certain amount of press interest. As the parties and their representatives knew and had

[1] See *R(Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 and *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin).

agreed, members of the press would have to access the hearing from the second courtroom.

8. The Memorandum went on to indicate that at present it was intended that only one witness would be giving live evidence in the court room and the remaining four witnesses would be giving their evidence via video link: one, a Mr Roman Grinin, from St Petersburg, another, Sir Andrew Wood, from the Channel Islands, and two more from the Düsseldorf office of MWE. In the event, the latter two witnesses were able to attend and give their evidence in court.

9. The Memorandum also recorded that the parties had discussed the use of the Opus 2 system for the electronic platform to be used at trial and that they were in the process of obtaining a quotation for the cost, which the parties would share. They were also going to investigate the practicalities relating to overseas witnesses and their ability to see the judge and the person questioning them over the video link.

10. The trial was listed for a five-day hearing before Warby J starting on 20 July. On 8 July, the Queen's Bench listing officer received an email from an associate solicitor at MWE, expressed in peremptory and inappropriate terms. It said:

"[W]e should be grateful if you would consider the following requests based on the parties' requirements for the courtrooms:

1. *We require the courtroom to be in the Rolls building, and to be of sufficient capacity to accommodate the judge, both legal and counsel teams as well as the key witnesses (we estimate there to be at least 15 individuals but will confirm as soon as possible).*

2. *We require a 2nd courtroom to be reserved for the press and public.*

3. *The trial will be conducted using the Opus 2 platform to accommodate for some participants attending in person and others attending remotely by video. The Opus 2 technical engineers will require all-day access to the primary courtroom on Thursday 16 and Friday 17 July to set up the hardware and conduct a test run.*

4. *Please note, it is Opus 2's strong preference that the courtrooms are in the Rolls building so that they can access the relevant connectivity to ensure the Audio-Visual arrangements are properly working."*

11. The listing officer sent an email to the associate solicitor in response, explaining that Court 73 had been set aside for the trial, and that none of the courts in the Rolls building that could have accommodated the trial were available during the week of 20 July 2020.

12. The email also included the comments of the judge about the communication from MWE. The judge described its wording as "unfortunate", deprecated the use of the word "require" and made it clear that it was not for the parties to make "demands" in such terms. As the judge pointed out, the management of the trial is a matter for the Court, which has to bear in mind the needs of other cases, the limits on its resources, and the applicable substantive and procedural law. The judge went on to say this:

"It is inappropriate to write (for instance) that we require the courtroom to be in the Rolls building…" It is also inappropriate to assert in correspondence that "the trial will be conducted using the Opus 2 platform…" when no direction has been given or even sought to that effect. The Memorandum that accompanies the PTR Order shows that the parties have agreed that this is appropriate. The Judge is not opposed to this. But no order has been made.

What the parties do "require" is the Court's permission for (i) the use of an off-contract transcriber, and (ii) the provision of a live transcript feed to any external location. The parties will need to make a formal application for the permissions identified above. The Court will also need to know exactly what is proposed by way of any transmission from the main courtroom to any other location: is the proposal to provide text only, or audio and/or video, and in any event to which external locations is it proposed to transmit?

In addition, although the Court may allow evidence to be adduced from witnesses through video links (CPR 32.3), there is no absolute right to adduce evidence in this way. Again, I am amenable, but an application needs to be made. PD 32 para 29.1 and Annex 3 provide guidance on the use of video conferencing, to which reference should be made.

If applications for these further directions are agreed, I will deal with them on paper, without a hearing. Otherwise, there may need to be a further PTR which could be held on Tuesday or Wednesday of next week."

13. Following these appropriate admonitions, and the identification by the judge of what was required, MWE, through the associate solicitor, issued an application notice supported by evidence from her on 10 July 2020 on behalf of the claimants, seeking permission from the Court, amongst other matters: (i) for the parties to use Opus 2 as a transcriber; (ii) for Opus 2 to provide a live audio and video feed of the trial to the adjacent courtroom, subject to such courtroom being available; (iii) for Opus 2 to have access to the courtroom in the week of 13 July 2020 to conduct urgent connectivity testing before the commencement of the trial, and to allow for all parties to undertake a test run of the facilities, and (iv) for Mr Grinin and Sir Andrew Wood to give their evidence by video link pursuant to CPR PD 32 para 29.1 and Annex 3. The claimants were stated to be the party responsible for arranging the videoconferencing.

14. In the evidence section of the application notice, the associate solicitor stated that the claimants would make all necessary enquiries with Opus 2 about the logistics of the videoconferencing facilities (VCF) and inform the Court of the outcome. She said that the claimants would also ensure that the VCF session was as close as possible to the usual practice in a trial court where evidence is taken in open court. Her evidence then continued as follows:

"B. The parties further discussed the use of Opus 2 as a platform to accommodate the hybrid nature of the trial. It was agreed that such use of the platform would be appropriate. In particular, it was agreed that it would be useful for the judge and the parties to have a real-time transcription of the proceedings, including a live audio-visual recording, that could be transmitted to participants that were unable to attend the trial in person due to the U.K.'s quarantine restrictions or unable to be in the

primary courtroom due to social distancing requirements. One order made by the judge at the PTR was that there should be a second courtroom for press and the public." [Our emphasis].

15. A draft consent order was annexed to the application, to which it was said the defendants had agreed. So far as the proposed live audio and video transcript feed of the trial was concerned, the draft consent order mirrored the application, and confined the feed proposed to the second courtroom, subject to such a courtroom being available.

16. We have before us a witness statement from Ms Lynsey McIntyre, the partner in MWE responsible for the preparation of the claim for trial. She states that the associate solicitor recognised that her email to the listing office was unfortunately worded and "regretted that" following discussions with Ms McIntyre which took place shortly after receipt of the judge's comments. However, the application itself merely said that: "*the parties regret that these orders were not sought at the PTR and respectfully request that the Court grants the orders in the form sought on the papers.*" Nothing was said to acknowledge or accept the judge's criticism of the high-handed manner in which the associate solicitor had sought to tell the court how the trial was going to be conducted.

The Order of 14 July 2020

17. Warby J was naturally concerned by the reference made in the evidence in support of the application to the possibility of transmitting the live audio-visual recording to participants that were unable to attend the trial in person due to the United Kingdom's quarantine restrictions (and thus, by necessary implication, to the possibility of such transmission outside the jurisdiction). He therefore took the sensible precaution of spelling out in the clearest possible language that this *would not be permitted*. This is not something which a judge would ordinarily expect to have to do, as legal professionals who use the courts are expected to be familiar with the legal requirements concerning the broadcasting of proceedings, and if they are not, to make the necessary enquiries to find out what they are.

18. In the event, the Order made by Warby J on 14 July 2020 contained, in addition to the terms of the draft consent order, some additional directions in three further paragraphs. These read as follows:

> "*7. The second courtroom identified in paragraph 1(2) of the PTR Order shall be deemed to be an extension of the principal courtroom.*
>
> *8. (For the avoidance of doubt) unless the Court so directs, there shall be no transmission of any live audio or video recording, nor any live feed of any transcript of the trial or any part of it, to any location other than the second courtroom identified in paragraph 1(2) of the PTR order.*
>
> *9. Any person wishing to seek permission to transmit to any other location any audio and/or video recording, and any application for the transmission of any live transcript or other live text based report or of the trial or any part of it must make a written application supported by written evidence or an explanation of the reasons for seeking permission and, in the case of an application for transmission of a video or*

audio recording identifying the specific location in England and Wales to which it is sought to transmit."

19. Those paragraphs had been made of the Court's own motion without a hearing and without inviting representations. The Order therefore recited, correctly, that pursuant to CPR 23.8 (c) any party affected had the right to apply to vary or discharge those paragraphs. It directed that any such application must be made in writing by no later than 4 p.m. on Thursday, 16 July 2020, on notice to all other parties. No such application was made.

20. The judge took the trouble to explain why he was making those additional directions. Under the heading "Reasons" he said that the application and supporting evidence addressed a number of concerns he had already expressed to the parties via Queen's Bench listing about the outcome of the pre-trial review, namely an Order and a related Memorandum, the latter of which dealt with matters that are under the Court's control but did not have the status of an order. He then continued:

> *1. ...Arrangements such as transcription and (in particular) live feeds are not matters to be dealt with by agreement between the parties, without the Court's express permission. I am content to make the orders sought…*
>
> *2. I have added paragraphs 7 to 9 in view of the evidence that:*
>
> *"it was agreed that it would be useful for the judge and the parties to have a real-time transcription of the proceedings, including a live audio-visual recording, that could be transmitted to participants that were unable to attend the trial in person due to the U.K.'s quarantine restrictions…"*
>
> *and the applicable law.*
>
> *3. I note that there is no application for transmission to participants, outside the second courtroom. But the general position with regard to video and audio hearings in Court is that:*
>
> *(1) it is permissible to make video and audio recordings and transmit them to a second courtroom, or other location in England and Wales which is designated as an extension of the Court.*
>
> *(2) exceptions have been made for live streaming from the Supreme Court, Court of Appeal, and certain sentencing remarks: but*
>
> *(3) otherwise, live streaming of video and audio is prohibited. R (Spurrier) v Sec of State for Transport [2019] EWHC 528 (Admin) [2019] EMLR 2016; Criminal Justice Act 1925, s.25; Contempt of Court Act 1981, s.9; s.71 (1); Senior Courts Act 1981; CPR 2.7; Constitutional Reform Act 2005, s.47: Crime and Courts Act 2013, ss 31, 32 and orders made thereunder.*
>
> *4. Live text-based reporting, which includes live transcription, stands in a different category. It is not prohibited by statute, but regulated in the exercise of the Court's inherent jurisdiction, in the interests of the administration of justice. Journalists may live tweet. Others may report in this way with the court's*

permission: see the Lord Chief Justice's Practice Guidance of 14 December 2011 esp at paras 9 and 10."

21. The judge did not mention the provisions of the Coronavirus Act 2020 which enable the Court to permit livestreaming in certain circumstances. These provisions were immaterial in the present case because the hearing was not to be conducted wholly remotely.

22. The judge's Order (and his Reasons) could not have been clearer. The solicitors ought to have supplied copies of it to their clients, or at least to have explained its effect so as to avoid any possibility of a misunderstanding arising in the future. We would also have expected the solicitors to provide a copy of the Order to the transcribers, so that the transcribers could be in no doubt either as to what it was they were, or were not, permitted to do. Neither of these things happened.

23. Ms McIntyre's evidence is that she read the Order when her firm received it on the afternoon of 14 July, when she circulated it to the claimants' counsel and served a copy on the defendants. She had previously discussed with her clients whether it would be possible for their US lawyers to passively participate in the trial by some form. She noted that, absent permission from the Court as set out in the terms of the Order, the sensible way for them to follow proceedings would be to receive the daily transcripts at the conclusion of each day or (in view of the time differences between the UK and the USA) at the conclusion of the trial. She says that she made a mental note to discuss the matter with counsel because the status of the transcripts during the trial, and the question whether they could be released to non-parties, was not clear to her. However, she did not recall communicating this thought to the rest of the MWE legal team. Nor did she instruct the associate solicitor to send the order to the Opus team so as to draw its contents to their attention. She found out from the associate solicitor in the course of the trial that this had not happened. She accepts that because the claimants were the VCF arranging party it was her responsibility to make sure that this had happened.

24. The use of an outside transcriber or organisation to facilitate video and/or audio hearings is an exceptional course, for which permission must be obtained from the Court. Although we accept that Opus 2 were not sent a copy of the Order by MWE, they would or should have known that their activities in this regard could only take place with the permission of the Court. We therefore find it surprising that Opus 2 did not ask to see any such order, in order to ensure (i) that they knew precisely what they were permitted or were not permitted to do; (ii) that they obeyed the Court's orders (whatever they might be) and (iii) that they did not act in contempt of court, or otherwise take steps that would prejudice the particular proceedings and the administration of justice.

25. The defendants' solicitors, Reynolds Porter Chamberlain (RPC) did take notice of the 14 July Order. On 17 July 2020, pursuant to paragraph 9 of the Order, RPC sought and obtained the judge's permission for the transmission of the live transcript of the trial to a specified individual. This person was a representative of the defendants' insurers, who had contracted the coronavirus and was self-isolating at an address in London. The application was made by email and was copied to the solicitors within MWE who were responsible for the claimants' case, that is Ms Robertson, Ms McIntyre and the associate solicitor. Had there been any doubt about the appropriate

course to take in the event that any person who could not be present in either of the courtrooms wished to have a live transcript or video or audio link of the trial, that should have dispelled it.

26. Whenever a judge gives permission for a transcript or report from a recording made other than by the Court itself to be prepared, a form must be completed and lodged with the Court. The first two sections must be completed by the applicant and the approved transcription supplier respectively, and the third by the judge. A copy of the form will be retained by the judge's clerk. The part of the form completed by MWE stated that the details of any third party on whose behalf the transcript is to be prepared or any third party to whom the transcript will be provided were "*all involved parties and supporting counsel teams*". The section for completion by the transcription provider states that notwithstanding any description of the intended use provided, they may not

    i) make publicly available either by itself or as part of any other material

    ii) provide to a third party not specified above or

    iii) otherwise publish whether or not for payment of a fee

    the whole or any part of the transcript.

27. The transcriber must also agree to comply with the information security requirements set out in annex 1. Section 2 of that annex includes a requirement that transcription suppliers shall take reasonable steps in all cases to enable secure transmission, including checking that recipient email addresses are accurate and genuine and requesting confirmation of receipt, and using read receipts as standard. Passwords are stated to be mandatory.

28. Ms Robertson had overall responsibility for the conduct of the case, but was not closely involved in it after her initial involvement in February 2017, and left the day-to-day handling of the matter to Ms McIntyre. Nevertheless, we would have expected her to obtain periodic updates from Ms McIntyre or the associate solicitor on any matters of significance, including the arrangements made for the trial. In her first witness statement, Ms Robertson says that she had seen a copy of the Order dated 14 July 2020 which provided that the hearing should not be streamed remotely, but she did not forward it to her clients.

29. On 15 July 2020 Opus 2 were asked by the parties to facilitate a feed into the second court room, Court 72. This Opus 2 did, using the Zoom platform.

30. On 17 July 2020, following written correspondence with MWE, Opus 2 received a telephone call from the associate solicitor who requested that the same link for the feed be sent to their attendee list, which had been sent to Opus 2 on 10 July via email. That list comprised Ms Robertson, Ms McIntyre, the associate solicitor and three of their clients, Mr Gubarev (the first claimant), Mr Nikolay Dvas and Ms Justine Wadhera.

31. According to a letter written by Ms Sarah Mill, the Global Head of In-Court services of Opus 2 to the judge on 28 July 2020, it was their understanding that this link was to

be used and therefore the feed accessed, only in the hearing room (i.e. Court 72). This was because social distancing requirements meant those seated in the public gallery would not have access to a video screen. The link was provided so that they would be able to see remote participants as and when necessary. The same link was also circulated separately to the 2 remote witnesses (which it should not have been) and to members of the Opus 2 team who were involved in providing and overseeing their services. Opus 2 have confirmed that they were not instructed to and did not send the link to any RPC attendees at any point during the proceedings.

32. Ms McIntyre says that she met counsel and the clients at a pre-trial conference at MWE's offices on the afternoon of Friday 17 July where a number of matters were discussed, but not the Order of 14 July. At that point it was her understanding that only those giving evidence by video link could be permitted to join the hearing remotely as active participants, in accordance with the judge's Order. The only exception to that was the representative of the defendants' insurers who had been expressly permitted by the judge to receive transmission of the live transcript via the Opus 2 external website. She says that any question of seeking permission for external participants to have access in this way had not been raised by her clients with her either at the pre-trial conference or previously.

33. On the evening of Friday 17 July, Ms Robertson received the Zoom invite from Opus 2 for the following Monday, 20 July, which was the first day of trial. She says that she was not sure what its purpose was. Ms McIntyre also received the same link and immediately emailed the associate solicitor to find out what it related to (confusingly, the Zoom invite described the invitation as being to a "webinar") and why it had a start time of 10.00 a.m. rather than 10.30 a.m. The associate solicitor explained that in consequence of the discussions at the pre-trial conference, she had made enquiries with Opus 2 to see if there was a way in which the video evidence of the remote witnesses could be viewed on laptops within the court room by those in the public gallery. That fits with the explanation that was given to Opus 2.

34. Ms McIntyre says that although she received various text and email messages from the clients over the weekend of 18 to 19 July concerning the trial, no questions were raised with her about the Zoom links or external participants. She also says that she did not review Warby J's Order of 14 July during the course of that weekend. She was the partner in MWE with responsibility for the day to day running of the trial which was due to start the following Monday. We find it surprising that she did not review the Order as it bore directly on how those proceedings were to be conducted, and in order to make sure that the arrangements for which she was responsible fully complied with its terms.

35. On the evening of Sunday 19 July 2020, Ms Robertson received a text message from Mr Dvas, who asked her "is the link public?" In her first witness statement for the hearing before us, Ms Robertson explained that she interpreted this as a query as to whether the Zoom invite was an open invite that could be sent out to other parties, such as the claimants' US attorneys, who had planned to attend trial but could not travel to the United Kingdom because of Covid 19. Ms Robertson responded "I need to check. Where did you get this from?" Mr Dvas sent her the address. Ms Robertson responded "that's Opus - our trial management platform. It is not a public link as far as I'm aware. The judge has not authorised live streaming of the case other than to the D's insurance representative." Mr Dvas's full response is not included in the

screenshot of this exchange exhibited to Ms Robertson's first witness statement but she says that he pointed out that the Zoom link *was an open link without any measure of security or confidentiality in place*. His answer begins "I'd ask Opus 2 why on Earth would they have a non-public hearing translated over a non-".

36. Presumably the missing words are "non-secure link" or something similar. The hearing of the trial was to be a public hearing, as it was to be heard in open court to which the press and public were to have access from the courtroom next door. Ms Robertson did not however think to ask Opus 2 why her client had been sent such a link, or to ask Opus 2 about the lack of security and confidentiality of the link he had been provided with, or to ask one of her subordinates to investigate the matter further.

37. On the Monday morning, the start of the trial was delayed because there were serious transmission problems with the link into court 72. Opus 2 were not able to resolve these problems until after lunch; and, in fact, these transmission problems continued intermittently throughout the course of the trial, disrupting its progress. Warby J allowed Mr Andrew Caldecott QC for the claimants to open the case, even though he could not be seen or heard by anyone other than those who were physically present in Court 73, because the opening had been reduced to writing and he was reading it out verbatim. The judge directed that the script of that opening would be made available to anyone who wished to have it. He referred to the fact that the parties' skeleton arguments had been emailed to the media. The judge also raised the question whether it would be possible for a recording of what had been said during the morning session to be made available in some way to be viewed and/or listened to at some later stage, if anyone in Court 72 wanted to do so.

38. On the second day of the trial the Judge returned to that topic, because one of the observers in the next-door courtroom wanted to find out whether a transcript or an audio recording of the opening for the claimants would be available. He said:

> *"[T]he general position is of course that audio recordings are only ever made available under limited circumstances and only in the court building. Normally a transcript is enough, so that's the starting point and we'll see what happens."*

On the morning of day 3, Wednesday 22 July, the Judge asked counsel whether there was any objection to the transcript (for which both parties were paying privately) being supplied to that one individual and was told that there was not.

The breaches are discovered by accident

39. Later that day, during the cross-examination of another witness, the judge noticed that one of the remote witnesses, Sir Andrew Wood, was on one of the video screens and that he could obviously hear what was going on. The judge said that he was surprised to see Sir Andrew, he did not know he was watching, he had not authorised it, nobody had asked him to authorise it, and he was quite discomfited by what was going on. He then said:

> *"[I]t seems to me that there has been a lot of failures of understanding at various places. I don't know how they've come about, I'm not blaming anyone for the moment, I'm just expressing quite profound dissatisfaction with the disruption and the disorganised way in which these proceedings have been partly transmitted to places*

that they should have been transmitted and apparently transmitted to places which were not yet authorised."

40. Warby J rose for a short time to enable enquiries to be made as to how this state of affairs had come about. When the Court reconvened, the judge said he should like to know who it was proposed should be receiving a live feed of the proceedings. He quoted the express prohibition in his Order of 14 July. He observed that it could not have been clearer and that at the moment he failed to understand how that was not implemented.

41. Mr Caldecott QC then gave an explanation and an apology. He said that Opus 2 had sent out a Zoom link to the court proceedings and that Ms Robertson correctly said on Sunday that there had been no authority for live streaming, but that:

"she [had] what, frankly, she accepts is a slight memory fade on Monday, when she told some of my clients that it was all right to use the Zoom feed. She knows that that was wrong, she checked she gave the right advice on Sunday evening and she's just very apologetic and embarrassed about it and I can say no more than that, but it's very unfortunate that it happened."

The judge said that he was grateful for the explanation and he accepted the apology, but that he would like to know who it had been streamed to if that were possible. The defendants' counsel Mr Millar QC said that they would also like to know who it had been streamed to. The judge then stated that if there was any live streaming going on it must come to an end, and it must not resume until someone had made an application for it to continue.

42. That evening, Ms Robertson sent an email to the judge's clerk apologising for what had happened. She said this:

"[A]s Mr Caldecott QC informed his Lordship earlier this afternoon, having advised the claimants on Sunday not to disseminate the did the Zoom link they received from Opus, I gained the impression on Monday – and told them – that they would be able to do so. I cannot now recall how or from whom I gained that impression, but I entirely accept that it was wrong. I did not check the position with the Court or Counsel as I should have done. As Mr Caldecott QC told his Lordship, I am embarrassed and apologise unreservedly to the court. I should make it clear that at all times my clients were simply following my advice. Until I informed them wrongly that they were at liberty to disseminate the link they did not do so." [Our emphasis].

43. Ms Robertson then set out a list of 7 individuals directly connected to the claimants, to whom the Zoom link had been sent. These included Mr Gubarev's wife and daughter in Cyprus, Mr Dvas's mother in Russia and the claimants' US attorneys in the USA. She said that she was told that the link was not forwarded to third parties by those persons, who had individually watched only part of the proceedings (if at all). It has since transpired that she was misinformed about that.

44. Ms McIntyre sent an email to the judge's clerk later that evening enclosing an email from Opus 2 addressing the ongoing technical difficulties. She said that because Opus 2 had said a reliable video stream to court 72 could not be guaranteed for the rest of the trial due to connectivity issues "*it appears that the most reliable way to ensure*

that members of the press/public can follow the proceedings in real time is by way of live stream via Zoom, which will of course require Mr Justice Warby's permission." Even at this stage, both Ms McIntyre and Opus 2 appeared not to understand what was legally permissible and what was not, notwithstanding what the judge had said in the Reasons section of his Order of 14 July, namely that whilst a live time relay to a different court room was potentially permissible, live streaming via Zoom or any other unsecure web based platform was not.

45. On the morning of 23 July, the judge sent an email via his clerk to the parties' legal representatives making plain his general dissatisfaction with what had occurred and that he did not regard Ms Robertson's explanation as full, clear or satisfactory.

46. Following brief discussions with counsel, at the end of the hearing on Friday 24 July, the judge made an order giving directions for a further hearing to consider the consequences of the breaches of his Order. This hearing took place on 28 July. By then (i) MWE had reported itself, Ms Robertson and Ms McIntyre to the Solicitors Regulatory Authority (the SRA), and Opus 2 had sent a letter to the Court with a list of those who had accessed the trial via the Zoom link.[2] The list showed that two persons in addition to those earlier identified by Ms Robertson had used the link, namely a Ms Bonnie Eslinger and Mr. Chuck Ross. Both are journalists. Subsequent investigations have revealed that Ms Eslinger was in court 72 and had simply provided her laptop to an Opus 2 technician over the lunch hour to assist him in resolving a technical problem. We are satisfied that this was the full extent of her involvement and that she did not use the link. Mr Ross, who is based in the USA, was contacted by Mr Rogaczewski, the deputy general counsel of an associate firm of MWE in Washington DC, to find out from whom he had received the link and whether he used it, but Mr Rogaczewski received an answer which is both equivocal and unconvincing. We inferred from Mr Rogaczewski's evidence, and Mr Patrick Lawrence QC confirmed at the hearing before us, that despite initially telling his clients that he had not disseminated the link to anyone else, one of the claimants' US lawyers had forwarded it to Mr Ross.

47. The judge considered the further information which had been provided to him, together with witness statements from Ms Robertson and Ms McIntyre which gave a somewhat fuller explanation of material events, together with submissions made on behalf of MWE and Ms Robertson by Mr Lawrence QC, and decided to refer the matter to the Divisional Court. He said he was satisfied that this was not a case of open defiance of his Order but that the evidence revealed significant failures to investigate, understand and conform to the legal parameters and clear breaches of an Order of the Court that was crystal clear. We agree with that description of these events.

Discussion

48. However a court hearing is conducted, it is a matter of fundamental importance that the formalities of court hearings must be observed and the orders made by the court must be obeyed.

[2] MWE had previously asked them for that information. Opus 2 had refused to provide it on grounds of confidentiality, but said that they were prepared to provide the information directly to the Court.

49. In this case, after discovering that his orders had not been obeyed and subsequent interventions into the proceedings by the technician employed by Opus 2 which do not make for happy reading (seemingly treating the proceedings as akin to an ordinary conference call) the judge was constrained to remind those present in court on day 3 of the trial, that a court hearing is a formal public process which deserves respect, in which the Court is endeavouring with the assistance of the parties to arrive at important decisions on contested matters. It is not a live-streamed event unless the Court decides that it is both lawful and appropriate to make it such. It is not an event, even if it is taking place in court, that can be lawfully made open to any remote party that the participant parties, let alone the service provider, chooses to let in.

50. During this pandemic, there have been temporary changes to the way in which parties and their representatives and others, including the media and the general public, have been permitted to obtain access to proceedings. Nonetheless, whether a court hearing is a remote hearing or a hybrid hearing, that is one that is partially face to face and partially remote, or a conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm.

51. In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. The judge can immediately see, as Warby J did in the course of this hearing, that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission. That a judge can see and hear everything that happens in court enables the judge to maintain order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court.

52. Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined. In these circumstances, it is critical that those who have the conduct of proceedings should understand the legal framework within which those proceedings are conducted, and that the Court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the Courts are obeyed.

53. It will be appreciated from the history we have related that it was a matter of pure serendipity that the breaches of the judge's Order were discovered. As indicated above, he was alerted to the fact that something was amiss by the appearance on a screen of one of the remote witnesses, before he was due to give his evidence (this was an innocent coincidence: the witness concerned was a defence witness who had been sent a separate zoom link in order to carry out a test in advance of the video conference).

54. It is difficult to think what more the judge could have done to express what was and was not permissible. Both Ms Robertson and Ms McIntyre accept that they read his

Order. Ms Robertson obviously understood it, because she was able to tell her client on the Sunday night that the Zoom link was not to be disseminated even though it appeared to be a public link with no security protection. In that context, we note with considerable concern that this was a breach of the terms on which permission had been granted for the transcription of court proceedings by a non-court service provider.

The solicitors' explanations

55. In her first witness statement, Ms Robertson says that on the morning of the first day of the hearing it was not clear who should or should not be in courtroom 73. This however was clear from the order made at the pre-trial review by consent. Ms Robertson ought to have been familiar with its terms, which were that the press and the public were to have access to the proceedings from court 72; and that apart from the judge, the Opus 2 technicians and necessary court staff, for reasons connected with social distancing and safety, only the parties and their lawyers and any witnesses giving live evidence were to be allowed into court 73.

56. Ms Robertson says that at one point she overheard a discussion about a Zoom link to court 72. She was reminded of what Mr Dvas had said to her the previous night about the Zoom link being unsecure and she asked Ms McIntyre whether the Zoom link was streaming the trial and whether it was unsecure. Ms McIntyre said that she thought so, and Ms Robertson asked her whether it would be "OK" for the clients' US team to use it too. Ms Robertson thought that Ms McIntyre said yes, but on reflection she believes they may have been at cross purposes. Rather than stopping to think, or to ask whether the Order of 14 July had been varied or generally inquiring into the position, she then told Mr Dvas that it appeared to be "OK" to send the link to the clients' US lawyers.

57. According to Ms McIntyre's evidence however, Ms Robertson was having a discussion with the associate solicitor about the transmission problems Opus 2 was experiencing and the Zoom link that had been circulated and she briefly joined the conversation, for no more than a minute or so. Whilst she could not recall precisely what was said in that brief conversation, she remembered making a comment to the effect that it was a public hearing and that members of the public have the right to attend it. She could not recall Ms Robertson asking her a question about the circulation of the Zoom link, but she accepted that she may have done so and that there may have been a misunderstanding.

58. Later on in her first witness statement Ms Robertson says that on reflection, she believed that because an unsecured Zoom link had been set up and was being used in the court room next door, she took it to follow that it was permissible for the link to be used remotely by people such as the US lawyers, who would have been in the court if it were not for the Covid 19 restrictions. She said she was influenced by the fact that the Zoom link had been sent to various people by Opus 2 in what seemed to be a routine way.

59. In her second witness statement Ms Robertson says that she had not read the Order of 14 July closely and did not at that time fully apprehend the general prohibition on the live streaming of court proceedings. Had she apprehended it she would not have acted as she did. When she heard about the live streaming of the proceedings by Zoom link

to those in the next-door courtroom she should have realised that this did not amount to a general authorisation of live streaming, because the next-door court was to be regarded as part of the courtroom in which the trial was taking place. All of that is clear to her now.

60. Later on, on the first evening of the trial, Mr Dvas sent a text to Ms Robertson asking whether it was possible for the link for the following day's hearing (by now password protected) to be sent not only to Mr Gurvitz, one of the claimants' US lawyers, but to a Mr Bezruchenko, a director of the corporate claimant and Mr Borodin, an investor in the group to which the corporate claimant belongs. She told him (wrongly) that this would be fine. Ms Robertson says that at the time of these exchanges she had not read the case of *Spurrier* to which express reference was made in the Order of 14 July. She offers no explanation for her failure to do so. It appears that the claimants then asked the associate solicitor to forward the link to Mr Gurvitz rather than do this themselves. In fact, the associate solicitor forwarded the link to him twice, once apparently at his request.

61. These various explanations are difficult to comprehend and lack coherence. They do not address how the link came to be sent to members of the families of Mr Gubarev and Mr Dvas in Cyprus and Russia, unless it be the case that that those gentleman were given the impression by Ms Robertson that they were free to do so. Nor do they explain satisfactorily why someone of Ms Robertson's seniority thought it would be acceptable for what she knew to be an unsecure link to be sent to anyone, let alone without any restrictions on it being forwarded to others. In that context, it is to be noted that the judge was moved to spell out the prohibitions that he did, precisely because of the evidence before him of the wish of the US lawyers to participate in the hearing remotely: see paras 14 and 17 above. Ms McIntyre, with a much closer involvement in the conduct of the proceedings than Ms Robertson, could and should have been in the position to resolve any misapprehensions on the part of her more senior colleague. She should also have been aware that the associate solicitor was disseminating zoom links to the US lawyers and should have stopped it from happening. Neither she nor Ms Robertson appears to have thought it appropriate at any stage in this unfortunate debacle to take the simple step of looking at the Order itself or of speaking to their counsel before giving any advice to their clients or instructions to the associate solicitor.

62. Even if the explanations are to be taken at face value however, the picture that they paint is an unhappy one, demonstrating a casual attitude towards orders of the Court which falls well below the standards to be expected of senior and experienced legal professionals, and a lack of appropriate guidance and supervision of more junior staff, in a matter of importance. Furthermore, until the judge made plain how seriously he viewed what had happened, there appeared to be a lack of focus on and engagement with the seriousness of the breaches. It is regrettable in that context that Ms Robertson's first explanation to the judge as to who had been sent the links in breach of the Order (see paras 42 and 43 above) was given before proper inquiries had been made by her about the position, and proved to be inaccurate. However, we accept, as did the judge, that this matter has been taken extremely seriously thereafter; and that Ms Robertson has frankly accepted her responsibility for what happened and has made a full and unreserved apology to the Court. We further accept, as did the judge, that this was not a case of deliberate defiance of the Court's Order.

63. It is the solicitors' responsibility to make sure that they and their clients and any third party transcribers they are responsible for instructing are fully familiar with the contents of any order relating to the relaying or transmission of proceedings or the provision of transcripts and the like, and to make sure that they have copies and refer to them whenever any issue of this nature arises in the future. It is important nonetheless to emphasise that all participants in legal proceedings, including legal representatives, parties, and those involved at an ancillary level, including court transcribers, understand that any breaches of express prohibitions in court orders, and in particular, breaches of the legal prohibitions on broadcasting and of related protective measures such as security requirements, will be treated with the utmost seriousness. They may result in the papers being sent to the Solicitors Regulation Authority ("SRA") or to Attorney General with a view to considering whether proceedings should be brought for contempt of court, a course which Warby J actively contemplated in this case.

64. Sir John Thomas P said in *Hamid* at para 11:

> *"The court … intends to take the most vigorous action against any legal representatives who fail to comply with its rules. If people persist in failing to follow the procedural requirements, they must realise that this court will not hesitate to refer those concerned to the Solicitors Regulation Authority.*
>
> *That is a warning for the future. We hope it will be unnecessary to have to have any further hearings of this kind or to refer anyone to the Solicitors Regulation Authority, but we will not hesitate to do so where there is a failure to comply with the court's requirements."*

We endorse those sentiments, substituting "orders" for "rules" and "procedural requirements". We likewise hope and expect that it will be unnecessary to have any further hearings of the kind we have held in this case. This judgment in this case, like that in *Hamid,* is intended to serve as a warning for the future, and as a mark of the Court's concern.

65. As MWE has already referred the matter to the SRA it is unnecessary for us to do so. We will nonetheless direct that a copy of this judgment is sent to the SRA so that this Court's views of the seriousness of the breaches in this case can be made known to it.