Case No. 1995 MNO 2439

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand,
London. WC2.

Monday, 24th May 1999.

Before:

THE HONOURABLE MR JUSTICE BUCKLEY

MEALEY HORGAN PLC — Claimant

- v -

TIMOTHY HORGAN — First Defendant
HILL SAMUEL BANK LTD. — Second Defendant

MR. GOLDBERG, Q.C. and MR. LIGHTMAN (instructed by Messrs. Goldkorn Davies Mathias) appeared on behalf of the Plaintiff.

MR. A. CLARKE, Q.C. (instructed by Messrs. Tarlo Lyons) appeared on behalf of the Defendants.

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(Verbatim Reporters and Tape Transcribers)
Suite 22, Chancery House, 53-64 Chancery Lane, London, WC2A 1QX.

JUDGMENT
(As Approved by the Court)

MR. JUSTICE BUCKLEY: This is an application by the Defendants to extend the time for serving two witness statements, that is one each from a Mr. Horgan and a Mr. Badcock. There undoubtedly has been significant delay in preparing the witness statements on both sides in this matter. It is not necessary to go into details but it appears that the time for exchange was originally January. The parties have by agreement made several extensions to that, the final agreement as it is called or the final date for exchange as arrived at was April 20th. The Claimants were ready with their witness statements on that day, the Defendants were not. Explanations were given as to why the Defendants were still not ready. They include that there was a lot of work to be done, there were some amendments to pleadings and so forth. All I need to say is I see the explanations, I understand them but if anything turned on it I do not think they are wholly satisfactory explanation for failing to be ready on time. It looks to me as though the reason is that enough work had not been done to meet the deadline. However the Defendants' statements were ready and were exchanged some days later. The trial is on 21st June so although it is now imminent the Defendants' witness statements were served on the Claimants some six weeks or more before trial.

It is also noteworthy that although the Defendants do point to prejudice to them and an uneven playing field in the sense that the Defendants have had their statements for longer than the Claimants have had the Defendants and that the Defendants' are lengthy statements and the Claimants' advisers are going to have to work on them, there is no suggestion, and indeed it would need

to be carefully scrutinised if there was one, but there is no suggestion that they cannot conveniently deal with the matter in order to be ready for trial on 21st June.

The Claimants' original position as I understand it from the witness statement of Mr. Goldkorn and indeed counsel's skeleton argument, that is Mr. Goldberg and Mr. Lightman's skeleton argument, was that the court should not give the relief sought. Mr. Goldberg sensibly in my judgment does not pursue that submission before me and indeed it would be wholly out of proportion in my judgment for a court to deal with a case in effect on one side's evidence. It is or would be wholly unsatisfactory and unjust save in fairly extreme circumstances. I do not need to identify or suggest what those circumstances might be. Clearly they would include or might include deliberate flouting of court orders by the other side or such inexcusable delay that would mean that the only way the court could fairly entertain their evidence would be by adjourning the trial and so forth. This is not such a case. The Claimants can properly prepare for trial and can do their case justice, notwithstanding the extra days that the Defendants took in producing these witness statements. In my judgment therefore it is quite plain that relief should be given.

However that is not the end of the matter. The background to this case unhappily is one of mistrust between the parties and allegations and counter allegations arising out of that. I may not have the precise dates correctly but nothing turns on to a day. The position is, we now know, that Mr. Badcock's statement was signed on or about 21st April. The Defendants had at around that

time or just after that time, they received the Claimants' witness statements. Some few days after that the Defendants' solicitors understood from Mr. Badcock that there were amendments to be made to his statement. The solicitors have said, Mr. Arnold that is has said, that Mr. Badcock so far as he knows had not seen the Claimants' witness statements. However the Claimants are suspicious that he might have nevertheless discussed the matter with Mr. Horgan. It is not entirely clear to me whether Mr. Horgan had seen the statements by then but even assuming he had there is that sort of suspicion in the Claimants camp and it may be that Mr. Clarke, Queen's Counsel for the Defendants, realising the mistrust between the parties and being told of the proposed amendments, advised that they could be made, the statement not having been served on the other side or filed at court in any way, but that they should be made in a transparent way. In other words instead of a new statement being produced the amendments ought to be made as per a pleading, just being crossed out and amended so that the other side could see exactly what had happened. That seems to me to be an entirely proper and sensible way of proceeding and one that does not engender any professional embarrassment to the Defendants' advisers and is in accord with the modern tradition of cards on the table.

Mr. Goldberg's submission, having resiled from the suggestion that I should not give permission to use the statements at all, is that the amendments should not be allowed and that I should order the statement as originally signed or give permission for the statement as originally signed to be used at trial but not

the amended one.

I do not accept that submission. It seems to me that a witness statement is not, so far as the court and the rules of court are concerned, a witness statement until it is served on the other side or filed in court and that the provisions about amending a witness statement therefore do not apply so long as the statement remains in the hands of one party, and indeed it is I would have thought not that uncommon for certainly draft statements to be amended by the witness and not that uncommon even for amendments or second thoughts to occur after the statement has been signed.

I say that subject of course to the proper conduct and standards to be expected of solicitors and counsel in respect of such statements and of course it may be that if a statement is clearly made, let alone signed, and the witness then purports to go back on it and say something that is inconsistent at the very least without a good explanation, that of course could place the lawyers in a position of professional embarrassment. But leaving that aside it seems to me that the sensible thing here is to give permission for the statement to be used. The Claimants' position is wholly protected in that they can cross-examine as they see fit in the full light of the amendments that have been made. They have both the original and amended versions in effect and if it is the case that there is no sufficient or honest justification for the amendment then of course it will cut no ice at all with the judge and indeed there may be a knock-on adverse effect on the witness's credibility.

The alternative which Mr. Goldberg urges on me of my not

giving permission seems to me to be impractical or unsatisfactory because all that will happen is that the witness will be called to give evidence, when his unamended statement is put to him when he is asked whether it represents his evidence and he has signed it and so forth he will be bound to say "Well yes but there are certain paragraphs that need amending" and it seems to me that that is an unsatisfactory situation to set up for trial when there is still as I have said plenty of time to deal with the matter. Again I stress that these are not amendments which the Claimants say unduly embarrass them at this stage in the sense that they cannot deal with them. They are not amendments that raise new matters that are going to send the Claimants scurrying off to investigate with other witnesses and so on and so forth, so in my judgment the statement as amended should be allowed as the witness statement and the matter can be dealt with suitably by cross-examination and the judge forming such a view of it all as he sees fit.

Even that is not quite the end of the matter because the Defendants all admittedly at the eleventh hour, took the view doubtless or maybe correctly that Mr. Badcock's new employers ought to have sight of his statement perchance there were confidential matters or other matters that they wanted to have some say on and that did cause some of the delay in question. The upshot is or was that the employers sought to persuade the defendants' solicitors to extract an undertaking from the Claimants, an undertaking about the use of the witness statement which it is suggested would have gone a little further than the position as set out in the Civil Procedure Rules. It may be that Mr. Goldberg is right when he

submits that those matters are really all matters for the Defendants and of no concern to the Claimants and why should they, as the price for receiving a witness statement, give undertakings that go further than the rules lay down. I am prepared to assume for present purposes that he is right on that. So the undertaking was not forthcoming. The Defendants chosen method of dealing with the situation was then to delete certain paragraphs. They have sensibly written a letter giving some indication to the Claimants as to the content of those paragraphs. Again I rather agree with Mr. Goldberg, having seen the letter, that it goes little further than giving an identification of the topics that are discussed in those paragraphs.

Mr. Clarke in the end does not invite me to deal with that situation in any way today. He is content to take his chance at trial with the trial judge. Mr. Goldberg as I understand it is content with that. Each party may feel they will have winning submissions to make when the time comes, but the position is therefore that the witness statement for which I give permission is the statement with the amendments and also with the blanks, so if at trial it is wished to ask the witness to give any further evidence, in particular filling in the blanks, that is something that the trial judge will need to be persuaded to do.

The final matter is that Mr. Goldberg urges upon me to impose the sanction of making the Defendants pay money into court. The only reason for this I think is the spirit of the new rules, the thought that judges must be tough in ensuring from now on that rules are complied with, that timetables laid down are not just

there for guidance but to be adhered to, and that if parties do not adhere to them there should be a penalty. To my mind the penalty for this type of situation is that the party in default has to come to court and obtain permission to use the statement. I think all are agreed that I have jurisdiction in an appropriate case to impose further sanction including a payment into court but I do not think it is appropriate in the present case. It may be appropriate if a party has behaved worse than the Defendants have here, there is a history of repeated breach of timetables or of court orders or if there is something in the conduct of the party that gives rise to suspicion that they may not be bona fide and the court thinks the other side should have some financial security or protection. Again those are matters or examples that come to mind as it were off the cuff. I am sure there are many others. But to my mind this is a straightforward case in which both parties did not adhere to the original timetable for witness statements. The Defendants took some days longer than the Claimants to produce theirs, which took them beyond the final agreed date, but that default has not prejudiced the trial and has not significantly prejudiced the Claimants to my mind. There is no suggestion here of deliberate manoeuvring or that the Defendants are not likely to be good for this claim. Indeed such evidence as I have seen is rather to the reverse; that they have made a great deal of money and certainly the Second Defendant is unlikely to default on any judgment, so scouting around quickly I cannot see any reason other than pure punishment to order a payment in and I do not think, subject to the Court of Appeal in due course saying that this is wrong, I do

not myself read the new rules as encouraging the court to punish this type of default by ordering payments into court. I think that the position can otherwise be dealt with conveniently.

So there we are. I give permission for the witness statements of Mr. Horgan and Mr. Badcock to be adduced at trial and to that extent I extend the time as is necessary to 26th or 27th April, whichever it was.

(Discussion as to costs)