IT'S NOT FAIR

Adjourning trials after *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221

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I summarise and discuss the decision of the Court of Appeal in *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221, in which the Court overturned the decision of Marcus Smith J and ordered the adjournment of a five-week trial where one of the witnesses was unavailable to attend for medical reasons on the date originally listed. The Court summarised the principles to be applied to applications to adjourn where a party/witness was unavailable, the key question being whether refusal to adjourn would render the trial unfair.

Introduction

1. In *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221 the Court of Appeal overturned the decision of Marcus Smith J refusing to adjourn a trial where an important witness was unable to attend on medical grounds. The Court set out the principles to be applied in determining such adjournment applications. The key question is whether refusal to adjourn will lead to an unfair trial.

The facts

2. The case concerned an application made by Tradition Financial Services Ltd ("TFS") for an adjournment of a five-week trial scheduled to commence on 25 January 2021. The application was dismissed by the trial judge, Marcus Smith J, on 11 January 2021. Permission to appeal was granted by the Court of Appeal; Nugee LJ, David Richards LJ and Peter Jackson LJ subsequently allowed the appeal.

3. The underlying claim was issued by Bilta (UK) Ltd (in liquidation) ("Bilta") and others against five defendants, of whom only TFS was actively engaged in the proceedings by the time the application was issued. The claimant companies accused the defendants of perpetrating "MTIC" fraud: they alleged that the directors of the claimant companies had caused their respective companies to incur VAT liabilities and arranged their affairs so that they could not discharge them. In doing so they were in breach of their fiduciary duties to the companies.

4. TFS, who acted as a broker rather than a trader, was accused of dishonestly assisting the directors in their breaches of duty by introducing the sellers to another of the defendants and liaising between them. The claimants contended that TFS was liable in equity to compensate the companies for the losses they had sustained. Those losses were substantial, amounting to more than £22m.

5. Alternatively, the directors of each claimant company were said to have engaged in fraudulent trading as defined by s 213 of the Insolvency Act 1986. The claimants alleged that TFS was knowingly a party to the fraudulent trading.

The adjournment application

6. Four employees of TFS were to give oral evidence at trial. Extremely serious allegations of dishonesty were made against each of them; the claimants' case was that the employees' alleged dishonesty was either attributable to TFS or that TFS was vicariously liable for any resulting loss. TFS denied that its employees had acted dishonestly and this was an issue which, as Marcus Smith J put it, would inevitably "loom large" at trial.

7. The need for an adjournment was said to be two-fold. Of the four witnesses, three expressed concern in December 2020 about attending the trial in light of the significant rise in Covid-19 cases in the UK. The fourth ("Ms. Mortimer") was diagnosed in August 2020 with a serious illness from which she was at that time not expected to recover. It appeared highly unlikely that she would ever be able to attend trial and TFS served a hearsay notice in respect of her evidence. However, by December 2020 the prognosis had significantly improved. She would not be able to attend a trial in January 2021 but was expected to make a full recovery by September 2021. TFS sought an adjournment to the first available date after 1 October 2021.

8. The Judge dismissed the adjournment application. He dealt with the concerns of the first three witnesses in a manner described by Nugee LJ as careful, thoughtful and sensitive, giving detailed directions for a "hybrid" trial. No criticism was made of that part of the judgment, which was not the subject of the appeal.

9. As to Ms. Mortimer's position, the Judge dismissed the application notwithstanding that:

   a. She was an important witness to TFS;
   b. She was willing to give evidence;
   c. She was unable to give evidence at the time scheduled for the trial through no fault of her own but would be available at a later date should the trial be adjourned; and

d. She positively wanted to give evidence to "clear" her name from what she considered to be unsubstantiated and false allegations by Bilta.

10. Nonetheless Marcus Smith J considered that her application could not justify *"standing out of the list a trial of this sort, so close to the hearing."*

The parties' submissions

11. TFS submitted that the Judge erred in failing to ask himself whether a trial would be fair without the live evidence of Ms. Mortimer; he should have asked himself that question and concluded that it would not be. Relying on paragraphs 32 to 35 of the judgment of Gloster LJ in *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101 ("Solanki"), TFS argued that the proper approach to an application to adjourn in these circumstances was to ask whether the trial would be fair if it took place. If the answer was "no," then an adjournment should be granted absent some countervailing consideration, even if it would cause inconvenience.

12. The claimants sought to distinguish between cases where adjournments were sought on the basis that a party was unavailable and those in which a witness was unavailable. *Solanki* dealt with the former situation but the same principles did not apply to the latter.

The principles to be applied

13. The leading judgment was given by Nugee LJ with whom David Richards LJ and Peter Jackson LJ agreed. Nugee LJ conducted a comprehensive review of the authorities, including those pre-dating the introduction of the CPR. He held that the following principles apply where an adjournment of a trial is sought on the grounds that a witness is unavailable:

a. The test is whether the refusal of an adjournment will lead to an unfair trial. That test is the same whether it is to be applied by virtue

of the common law requirement for a fair trial, Article 6 of the Human Rights Act 1998 ("Article 6") or the application of the overriding objective;

b. In one sense the decision whether to adjourn is discretionary. However, the central question is whether the trial will be fair which is *"more of an evaluative question."* This means that an appellate court will conduct a *"non-Wednesbury"* review of the lower court's decision. The appellate court must ask whether the lower court was entitled to reach the decision that it did and must be satisfied that a decision to refuse an adjournment will not cause injustice or unfairness;

c. More than one outcome may be fair, though in reality sometimes there will only be one answer;

d. Fairness means fairness to both parties. Inconvenience to the other party or other court users is not a relevant countervailing factor and will not usually be a reason to refuse an adjournment. However, injustice for which the other party cannot be compensated may be a ground for refusing an adjournment.

14. In Nugee LJ's judgment, there was no real and significant difference between an application to adjourn based on a party's own unavailability and that of an important witness. The unavailability of a party to attend trial may engage Article 6 where that of a witness will not. However, whether Article 6 is engaged at all will depend on the circumstances of the case. Where a party is a corporate entity there may be no correlation between the individuals conducting the litigation and the witnesses they propose to call. Availability of the witnesses may prove much more important. The significance of the oral evidence is fact-dependent and the question cannot be approached in a *"mechanistic or box-ticking manner."*

15. While Nugee LJ considered that fairness meant fairness to both parties, he commented (*obiter*) that there was *"considerable force"* in the suggestion that the Court can and should have regard to fairness to witnesses as well.

On the facts of *Bilta* the potential consequences for Ms. Mortimer could hardly have been more serious.

Application to the facts

16. The Court held that the Judge had taken the wrong approach. He should not have balanced the importance of the evidence to TFS against the inconvenience of an adjournment and should instead have focused on whether the trial would be fair.

17. As a result it fell to the Court of Appeal to consider whether it would be fair to adjourn the trial. Each case is fact-dependent and so parties to litigation should not assume that an adjournment will be granted/refused where the facts of their case are similar to/distinguishable from *Bilta.* Nonetheless it is useful to have regard to the factors which the Court took into account in deciding that the trial should be adjourned.

18. On the one hand, Nugee LJ held that Ms. Mortimer was an important witness for TFS (as everyone acknowledged). Cases concerning allegations of dishonesty were *"paradigm examples"* of cases where live cross-examination would assist the trial judge. In this particular case the claimants relied heavily on transcripts of phone conversations from which they invited the Court to draw adverse inferences; Ms. Mortimer should have the opportunity to explain why she said those inferences should not be drawn.

19. On the other hand there was no countervailing injustice to the claimants for which they could not be compensated. This was a monetary claim the success of which did not turn on recollections which would fade in the intervening months should an adjournment be granted.

Conclusions

20. The Court of Appeal in *Bilta* set out clear principles which the Court should apply in deciding whether to adjourn a trial where one of the parties or

witnesses is unavailable. The litmus test is fairness, to all the parties and perhaps to their witnesses too.

21. It is worth noting that the medical evidence in *Bilta* was *"detailed, recent and entirely compelling"* and was *"rightly"* accepted by the Judge without qualification. That will not always be the case. *Bilta* has not altered the approach the Court should take where there are doubts as to the sufficiency of the medical evidence. In those circumstances reference should be made to the existing case law, including the judgment of Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) (see paragraph 39 of Nugee LJ's judgment). Wherever the facts are in dispute the Court will first need to assess them before addressing the question whether to adjourn.

22. Finally, the decision of Marcus Smith J was overturned but his judgment (*Bilta (UK) Limited (in liquidation) and others v Tradition Financial Services* [2021] EWHC 36 (Ch)) may still provide invaluable assistance for parties seeking to agree directions for trial while social-distancing measures remain in place and there are (understandable) concerns for the safety of all involved. At paragraph 19(3) of his judgment Marcus Smith J made detailed proposals for trial, which included the following:

    a. Making the "supercourt" allocated to the trial available at least 48 hours before the hearing started and ensuring that it was not used for any other purpose until the conclusion of the trial, except to be deep cleaned;
    b. Conducting a "hybrid" trial so that certain parties attended in person and others remotely;
    c. Altering the hours in which the Court would sit to enable travel to and from Court to take place outside rush hour; and
    d. Setting a much stricter timetable for trial than is usual so that witnesses/parties were not waiting at/outside Court longer than necessary.

23. Whether to conduct a trial remotely, in person or by a "hybrid" method is ultimately one for the Court. The views of the parties – even if they are

agreed – are not conclusive, as Marcus Smith J pointed out in *Bilta.* Nonetheless the proposals made by the Judge could provide a very useful starting point in considering how to ensure the safety of all participants where "live" hearings are needed.

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