



Neutral Citation Number: [2020] EWHC 3206 (Comm)

Case No: CL-2018-000701

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

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

Date: 13 November 2020

Before:

MRS JUSTICE COCKERILL DBE

Between:

**(1) ABDULRAHMAN BIN ABDULLAH BIN
IBRAHIM AL-SUBAIHI
(2) JAMAL ABDULLAH AL-MUZEIN**

Claimants

- and -

MISHAL MAAN AL-SANEA

Defendant

Rupert D'Cruz (instructed by Dentons UK and Middle East LLP) for the Claimants
Duncan McCombe (instructed by Harbottle & Lewis LLP) for the Defendant

Hearing dates: 13 November 2020

APPROVED JUDGMENT

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

Mrs Justice Cockerill:

Introduction

1. This is the application of the Defendant (“Mr Al-Sanea”) for an order that, unless the Second Claimant (“Mr Al-Muzein”) provides disclosure and inspection in accordance with the Order of Mr Justice Teare dated 14 December 2019 (the “Teare Order”) by a certain date, his claim shall be struck out.
2. It arises in circumstances where Mr Al-Muzein has certainly breached the Teare Order, and apparently wilfully so; but also in circumstances where (i) Mr Al-Muzein is currently in detention in Kingdom of Saudi Arabia (“KSA”) and (ii) he has indicated that he now intends to comply with the Teare Order via his family.
3. As I describe further below, this claim is brought by Mr Al-Muzein together with the First Claimant (“Mr Al-Subaihi”) for payment of sums allegedly due to them by Mr Al-Sanea under a Final Clearance Agreement entered into on or around 29 November 2017 (the “Final Clearance Agreement”). In his defence, Mr Al-Sanea denies the enforceability of the Final Clearance Agreement against him.
4. The claim was originally listed for trial in this court commencing on 14 January 2021. The parties have now agreed that the original trial date should be vacated, to be replaced with directions for a trial later in 2021.

Background

Background to the claim

5. The Claimants are lawyers in KSA who provided legal services to Mr Al-Sanea’s father, Maan Abdulwahed Al-Sanea (“Mr Al-Sanea Senior”), and various companies which are connected with him and form part of the Saad Group, including Saad Specialist Hospital (“Saad Hospital”) and Saad Trading Contracting & Financial Services Co. (“Saad Trading”).
6. In April 2017, Mr Al-Sanea signed eight promissory notes (the “Promissory Notes”) on behalf of Saad Trading and Saad Hospital, by which Saad Trading undertook to pay (and Saad Hospital guaranteed the payment of) the Claimants’ fees for services provided by them to Mr Al-Sanea Senior and various Saad Group companies.
7. On or around 29 November 2017, Mr Al-Subaihi and Mr Al-Sanea executed the Final Clearance Agreement, by which Mr Al-Sanea agreed to pay US\$13,734,000 and US\$2,265,000 to Mr Al-Subaihi and Mr Al-Muzein respectively in full settlement of the debts recorded in the Promissory Notes.
8. The Claimants now bring their claim against Mr Al-Sanea personally for payment of their fees pursuant to the Final Clearance Agreement.
9. Mr Al-Sanea contends that the Promissory Notes and the Final Clearance Agreement are unenforceable by reason of duress and/or undue influence and/or breach of fiduciary duty of Cs and/or being unconscionable transactions. As part of his defence, Mr Al-Sanea relies on undue influence arising from a number of circumstances, including alleged threats made by Mr Al-Subaihi around the time of the execution of

the Promissory Notes and Final Clearance Agreement, an allegation which is denied by the Claimants. The existence of the threats against Mr Al-Sanea and his family is therefore one of the key factual issues in dispute and Mr Al-Sanea suggests that Mr Al-Muzein's disclosure is likely to bear significant relevance to that issue.

Relevant procedural background

10. The Case Management Conference took place before Teare J on 19 December 2019, resulting in directions to trial embodied in the Teare Order. Paragraph 3 of the Teare Order addressed disclosure, stating:

“Disclosure by the parties will be in accordance with Sections 1A and 1B of the Disclosure Review Document as appended to this Order at Annex 1.”

11. As Practice Direction 51U requires, the parties also took steps to complete Section 2 of the DRD. In the Claimants' Section 2, the following information was provided in respect of Mr Al-Muzein:

- i) Limited relevant hard copy documents are stored by Mr Al-Muzein at his office premises in KSA;
- ii) Data sources for electronic files to be considered at collection comprise one (or possibly two) desktop computer(s) situated at his office in KSA, one Samsung mobile phone, an office email server and two Webmail accounts Jamal@jamallawfirm.com.sa and info@jamallawfirm.com.sa
- iii) Relevant electronic documents may have been created or stored in the form of Word documents, PDFs, Microsoft Outlook files, WhatsApp messages and text messages; and
- iv) A number of keyword search terms were identified, which would be applied in Arabic and, to the extent any English documents were located, in English.

12. Following agreed extensions of the deadlines in the Teare Order, the parties gave disclosure on 5 June 2020.

13. Mr Al-Muzein's disclosure was accompanied by the usual Disclosure Certificate, signed by him. The Disclosure Certificate describes the steps taken on behalf of Mr Al-Muzein to carry out a reasonable search to locate documents in accordance with his disclosure obligations and, purportedly, “*with the terms agreed between the parties and set out in the DRD*”.

14. The Certificate however makes clear that Mr Al-Muzein's searches in fact only encompassed his email data (and not the other data sources he had identified in Section 2 of the DRD). Mr Al-Muzein justified his more limited search on the following basis:

“In my position as a member of the Shura Council in the Kingdom of Saudi Arabia, there are a number of highly confidential and sensitive matters which are contained within my email and WhatsApp data. I have, therefore, only agreed for

my email data to be reviewed after applying the above listed key words (which are specific to the Defendant in this matter). Whilst my WhatsApp data has not been extracted or reviewed, I note that my WhatsApp conversations with the First Claimant were provided for review by the First Claimant and my WhatsApp conversations with the Defendant should already be available to the Defendant. As such, I am confident that I have satisfied my disclosure obligations.”

15. There followed an exchange of correspondence between Mr Al-Sanea’s solicitors, Harbottle & Lewis LLP (“Harbottle”), and Dentons UK (“Dentons”) regarding the extent of Mr Al-Muzein’s compliance with his disclosure obligations. As I explain further below, the timing of the correspondence is said to hold some relevance to the determination of Mr Al-Sanea’s application.
16. Harbottle first raised concerns about the deficiencies in Mr Al-Muzein’s disclosure and the explanation given in the Disclosure Certificate on 3 July 2020, noting that, if those deficiencies were not remedied, Mr Al-Sanea would apply to the Court for an order requiring their remedy on unless terms. Harbottle reiterated that position on 17 July 2020.
17. On 23 July 2020, Dentons clarified the steps taken on behalf of Mr Al-Muzein in the disclosure process but maintained that those steps were reasonable and proportionate for the reasons set out in the Disclosure Certificate.
18. On 28 July 2020, Harbottle repeated their concerns and confirmed Mr Al-Sanea’s intention to apply to the court. That application was subsequently issued on 30 July 2020.
19. Specifically, the alleged deficiencies in Mr Al-Muzein’s disclosure were that he:
 - i) Limited his search to only one data source, the email account info@jamallawfirm.com.sa. He did not search the other data sources identified in Section 2 of the DRD, including his own email account jamal@jamallawfirm.com.sa;
 - ii) Did not apply all of the search terms agreed between the parties;
 - iii) Failed to search for and disclose any WhatsApp messages, despite WhatsApp being the main method of communication between the parties (including between the Claimants themselves);
 - iv) Did not search documents of potentially pertinent custodians, in particular an associate of his firm who was copied in on communications between the parties (although, it was accepted by Mr Al-Sanea that Section 2 of the DRD did not in terms propose to search the data of any additional custodians); and
 - v) Did not search any hard copy documents (despite acknowledging in Section 2 of the DRD that relevant hard copy documents are likely to exist).

Mr Al-Muzein's detention in KSA

20. Since at least 28 July 2020, Mr Al-Muzein has been detained at a facility in KSA in connection with on-going investigations by the KSA authorities. Having been unable to communicate with Mr Al-Muzein in relation to the extant application, Dentons informed Harbottle of his detention on 24 August 2020. At that stage, the nature of the investigations and the likely timing of Mr Al-Muzein's release were unclear (and this uncertainty remained even as the date of the hearing of Mr Al-Sanea's application).
21. As a result, on 20 October 2020, Dentons applied for a stay of the proceedings until Mr Al-Muzein could give instructions. That application was supported by the evidence of Mr Adrian Giles, a partner in Dentons. Mr Giles confirmed that Mr Al-Muzein had had limited communications with the outside world and, in particular, remained unable to communicate instructions to Dentons in connection with the proceedings.
22. The present application relates to disclosure given by Mr Al-Muzein on 5 June 2020, which is made on the basis that it manifestly did not comply with the requirements of the Teare Order and the disclosure proposals agreed by Mr Al-Muzein in Section 2 of the Disclosure Review Document ("DRD") produced on his behalf pursuant to Practice Direction 51U.
23. Since Mr Al-Sanea issued his application, the scope of the disagreement regarding the deficiencies in Mr Al-Muzein's disclosure has narrowed significantly: Mr Al-Muzein has accepted that he must do more to comply with his obligations and the parties have agreed that he will now take further steps to do so by 15 January 2021.
24. In light of that agreement, the only remaining issue to be determined on Mr Al-Sanea's application is whether the requirement for Mr Al-Muzein to comply with his disclosure obligations by 15 January 2021 should be made on "unless" terms.
25. Mr Al-Sanea submits that established case law principles justify such a sanction due to Mr Al-Muzein's failures to comply with his obligations to date, which mean that the court cannot have any confidence in his future compliance. Mr Al-Muzein's position is that the unless sanction is not justified, principally on the basis that he is currently in detention in KSA and there is a risk that he will be rendered unable to comply with the proposed unless order for reasons beyond his control.
26. Mr Al-Sanea's application originally came before me on 23 October 2020, along with a responsive application by Mr Al-Muzein requesting a stay of the proceedings as a result of his on-going detention in KSA. I adjourned the hearing on 23 October to enable (i) Mr Al-Muzein's solicitors, Dentons and Middle East LLP to attempt to take instructions from him and (ii) for both parties to serve further evidence in respect of the applications, in particular in the light of the fact that Mr Al-Sanea's team indicated some scepticism about Mr Al-Muzein's inability to comply with any unless order, despite his detention.

Events following the hearing before me on 23 October 2020

27. Following the hearing on 23 October 2020, Dentons attempted to contact Mr Al-Muzein through various means, including through his family, his lawyer in KSA, and Mr Al-Subaihi. Those attempts were detailed in a further statement provided by Mr Giles.
28. Crucially, on 5 November 2020, Mr Al-Muzein was permitted to telephone his family and, during that call, he was informed of Mr Al-Sanea's application. Mr Giles's evidence was that this was the first occasion on which the issued application had been brought to Mr Al-Muzein's attention. Following that call, Mr Al-Muzein's daughter confirmed to Dentons that Mr Al-Muzein wished to comply with the Teare Order and had authorised her to assist in this process. Mr Al-Muzein's daughter also raised further practical issues in relation to his compliance with the Teare Order: (i) Mr Al-Muzein's mobile phone had been seized by the authorities and it was unclear whether his WhatsApp messages could be retrieved; and (ii) she was unsure of the location of the hard copy documents referred to in Section 2 of the DRD and would need assistance from Mr Al-Muzein himself to locate them.
29. On 10 November 2020, Dentons wrote to Harbottle explaining those developments. Noting the complexities that would be involved in the further disclosure process, Dentons proposed a deadline of 15 January 2021 for Mr Al-Muzein to comply with the Teare Order. As a compromise, Dentons also offered to inform Harbottle as soon as possible if they reached the conclusion that the proposed deadline was no longer achievable, to explain the reasons for delay, and to propose a revised date for Mr Al-Muzein's further disclosure.
30. Mr Al-Sanea accepted this proposed deadline, but only on the basis that an order requiring Mr Al-Muzein's compliance be made on unless terms.
31. The matter then came back before me on 13 November 2020. Mr Al-Muzein confirmed through counsel that he intended to comply with the Teare Order and that he considered that he was likely to be able so (though his family) by 15 January. Mr Al-Muzein's request for a stay of the proceedings is no longer pursued. At the hearing, I gave a short judgment (devoid of formalities and factual background) dismissing Mr Al-Sanea's application for an unless order, with these fuller reasons to follow, in the light of the fact that permission to appeal was sought unsuccessfully before me.

The parties' positions

32. In submissions, I was referred by counsel for Mr Al-Muzein to the decision of the Court of Appeal in *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, in which Moore-Bick LJ stated (at [34]-[36]) that, because non-compliance with an unless order automatically results in the sanction taking effect, the unless order should only be made if the eventual sanction itself would be justified:

“34. In my view it should now be clearly recognised that the sanction embodied in an “unless” order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material

respect. This has a number of consequences, to three of which I think it is worth drawing particular attention...

36. The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as “good housekeeping purposes”.

33. I did not understand counsel for Mr Al-Sanea to dispute that statement of principle; rather, it was Mr Al-Sanea's position that a strike-out sanction would be justified in this instance. The dispute between the parties therefore centred on whether the threshold for imposing the strike-out sanction was met, albeit there was some dispute about how the authorities say this question should be approached.
34. Mr Al-Sanea relies principally on the observations of Lord Neuberger in *Global Torch Ltd v Apex Global Management Ltd and Others (No.2)* [2014] UKSC 64, [2014] 1 WLR 4495 at [23]-[24]:

“23. ... The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction.

24. In the present case, essentially for the reasons given by the three judges in their respective judgments, there do not appear to be any special factors (subject to what I say in the next two sections of this judgment). Further, it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why

he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place.”

35. Mr Al-Sanea submits that Mr Al-Muzein is in clear breach of the Teare Order, as he himself has implicitly recognised by now (albeit belatedly) agreeing to comply with his obligations under that Order. He says, via Mr McCombe’s clear and forceful submissions, that it is clear from *Global Torch* that a sanction should therefore be imposed, that this is not a case in which there are special circumstances to justify departing from this position. It was submitted that in particular, the following circumstances make it appropriate for Mr Al-Muzein’s behaviour to be met with sanctions:
- i) Mr Al-Muzein has clearly and deliberately breached the Teare Order. The facts are similar to those in *Global Torch* and, if anything, the arguments weigh even more strongly against Mr Al-Muzein in that he proposed the searches in Section 2 of the DRD himself as a reasonable and proportionate measure. Mr Al-Muzein was therefore deliberately dishonest in stating in his Disclosure Certificate that he had acted “*in accordance with the terms set out in the DRD agreed between the parties*”;
 - ii) The reasons offered by Mr Al-Muzein for his breaches do not excuse his behaviour, as he now appears to accept;
 - iii) The order breached was designed to ensure the fair conduct of the proceedings, which is jeopardised by Mr Al-Muzein’s breaches;
 - iv) Mr Al-Muzein was given ample opportunity to comply with his obligations when Harbottle raised the deficiencies in his disclosure in *inter partes* correspondence in July 2020. The chronology of those exchanges shows that before his detention Mr Al-Muzein knew that Mr Al-Sanea had threatened an application for an unless order against him, and despite this he was prepared to instruct his solicitors to maintain the position that he was not in breach of the Teare Order;
 - v) Notwithstanding his on-going detention in KSA, Mr Al-Muzein is not saying that he *cannot* comply with his obligations; indeed, he is saying he will now do so; and
 - vi) Despite Mr Al-Muzein’s confirmation that he is willing to comply with his obligations, his previous breaches can give the court no confidence that he will now do so voluntarily, which risks leaving Mr Al-Sanea in the same position again in January 2021.
36. On this basis it is submitted that (i) there is clear authority to the effect that there should be an unless sanction and (ii) to the extent there is room for discretion the burden should be on Mr Al-Muzein himself: if it transpires he cannot comply with the order for reasons beyond his control, he can come back to court and apply for relief.
37. Mr Al-Muzein submits that the Court should consider carefully whether the sanction being imposed is appropriate and should not impose a strike-out sanction unless it can

be clearly justified (relying on *Marcan Shipping*). He places different emphasis on the passage from Lord Neuberger in *Global Torch*, citing it instead as authority supporting the proposition that a strike-out sanction is only to be deployed where there is continuing disobedience and - in particular - where the litigant has been given every opportunity to comply. He points out that the strike-out sanction remains one of “*last resort*” as confirmed following *Global Torch*, by the Court of Appeal in *Michael Wilson & Partners Ltd v Sinclair* [2015] EWCA Civ 774 (per Richards LJ at [34]).

38. Relying on those authorities, Mr Al-Muzein submits that imposing the strike-out sanction is not appropriate in this case and would be contrary to the principles established in the authorities above, on the basis that:
- i) This is not a case of continuing disobedience where the respondent has been given every opportunity to comply with the order. Mr Al-Muzein was only informed of the application in November this year, and having been informed of it, he immediately agreed to comply with the Teare Order. This not akin to the usual unless order situation, where the litigant is continuing to refuse to comply despite the threat of the unless order;
 - ii) Mr Al-Muzein faces a number of practical challenges in seeking to give disclosure by the agreed deadline, including: (i) the difficulty of extracting documents from KSA, particularly given the travel restrictions resulting from the Covid-19 pandemic; (ii) the need to process and translate a large volume of Arabic documents, (iii) the uncertainty arising from Mr Al-Muzein’s on-going detention and (iv) his limited opportunities for communication to assist in the disclosure process (for example, in relation to the provision of passwords, the detention of his mobile phone, access to his WhatsApp data, and locating hard copy documents). There is a risk that he might therefore be rendered unable to comply with his obligations by the agreed deadline, resulting in an automatic strike-out of his claim, for reasons outside his control, in circumstances where there is no continuing disobedience and he has not had every opportunity to comply with the Teare Order;
 - iii) The authorities do not require that the burden be shifted to the respondent to require him to come back to court and apply for relief if circumstances beyond his control make it impossible to comply with the order;
 - iv) The risk to Mr Al-Sanea is instead adequately addressed by the compromise offered by Dentons, in the form of an agreement to inform Harbottle if (and when) it transpires that the agreed deadline cannot be achieved. At that point, Mr Al-Sanea will be able to challenge the reasons why it is not possible to comply and to seek an unless order if he considers it justifiable. The court will then be in a position to assess whether there has been continuing disobedience and whether Mr Al-Muzein has had every opportunity to comply. This provides a fair balance of the interests of both parties; and
 - v) Strike out of Mr Al-Muzein’s claim would not be fair in the context of the wider proceedings, as it would deprive the remaining parties (including Mr Al-Sanea) of the further disclosure (which, on Mr Al-Sanea’s own argument, is said to be important to the key issues in the dispute).

Discussion

39. In relation to this application for an unless order the starting point is that I completely accept that there has been a breach of the Second Claimant's disclosure obligations and that that breach is an extremely serious one.
40. There is much indeed to be said for the submissions which have been made as to it being hard to reconcile what has been said by the Second Claimant when he filled out Section 2 of the DRD and said he "*acted in accordance with the terms set out in the Disclosure Review document agreed between parties*" with an honest answer. It may be that that is an answer given carelessly but, as I say, it certainly justifies the submission being made that it looks like it was a dishonest answer.
41. There is thereafter an unhappy history in relation to correspondence on the disclosure obligations where, after chasing by the defendant, by 23 July those acting for the Second Claimant were saying that they were still considering whether there were deficiencies in the disclosure exercise. At the same time however, what they were describing in the letter made it very clear in fact, that the disclosure exercise which had been done was not the disclosure exercise which the Second Claimant had agreed to perform under the order of Mr Justice Teare. In particular in that it made clear that only one email address had been searched, the personal email address had not been searched, the email server had not been searched and only three out of the ten search terms had been used.
42. There was no hint of regret or contrition about that obvious deficiency but simply what Mr McCombe described as an "unrepentant approach" and I would certainly say he is justified in so describing it in relation to that and a somewhat barefaced request to agree to a revised scope. In that respect the behaviour of the Second Claimant at that point was very similar to the circumstances which pertained in the *Global Torch* case to which Mr McCombe referred me. In other words, confronted with a breach, the Second Claimant did not apologise or promise to comply, but simply sought agreement to his *modus operandi*.
43. So the backdrop is a serious and originally unrepentant and uncontrite breach, against a background where an unless order was then threatened; but it is at about this point that the Second Claimant disappears into custody. Had matters stayed in the circumstances where they were at 23 July I would have little or no hesitation in imposing an unless order.
44. What has troubled me, as I have made clear to Mr McCombe in the course of argument, is the fact that two things have changed since then. Firstly, we are no longer in a position where what is being offered is "*we'll give you half of the disclosure*" or "*wouldn't you like to agree to what we have given you?*"; which was the position at 23 July. What is being said now is that the Second Claimant accepts that he has not complied and does intend to provide the remaining disclosure.
45. Secondly, the Second Claimant is now in detention. The disclosure will have to be done effectively remotely, with him giving instructions as and when he can to those who are acting for him. Those are plainly circumstances where there are potentially difficulties, even though the Second Claimant has said that he thinks he can provide the disclosure in the period agreed.

46. In that respect it is not a question of there being a need to produce, say, two documents and we know where they are. There is a portfolio of what has to be produced, in relation to some of which there are going to be technical aspects. There are also background issues which make the disclosure more complicated. I refer not just to the detention; there is also the background of these documents being in Saudi Arabia, some of them will be in Arabic which will have to be translated or assessed by somebody who is fluent in Arabic. Then the necessity of couriering. There may be difficulties of access to devices; and all of this of course takes place against the background of Covid.
47. Two other things trouble me. The first is a point which I have made on a number of occasions, namely *Marcan Shipping* and the fact that the sanction would follow automatically, which is uncomfortable when one has in mind that potential for difficulties. The second is the fact that what is being sought - and I pressed Mr McCombe on this last time - is only the "nuclear option" of striking out the claim. No lesser sanction is sought. So it is not a case where what is being sought is a condition which leads to, for example, debarring the Second Claimant from relying on any disclosure or so forth. This is the nuclear option in terms of conditions.
48. In those circumstances, while it is a situation where it is quite close to being one where I would grant an unless order, as a matter of the exercise of my direction I do consider that doing so in these circumstances against this background would be disproportionate and inappropriate. I hear what Mr McCombe says about the benefits of putting the onus on the Second Claimant, and I certainly have sympathy with his point; but for all that in my estimation where there is no longer an unrepentant breach (unlike *Global Torch*) and where there are these very particular circumstances offering obvious potential for difficulties not of the Second Claimant's making, the balance tilts away from an unless order.
49. So in those circumstances I am not going to make the order on an unless basis. I do not accept Mr McCombe's submission that *Global Toch* binds me to imposing a sanction. What was said there was that a sanction is almost inevitable and that "*if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting ... the claim*". It does not suggest that, even then, failure to impose the sanction would be wrong; and it explicitly contemplates (i) persistent disobedience and (ii) no special circumstances.
50. It follows that it would in any event be open to me to refuse to impose an unless order as matter of discretion. But also, in my judgment, this case falls exactly within the qualifications contemplated – there is no persistence in disobedience as of now (though there was in the past) and there really are special circumstances. So I will not make the order on unless terms.
51. However, I make it extremely clear that if there is not production of the documents within the time frame in which it has been indicated those documents are believed to be capable of being produced, I would expect another application for an unless order to be made and unless there is an extraordinarily good excuse, I would expect an unless order to be made with a very short period for compliance.

52. So I do want the order to include within it a provision that I believe there has been agreement to inform the defendant as soon as possible if there are any problems. I think we ought to have a reporting requirement to the defendant by a particular date as to whether a difficulty is anticipated and that will provide the defendant with an opportunity to make that unless order application in good time. That is important because we are about to adjourn this case over to a new date and if there is going to be non-compliance and there is going to be any question of this impacting the revised trial date that has to be dealt with as soon as possible.