



Neutral Citation Number: [2021] EWHC 2134 (Comm)

LM-2020-000006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 29 July 2021

Before :

MR ANDREW HOCHHAUSER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

BETWEEN:

- (1) **GOLDEN AGE MODELS LIMITED**
(2) **MR QUENTIN POORE**

Claimants

- and -

SANTANDER BANK PLC

Defendant

Mr Poore, a litigant in person, representing himself and the First Claimant
Robert Scrivener (instructed by TLT LLP) for the Defendant

Hearing dates: 18 and 28 May 2021

Approved Judgment

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailli. The date and time for hand-down is deemed to be 10:30am on Thursday 29 July 2021.

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MR ANDREW HOCHHAUSER QC :

1. This is an application (the “**Application**”) by the Defendant (the “**Bank**”), made by an Application Notice dated 23 February 2021, for an Order that:
 - (1) the Claimants’ Particulars of Claim and Reply are confirmed as struck out and the claim dismissed pursuant to paragraph 4 of the Order of Clare Ambrose, sitting as a Deputy Judge of the High Court, dated 19 November 2020 (the “**Ambrose Order**”);
 - (2) the Defendants’ Counterclaim is stayed for a period of two months to allow for ADR;
 - (3) the Defendant’s costs of this application be paid by the Claimants; and
 - (4) the Defendant’s costs in the claim be paid by the Claimants.

2. The grounds on which the Application are made are that :

“The Claimants have failed to comply with paragraphs 1 and 2 of the Ambrose Order, in particular they have failed:

1) to carry out a reasonable and proportionate search for, and to disclose, all relevant documents in their control falling within the categories set out in paragraphs 1.1 to 1.5 of the Ambrose Order; and

2) to file and serve a witness statement providing an adequate response to the matters set out in paragraphs 2.1 to 2.5 of the Ambrose Order.

As a consequence, the automatic sanction at paragraph 4 of the Ambrose Order is engaged and the Claimants’ Particulars of Claim and Reply have been struck out and the claim dismissed. The Defendant considers that a stay of the Counterclaim of 2 months to allow the parties to engage in ADR is accordingly reasonable and appropriate.”

3. The Application was supported by the sixth witness statement dated 23 February 2021 from Jack Higby Hargreaves, a solicitor in TLT LLP (“**TLT**”), which acts for the Bank (“**Hargreaves 6**”). There were numerous other witness statements to which I was taken in the course of the hearing, which I will set out below.

Representation

4. At the hearing the Second Claimant, Mr Poore acted in person, for both himself, and the First Claimant, a company which he wholly owns and controls. I commend him for the measured way in which he conducted himself in these proceedings. I should add that he has not always been a litigant in person, and until 12 February 2021, Messrs Simpkins & Co, solicitors, represented both Claimants, including during the period for compliance with the provisions of the Ambrose Order. The Bank were represented by Mr Robert Scrivener of Counsel. I am grateful to Mr Poore and Mr Scrivener for their oral and written submissions.

The Nature of the Claim

5. Stated shortly, this is a claim for an alleged mis-sale of certain government backed lending made by the Bank to the First Claimant in 2012. The First Claimant, a company which specialises in the sale of high quality model railways, alleges misrepresentation, breach of contract and breach of duty against the Bank. Mr Poore, as the sole shareholder and director of the First Claimant, and on the basis that he gave a personal guarantee and security over property in respect of the agreed loan facilities, that he too was owed similar contractual and common law duties by the Bank, which were breached. The quantum claimed is summarised in a Schedule of Loss, attached to the Particulars of Claim dated 6 February 2018 as:
 - (1) Loss of value of the business as at 31 December 2014;
 - (2) Actual losses to year ended 31 December 2015 and thereafter continuing to June 2017. The basis of this claim is said to be “*The Claimant continued to trade and incurred further losses; the Defendants assisted in that by expressly permitting the Claimant to open banking facilities at with another bank [sic]*”;
 - (3) Charges applied by the Bank to the Claimants’ accounts;
 - (4) Credit History Damage, said to be based on the fact the Claimants have had adverse credit ratings imposed and “*The Claimant will not easily obtain future credit to assist in the development of the business and the Claimant contends that this is damage for which the Defendant is responsible...*”.
6. According to the Claimants’ expert, the claim is worth some £3,320,148, plus interest. At paragraph 4 of his fourth witness statement dated 23 March 2021, Mr Poore puts it at £4,385,849.
7. This case has had an unhappy procedural history, with numerous failures on the part of the Claimants to comply with Orders and the requirements of the Civil Procedure Rules (the “**CPR**”). Since the Claim Form was issued on 9 October 2018, there have been no less than five procedural hearings, resulting in the numerous revisions to the timetable for the preparation for trial. Even now there are pending applications by both parties in relation to expert evidence. I set out in the following paragraph, some of the more significant events in the history of the litigation. It is not exhaustive.
8. Stated shortly:
 - (1) The Claimants initially failed to file any costs budgets for consideration at the CCMC, listed for 3 April 2020. On 27 March 2020, their then solicitors applied for an adjournment and filed a late costs budget. HHJ Pelling QC allowed the adjournment in part and ordered the Claimants to pay the costs of and occasioned by the Claimants on an indemnity basis.
 - (2) A second CCMC was listed for 20 May 2020 and came before Ms Julia Dias QC, sitting as a Deputy Judge of the High Court. The Claimants did not lodge their Disclosure Review Document (“**DRD**”) until the night before the hearing. It was held by Ms Dias to be inadequate and was not approved. She ordered that a revised DRD be served by 4pm on 3 June 2021, awarded costs to the Bank in

relation to the costs of or associated with effecting disclosure, and in default of compliance with the requirement to provide a revised DRD, ordered that the Claimants would not be entitled to any Extended Disclosure (the “**Dias Disclosure Order**”). The Claimants were ordered to provide disclosure and inspection in accordance with the Bank’s DRD.

- (3) At that hearing, Ms Dias refused to grant them any relief from sanctions, and pursuant to CPR 3.1.4, ordered that the Claimants are to be treated as having filed a costs budget comprising only the application court fees. Permission to appeal was refused by the Court of Appeal by Order of Stephen Males LJ dated 22 June 2021. The trial was listed to come for hearing on Wednesday 22 March 2021, with a time estimate of 5 days.
- (4) On 2 June 2020, the Claimants served a revised DRD in purported compliance with the Dias Disclosure Order. The Bank objected and made an application confirming that the sanction in Dias Disclosure Order was engaged. The matter came before HHJ Kramer QC on 14 August 2020, who confirmed that there had not been compliance with the Dias Disclosure Order, the sanction was engaged and the Claimants were not entitled to any Extended Disclosure. He made a costs order against the Claimants and the disclosure timetable was revised.
- (5) On 2 September 2020, the Claimants served their first Extended Disclosure list of documents (the “**Claimants’ Disclosure List**”) and Disclosure Certificate. The Bank took the view it was wholly inadequate and on 7 October 2021 applied for an Order that unless the Claimants complied with their disclosure obligations and payment of outstanding costs orders, the claim be dismissed. That application was supported by the fifth witness statement of Jack Higby Hargreaves dated 7 October 2020 (“**Hargreaves 5**”).

The Ambrose Order

9. The matter came before Ms Ambrose on 19 November 2020. She made an extensive Order, which I annex to this judgment. It included orders at paragraphs 1 and 2 requiring compliance by the Claimants with their disclosure obligations as set out in paragraphs 1 and 2 of the Ambrose Order by 4pm on 17 December 2020 and at paragraph 3, requiring compliance with paragraph 7 of the Order of HH Kramer QC dated 14 August 2020 by 3 December 2020, by paying the sum of £14,575.53 to the Bank. Paragraph 4 of the Ambrose Order provided:

“Unless the Claimants comply with each of the orders set out at paragraphs 1 to 3 above, the Claimants’ Particulars of Claim and Reply shall be struck out without further order and the Claimants’ claim will be dismissed.”

10. The preamble to the Ambrose Order made clear that it was not appropriate for the Claimants to rely upon multiple witness statements of fact from Mr Poore and his ninth witness statement was not appropriate, as it includes submissions and references to without prejudice material. At paragraphs 8 and 9 of the Ambrose Order, she ordered as follows:

“5. The eight statements of Mr Poore that were served on 4 November 2020 (including, for the avoidance of doubt, Poore 9) shall, for the avoidance of doubt, not

stand as the Claimants' evidence in chief or as witness statements served in these proceedings. Any reference in those documents to without prejudice material should be redacted.

6. The Claimants have permission to file and serve a single witness statement from Mr Poore setting out Mr Poore's evidence on behalf of the Claimants, such single statement to stand as the Claimants' evidence in chief. That witness statement shall not make any reference to without prejudice material. The statement ought to comply with the rules. It should not exceed 30 pages and should not contain argument or submission. The statement must be verified with a Statement of Truth in the correct form. It must be served by no later than 4pm on 17 December 2020."

11. She made a further costs order against the Claimants to be paid by 17 December 2021 and, once again, the procedural timetable had to be revised and this time the trial window was moved.
12. It is to be noted that there has never been any appeal from that Order by the Claimants, although I note that Mr Poore now protests that the ambit of the disclosure ordered by Ms Ambrose in paragraphs 1.3 and 1.4 of the Ambrose Order goes beyond that which was required by the DRD. For example, in Poore 3 at paragraph 5 and Poore 7 at paragraphs 3-5, focussing on Issue 3(c) of the DRD, Mr Poore points to the fact that the reference to "sales records" and "stock records" are specifically limited to 2013 by the opening words of issue 3. Whilst I can see that there is some force in this, it wholly ignores the ambit of issue 4, relating to the calculation of quantum, which, as Mr Scrivener points out, is not limited in time. In any event, as mentioned above, there was no appeal from that Order.

Events after the Ambrose Order.

13. The Claimants have complied with paragraph 3 of the Ambrose Order in relation to the outstanding costs, but it is asserted by the Bank that there has been non-compliance with paragraphs 1 and 2 of the Ambrose Order, despite the provision of further documents by the Claimants just before the deadline on 17 December 2020, a consolidated witness statement from Mr Poore dated 16 December 2020 made pursuant to paragraph 6 of the Ambrose Order ("**Poore 1**") and the disclosure statement from Mr Poore dated 16 December 2020 made pursuant to paragraph 2 of the Ambrose Order ("**Poore 2**"). The Bank therefore contend the sanction in paragraph 4 of the Ambrose Order is engaged.
14. On 1 February 2021 the Bank's solicitors, TLT, wrote to the Claimants' solicitors indicating that there had been non-compliance with paragraphs 1 and 2 of the Ambrose Order and as a result in accordance with paragraph 4 of that Order "*the claim will be dismissed*". The letter set out the aspects in which there had been non-compliance in relation to paragraph 2 of the Ambrose Order, which were said to be "non exhaustive". The letter concluded by inviting the Claimants to provide any explanation in relation to the breaches set out in the letter within seven days.
15. On 8 February 2021, Simpkins & Co wrote to the Bank's solicitors, protesting about the unreasonableness of imposing a 7 day deadline, having taken approximately one and a half months to raise the issue of non-compliance and suggesting until 1 March 2021 as a more reasonable time for a response. On 10 February 2021, the Bank's

solicitors replied, drawing attention to the Christmas and New Year holiday period and the reduced availability of individuals within the Bank to provide instructions as an apparent explanation and extending time until 15 February 2021 for the Claimants to respond.

16. On 12 February 2021, as stated above, Simpkins & Co came off the record.
17. On 15 February 2021, Mr Poore served his third witness statement (“**Poore 3**”), which sought to address the points in TLT’s letters of 1 and 10 February 2020.
18. This did not satisfy the Bank and the present application was issued.

Further Evidence

19. I was also referred to the following additional evidence:
 - (1) The fourth witness statement of Mr Poore dated 22 March 2021 (“**Poore 4**”), replying to the present Application;
 - (2) The seventh witness statement of Jack Higby Hargreaves dated 1 April 2021 (“**Hargreaves 7**”), responding to Poore 4;
 - (3) The fifth witness statement of Mr Poore dated 28 April 2021 (“**Poore 5**”), responding to Hargreaves 7;
 - (4) The first witness statement of Robert Parry, the Bank’s forensic accounting expert, dated 26 May 2021 (“**Parry 1**”), which set out the reason he needed to see certain of the Claimants’ documents for the purposes of preparing his expert witness report on quantum;
 - (5) The “supplemental and sixth” witness statement of Mr Poore dated 28 May 2021 (although it bears the date 27 April 2021) (“**Poore 6**”), which was for the purpose of (a) listing information that Mr Poore agreed to provide at the conclusion of the first day of hearing on 18 May 2021 and (b) objecting to the contents of a document entitled “Defendant’s Chronology and Note on Relief from Sanctions for 28 May 2021”, dated 25 May 2021;
 - (6) The seventh witness statement of Mr Poore dated 28 May 2021 (“**Poore 7**”), which I permitted Mr Poore to file, because he said that, in the absence of legal representation, his medical condition made it difficult for him to deal fully with all the points raised that day. I further permitted Mr Scrivener to make written submissions on the same, which he did on 4 June 2021.
20. There were also numerous bundles before me. The revised full hearing bundle for 18 May consisted of 1843 pages, with a “Core Bundle” of 880 pages. For the resumed hearing on 28 May 2021 there was a supplementary Bundle from the Claimants of 194 pages and one from the Bank of 41 pages. There were also two sets of combined authorities bundles, one for the hearing on 18 May and another for the hearing on 28 May 2021.

The Claimants' Position

21. The Claimants' primary position is that they are not in breach of the Ambrose Order, having done all that was required of them; that they acted in good faith and carried out "reasonable and proportionate searches" as required by paragraph 1 of the Ambrose Order; that the provisions of paragraphs 1 to 3 of the Ambrose Order have been complied with and there is no basis, therefore, on which the claim can be regarded as struck out.

22. There was no application made by the Claimants for relief from sanctions, in the event that this primary position failed. There was, however, the following passage at paragraph 41 of Mr Poore's skeleton argument dated 14 May 2021:

"In the alternative, should the Claimant be found to have breached the Ambrose Order, then the Claimant as "litigant in person" will request the Court's guidance during the hearing to immediately apply for relief from sanctions on the basis that the Claimant's searches and disclosures were made "in good faith" to comply with the Ambrose Order, as explained in paragraphs 3, 4 and 5 above; and on the grounds that any breaches that are upheld are either minor, unintentional, remediable and have caused no prejudice, particularly in view of the fact that the hearing is not listed until 15 November 2021, which will provide ample time for any remedies that may be required."

23. Despite the Bank's stance, that in the absence of any application for relief from sanctions, which could have been made by the Claimants' solicitors, who were still on the record when the alleged breaches of the Ambrose Order occurred, no belated informal application for relief from sanctions should be entertained, I took the view that, as a litigant in person, Mr Poore should be entitled to make such an application on the basis of the grounds advanced in that paragraph, particularly as the Bank had addressed the reasons why no relief should be granted at paragraphs 66 to 71 inclusive of its skeleton for the hearing on 18 May 2021. I could see no prejudice that would be caused to the Bank by taking such a course.

The First Question: Are the Claimants in breach of paragraphs 1 or 2 of the Ambrose Order?

24. First, I must determine whether there have been any of the breaches of paragraphs 1 and 2, as alleged by the Bank. When considering the individual provisions of those paragraphs of the Ambrose Order, certain of which make reference to several of the issues contained with the Model C and Model D requests within the approved DRD, it is of assistance to bear in mind that when the matter came before Ms Ambrose, the Bank's complaints principally fell into four broad categories:

(1) No search for non-quantum documents. The Claimants stated that they "*did not search for documents... in categories other than quantum*";

(2) No search for electronic documents. The Claimants further stated that they "*did not search ... for electronic documents*".

(3) A lack of transparency in relation to documents. Under the section: "*I wish to withhold production of the following documents, part of a document, or a class of*

documents which would otherwise fall within my obligations”, the Claimants’ disclosure certificate asserted that, in 2016, the Claimants suffered a “complete failure of computer systems... which could not be recovered”, which has “significantly prejudiced the Claimants’ ability to retain or access any electronic records prior to that date”. The disclosure certificate also asserted (for the first time) that in May 2020 the Claimants’ accountants “suffered a ransomware attack on their server system”, and although “it may be technically possible to recover the older servers” that “could have significant time and cost implications”. The Bank said that no proper explanation was given as to what documents do exist or what steps have been taken to locate those documents.

(4) The withholding of ‘privileged’ documents on GDPR grounds.

The Claimants withheld purchase, sales and stock data. The purported justification was that the documents are “privileged because they contain customer sensitive information and... commercially sensitive information, such as unit cost prices and product order quantities, the disclosure of which would prejudice the future of the business due to Data Protection Regulations, confidentiality and commercially sensitive trading information.”

25. I accept the submission made by Mr Scrivener that paragraphs 1 and 2 of the Ambrose Order effectively required the Claimants to redo substantial parts of the disclosure process.

The Law

26. Before turning to the alleged breaches of paragraphs 1 and 2 of the Ambrose Order, it is helpful to set out the relevant legal principles when carrying out this exercise. Mr Poore relied upon the first instance decision in Re Atrium Training Services Ltd. [2013] EWHC 2882 (Ch), where Birss J (as he then was) held that the liquidators’ case for fraudulent trading against former directors should not be struck out pursuant to an unless order, despite the fact that the liquidators had not complied with the unless order, as shown by the missing categories of documents having been found by their search, but not disclosed. He held in order to show that a disclosing party was in breach, it was not enough merely to show that it had within its control relevant documents which were not mentioned in the list. It would have to be established that no reasonable search had taken place. The deficiencies relied on had to be so significant that it could be said that a reasonable search simply had not happened. The fact that documents which had been found and not disclosed did not mean there had been a breach: there was no basis for saying that the liquidators’ view that they had anything other than copies of documents held elsewhere had been unreasonable at the time.
27. At [37]-[43] of the judgment, Birss J held there was no justification for saying that the search had not been reasonable. It had been extensive and made in good faith. It had been explained in detail to the defendants and based on a methodology ventilated in court when the unless order was made. It had been completed within the time specified. Although relevant documents had been missed, there was no suggestion that that was a result of bad faith, and it did not support an inference that the search had not been reasonable. He therefore declined to strike the action out pursuant to the unless order.

28. The matter went to the Court of Appeal, which unanimously allowed the appeal. In giving the only reasoned judgment, with which Christopher Clarke and Rimer LJ agreed, Lewison LJ held that the judge had erred to the extent that he had relied on the facts that the methodology of disclosure had been explained to the defendants and ventilated in court, and no bad faith had been shown. The question whether there had been compliance with the unless order was not a matter of discretion. There was no dispute about the extent of disclosure or the relevance of the documents, Digicel (St Lucia) Ltd v Cable & Wireless Plc [2008] EWHC 2522 (Ch), and Morgans v Needham Times, November 5, 1999, [1999] 10 WLUK 837 considered. It did not matter that the scripts were not "original" copies but had been created for the purposes of the dispute. They were relevant documents in the possession of the liquidators whose disclosure had been promised. As it was, they were the only copies that could be found. The judge found that the liquidators had acted in good faith, but that did not warrant an inference that a reasonable search had been made. There had also been a failure to make a proper disclosure list. The supplementary disclosure did not of itself demonstrate non-compliance with the unless order. The liquidators' disclosure statement here was not conclusive.
29. Critically at [49], Lewison LJ said:
- "...the absence of bad faith does not necessarily mean that the order was complied with. A party may conduct a search in good faith but nevertheless fail to comply with his obligation under Part 31.7. As the judge recognised, what is or is not a reasonable search is something that the court must decide. It is not simply left to the discretion of the party concerned."*
30. It is clear from this decision that a mere assertion of good faith is not a complete answer to an allegation of non-compliance. For the purposes of paragraph 1 of the Ambrose Order, I have to consider whether a reasonable and proportionate search has been conducted by the Claimants, leading to the disclosure by way of a supplemental disclosure certificate and list of all relevant documents in their control falling, with the categories there listed. A mere assertion by the Claimants will not suffice. I also have to have regard to the adequacy of Poore 2 to see whether the requirements of paragraph 2 have been complied with. Unlike the position with relief from sanctions, if I find there is a breach or there are breaches of the relevant paragraphs of the Ambrose Order, the striking out provision of paragraph 4 is automatically engaged. I have no discretion in that regard.

Discussion and Conclusion on the First Question: Are the Claimants in breach of paragraphs 1 or 2 of the Ambrose Order?

31. I have carefully considered the parties' respective submissions on the various alleged breaches, taken into account the evidence contained in the numerous witness statements listed above and examined the contents of the approved DRD, against the terms of the Ambrose Order.
32. The fact that the Claimants have had to serve a further Amended Disclosure List and Certificate on 28 April 2021, is indicative that there had not been full compliance with the Ambrose Order on 17 Decembber 2021. I take no account of the Amended Disclosure Lists dated 22 and 23 March 2021 because they relate to subsequent materials, that which had already been served or the pending appeal in the Court of

Appeal. More important are certain of the documents disclosed for the first time on 28 April 2021, namely the Amended Financial Statements for the year ending 31 December 2019, the abbreviated version of which was signed on 11 December 2020 and emails relating to the cancellation of orders in January 2016.

33. I have reached the conclusion that the Claimants are in breach of paragraph 1 of the Ambrose Order in the following respects:

34. **Paragraph 1.1** – this required a “reasonable and proportionate search” of:

“Any non-quantum documents (i) within the Model C requests for Issues 1, 2, 5, 6, 7 and 8 of the approved Disclosure Review Document or (ii) that are relevant to Issue 3 of the approved Disclosure Review Document (in respect of which Model D disclosure has been ordered).”

35. As can be seen from the table produced by Mr Hargreaves at paragraph 14.5 of Hargreaves 7, there are a number of emails which refer to attachments, which attachments have not been produced. For example, there is an email at B/707 dated 7 August 2012 from Mr Lyons of the First Claimant’s accountants, MKL Accountants (“MKL”), which contains five attachments relating to “business plan updates” that have not been produced. The significance of changes made to the business plans can be seen from the report dated 27 April 2021 of Mr Maurice Faull, the Claimant’s forensic accounting expert, at paragraphs 4.10 (where he refers to the business plan as “**the August 2021 forecast**”) and 6.18 of his report dated 27 April 2021. He derives his calculations of loss from that business plan. Mr Poore submitted that the missing attachments listed in the table at paragraph 14.5 of Hargreaves 7 had been produced as part of the earlier disclosure, but when I asked him specifically to demonstrate where they were to be found, I was not satisfied that there has been complete disclosure; in particular the attachments to the following emails could not be located: 641, 642, 645 (although Mr Poore said that it had been superceded by the document at GAM 71), 657, 663, 669 (although Mr Poore said it had been superceded by 670), 703, 730.

36. Additionally, the stock records and sale and purchase records disclosed by the Claimants only go as far as 2015. Furthermore, there has been no disclosure of any emails passing between the Claimants and the First Claimant’s accountants, MKL, after 2013, nor any information provided by the Claimants to MKL on which the accounts were based.

37. I have therefore reached the conclusion that there have been serious deficiencies in compliance with paragraph 1.1 of the Ambrose Order.

38. **Paragraph 1.2** – this required a “reasonable and proportionate search” of

“Any electronic documents (i) within the Model C requests for Issues 1, 2, 5, 6, 7 and 8 of the approved Disclosure Review Document or (ii) that are relevant to Issues 3 and 4 of the approved Disclosure Review Document (in respect of which Model D disclosure has been ordered). The search for these documents shall involve the engagement of specialist technical expertise insofar as necessary.”

39. In paragraph 6 of Poore 2, in relation to paragraph 2.4.2 of the Ambrose Order, when explaining the extent of the searches that the Claimants have carried out “pursuant to sub-paragraphs 1.1 to 1.5 inclusive above”, reference is made “*subject to the explanation under Paragraphs 2.1 and 2.2 above*” only to “*a full physical searches of all files by cross-references to the DRD and paragraph 59 above.*”¹¹¹ In paragraphs 2.1 and 2.2 of Poore 6, Mr Poore states that his computer system had failed during 2016, probably due to a power surge and his backup had failed and could not be accessed. He also says that “*GAM [the First Claimant] became aware of some MKL Accountants computer problems on 28 May 2020, which were resolved, but GAM was not aware of the ransomware attack until 1 September 2020. MKL Accountants have recently recovered the relevant files and the relevant documents are disclosed in Exhibit GAM-113.*” It is fair to say his witness statements are not easy to follow, because one paragraph directs one to another paragraph and then another, often in different witness statements. At paragraph 2.3 of Poore 5, Mr Poore directs the reader to paragraphs 5 and 6 of Poore 2, saying:

“Paragraph 1.2 of the Ambrose Order: The Claimant’s extensive disclosures are confirmed in the Claimant’s Disclosure Witness Statement [Poore 2] under the heading in paragraph 5 for each of the issues in the DRD and in paragraph 6 under the heading for paragraph 1.2 of the Order, with the witness evidence referring to many paragraphs in the Claimant’s Consolidated Witness Statement [Poore 1] and supported by the many numbered Exhibits. The engagement of “specialist technical expertise” is referred to in paragraph 6 of the Claimant’s Disclosure Witness Statement [Poore 2] under the heading for paragraph 2.1 of the Ambrose Order, which also confirmed the disclosures made, with the Claimant’s Witness Statement [which according to paragraph 5 of Poore 2 is a reference to Poore 1] and the many Exhibits (which are verified on the Claimant’s Extended Disclosure List of Documents).”

40. Unfortunately, paragraph 6 of Poore 2, under the heading “Paragraph 2.1” makes no reference to the details of any electronic searches. Under the heading “Paragraph 1.2”, it simply refers the reader to paragraph 5 above where “*My extensive disclosures*” are “*fully explained*”.
41. Paragraph 5 of Poore 5 is an analysis of which of the documents provided relates to which issue in the DRD. In relation to issues 1, 2, 5, 6, 7 and 8, one is directed to various paragraphs in Poore 1. There is no mention there of any electronic searches.
42. Mr Poore also relied upon paragraphs 15-17 of Poore 3. At paragraph 15, Mr Poore states:

“The Claimant’s Witness Statement clearly stated that the business was operated from the Claimant’s home since its incorporation in November 2004 and “relied on a single computer system supported by an encrypted back-up”. This was simply a home computer. The “specialist expertise” referred to is simply a reference to a computer engineer and in fact uses a very similar description to that already used in paragraph 1.5 of the Court Order itself, which refers to the engagement of “specialist technical expertise”. The Claimant’s Witness Statement also clearly explained that the

¹¹¹ This reference to paragraph 59 was apparently intended to be a reference of Poore 1 – see paragraph 9.4 of Poore 6. However, Poore 1 ends at paragraph 58.

computer failure was “probably due to a power surge and the backup system also failed and could not be accessed. Specialist expertise were unable to restore any of the electronic files from 2004 to 2016 and therefore the entire computer system had to be replaced during 2016”. This statement is based upon the Claimant’s recollection of what the computer engineer said in 2016 when he dismantled the system and could not repair it. By implication the electronic documents from 2016 onwards can still be accessed, because a simple perusal of the Claimant’s Extended Disclosure List of Documents provides evidence that Exhibits GAM-90 to GAM-108 and GAM-118 to GAM-121 are all dated 2016 or later and they all formed part of the Extended Disclosure on 17 December 2020. This paragraph of the Claimant’s Witness Statement also clearly stated that “GAM has also maintained paper-based back-up files for most of its purchases, stock and sales records, which are disclosed (with customers details redacted) with Claimants Witness Statement including the many Exhibits”. Again, a simple perusal of the Claimant’s Extended Disclosure List of Documents provides the evidence that these paper-based back-up files cover the whole period in question from 2004 to 2016 and have been disclosed in Exhibits GAM-1 to GAM-89 and GAM-110 to GAM-117. The Claimant maintains, therefore, that this is a “reasonable and proportionate” level of detail and disclosure according to both paragraph 1 and paragraph 2.1 of the Court Order.

43. The problem with this evidence is that it does not address the requirement following the Ambrose Order to carry out an electronic search, involving the engagement of specialist technical expertise insofar as necessary.
44. Mr Poore also referred me to paragraph 32 of Poore 3, which again refers to a physical search, which states that it *“included the electronic documents as well as the paper back-up files.”* It is not made clear, however, how the electronic documents came to be included. At paragraphs 31.1 to 31.3 and 31.5 of the Bank’s skeleton², there are examples of documents which have not been disclosed, referred to in other documents. Similarly in relation to documents produced in the Claimants’ expert report which were produced for the first time in an annex to the report of Mr Faull dated 27 April 2021. These include copies of emails from customers cancelling orders³. At paragraph 3.44 of Mr Faull’s report, he states: *“Furthermore, I have been provided with copies of some emails from customers cancelling orders from GAM due to the fact that they have not received the products ordered from the company. It is Mr Poore’s contention that the failure to be able to provide these products to his customers is a direct result of the wrong advice and misrepresentations made to the company by the defendant in respect of the EFG Scheme and loans and overdrafts, and the subsequent actions of the defendant.”* These are clearly relevant and they should have been provided to the Bank pursuant to the Ambrose Order. I reject the submission of Mr Poore that such documents could await exchange of experts’ reports and did not have to be produced in disclosure before then.
45. Mr Poore at paragraphs 26.2 and 33 of Poore 4 confirms that the Claimants are in possession of electronic documents from 2016 onwards. I do not read any of his

² I did not think that paragraph 31.4 of the Bank’s skeleton evidenced underlying documents which had not been disclosed.

³ An Amended Disclosure List was served on 28 April 2021, which amongst other matters, listed emails relating to cancelled orders in redacted form and accounts for the year ending December 2019, signed by Mr Poore on 11 December 2020.

evidence as saying that, following the Ambrose Order, he personally carried out an electronic search of his own documents. The closest one gets to this is at paragraph 17 of Poore 3 where he says “*by implication the Claimant is indeed able to access the electronic files from 2016 onwards.*”, and paragraph 13 of Poole 5, where he states “*he has been able to carry out electronic searches from 2016 onwards.*” If he did so, there are no details of the methodology employed by him or his then solicitors.

46. The Claimants’ accountants, MKL, appear to have carried out an electronic search, because at Poore 4 at paragraph 26.2, Mr Poore says “*...paragraph 6 of [Poore 2] confirmed under the heading for Paragraph 2.2 that the documents were indeed recovered and disclosed. MKL Accountants did not advise the Claimant exactly how this was done, but the Claimant believes that “specialist technical expertise” would have probably been engaged to achieve this.*” He supplied no further details. Paragraph 13 of Poore 5 states: “*Furthermore, the recovery of the documents from the MKL server involved electronic searches and the documents disclosed all pre-date 2016.*” Further at paragraph 20 of Poore 3, Mr Poore says in relation to the recovery of files by MKL, “*...there were other files and documents recovered at the same time which are not relevant to this Claim...*” In those categories which he lists he includes “taxation matters” of the Claimant. Given the terms of Issue 4(b), those appear to me to be relevant.
47. MKL have ledgers relating to the Claimant in electronic form. Partial disclosure of the First Claimant’s trial balances and nominal ledgers for the year ending 31 December 2016 was given for the first time in April 2021 as annexes to Mr Faull’s expert report. These should have been provided earlier. Such documents should have been available for consideration by both side’s experts. They are not the only documents in the appendix to Mr Faull’s report entitled “Source Documents” that had not been disclosed in accordance with the Ambrose Order. They are set out in paragraph 16 of Hargreaves 7.
48. Mr Parry, the Bank’s forensic accounting expert, in Parry 1 comments on the significance of a number of documents which have come to light and to which he had not had access. At paragraph 27, he makes the point that Mr Faull has been given access to various documents which he has not and that he would want to have the same opportunity as his opposite number to review the same material, when forming his opinion. That point, in my view, has some force. I reject the suggestion of Mr Poore, made at paragraph 10 of Poore 6, that there are serious concerns with this evidence because of a “potential conflict of interest”. At paragraph 18, Mr Parry refers to an email from Mr Poore to Mr Lyons dated 20 April 2012 disclosed by the Claimants, in which Mr Poore stated: “*The need has now arrived if we are to succeed with the banks...I need the accounts finalising in the best possible light first before they are submitted*”... “*Please can we discuss how to use the above reserve to show a better net profit.*” As stated at paragraph 36 above, notably, there has been no disclosure by the Claimants of any communications between the Claimants and MKL in relation to the period post-2013. I would expect an electronic search carried out by MKL or Mr Poore to produce such communications.
49. I am therefore not satisfied that there has been a reasonable and proportionate electronic search, and I am satisfied that material documents have not been produced in relation to paragraph 1.2 of the Ambrose Order.

50. **Paragraph 1.3 and 1.4** which required a reasonable and proportionate search of “1.3 Any purchase and sales records (which may, insofar as is necessary, be suitably redacted to protect customer sensitive information) between 2011 and 2015.

1.4 Any stock records between 2011 and 2015.”

51. I am satisfied that there has been a breach of these paragraphs of the Ambrose Order. For the period relating to 2011 to 2015 only 8 pages of stock have been provided. This is to be contrasted with paragraph 7.6 of Mr Faull’s report, where he states:

“I reviewed the ‘order book’ during my visit on 1 April 2021. The first point to make is that I would call the file more of an ‘enquiry list’, rather than firm orders. I can confirm that there were at least 40 wallet-type files in a steel filing cabinet, varying in size of thickness, and a few more files in a pile for filing.”

52. Mr Poore’s explanation for not disclosing any of this information is that Issue 3(c) and the Ambrose Order of the approved DRD made no specific reference to “customer orders” and therefore this matter was not applicable as at the date of the Extended Disclosure on 17 December 2020. I disagree. The fact that Mr Poore regarded this as material which should be examined by Mr Faull as part of his assessment of quantum, clearly indicates that he regarded this as material which fell within Issue 4, the quantum issue, and this was not available to the Defendant’s expert.

53. **Paragraph 1.5** which required a reasonable and proportionate search of

“Any relevant documents within the Claimants’ possession or control held on MKL Accountants’ server (the “MKL Server”). The search for these documents shall involve the engagement of specialist technical expertise insofar as necessary.”

54. I have dealt with the electronic searches carried out by MKL earlier in this judgment. Suffice it to say that I am not satisfied that a reasonable and proportionate search has been carried out in this regard. Reliance was placed on a ransomware attack in May 2020, but I fail to see how this would have resulted in the loss of documents. As far as I can see there has been inadequate compliance with paragraph 2.4.2 of the Ambrose Order in relation to paragraph 1.5, which required setting out the method(s) by which documents were searched, including identification of custodians, date ranges, document types and keywords.

55. Paragraph 2 of the Ambrose Order required a witness statement from the Claimants, addressing each of the matters set out in sub-paragraphs 2.1-2.5 inclusive. **Paragraph 2.1** of the Ambrose Order required a section:

“Explaining the nature and extent of the failure of the Claimants’ computer systems in 2016 and identifying the extent to which the Claimants remain able to access electronic documents in their possession or control (howsoever created or stored). A full explanation as to why any documents are not available shall be given.”

The explanation is to be found at paragraph 6 of Poore 2. It is hardly detailed. For example, it gives no precise date on which the failure occurred in 2016. Although it refers to specialist expertise, no details are given to the exercise performed and when

this exercise was carried out. Also given that Mr Poore states the First Claimant contained paper-based back-up files of most of its purchases, stock and sales records, it is unclear why there are gaps in the disclosure provided, for example as identified at paragraph 51 above.

56. **Paragraph 2.2** required a section:

“Identifying (i) when the Claimants first became aware of the ransomware attack on the MKL Server; (ii) the extent to which the Claimants (or their accountants) remain able to access documents relating to the Claimants held on the MKL Server that are in the Claimants’ accountants’ possession or control; (iii) the nature of the documents relating to the Claimants held on the MKL Server and (iv) any steps that can be taken to recover those documents, along with the time and cost implications of taking those steps. A full explanation as to why any documents are not available shall be given.”

57. At paragraph 39 above I have referred to the information provided in paragraph 6 of Poore 2 under the heading 2.2. This terse passage does not properly address the matters required by that part of the Ambrose Order.

58. **Paragraph 2.3** required a section:

“Confirming what steps (if any) have been taken to comply with the Claimants’ obligation to preserve documents and when any such steps were taken.”

59. Such information as there is, can be found at paragraph 6 of Poore 2, to which I have already referred in paragraph 39 above. It simply states: *“Confirmed in paragraph 59 and Paragraph 2.2 immediately above.”* Paragraph 59 is an error and paragraph 2.2 does not address the steps taken by the Claimants to preserve documents and when such steps were taken.

60. **Paragraph 2.4** required a section:

“Explaining the extent of the searches that the Claimants have carried out pursuant to sub-paragraphs 1.1 to 1.5 inclusive above. That explanation shall identify:

2.4.1 the location(s) of the documents searched; and

2.4.2 the method(s) by which documents were searched including identification of custodians, date ranges, document types and keyword searches; and

2.4.3 details of the review carried out for relevance on behalf of the Claimants.”

61. The passages at Poore 2 which purport to deal with this are inadequate in relation to 2.4.2 and 2.4.3. They simply do not provide all the information requested. Mr Poore’s reliance additionally on paragraph 33 of Poore 3 and paragraph 2.11 of Poore 5 (which was not served until 28 April 2021) takes matters little further.

62. Finally, **paragraph 2.5** required a section:

“Explaining how and why two different versions of the email dated 2 March 2011 timed at 14:33 came to be provided at document references GAM15 and GAM16 of the Claimants’ extended disclosure documents.”

63. Poore 2 states the explanation is to be found “at paragraph 6 above”. It was not to be found there. In fact, it is at paragraph 6 of Poore 1, which states that the discrepancy

was due to the email being forwarded internally in an abbreviated form. I am satisfied this complied with that part of the Order, despite the protest in paragraph 6.2 of TLT's letter of 1 February 2021.

Conclusion on whether there has been a breach of the Ambrose Order

64. For the reasons set out above, I am satisfied that there have been serious and substantial breaches by the Claimants of paragraphs 1 and 2 of the Ambrose Order and therefore the sanction in paragraph 4 therein is engaged.

Relief from sanctions

65. In the light of the finding in paragraph 64 above, the next question to consider is whether the Claimants are entitled to relief from sanctions.

The Law

66. The applicable principles are those set out by the Court of Appeal in Denton v TH White Limited [2014] EWCA Civ 906 [2014] 1 WLR 3926 (“**Denton**”). I have to consider the three stages identified in that case, namely:

- (1) is the default serious or significant?
- (2) whether there is good reason for the breach?
- (3) considering all the circumstances of the case, should the relief be granted?

67. The Bank drew my attention to the guidance of Popplewell J. (as he then was) in Sinclair v Dorsey & Whitney (Europe) LLP [2015] EWHC 3888 (Comm) at [25] and [26], where he said:

“25 it seems to me that when a court is considering an application for relief from sanction where there has been a failure to comply with an unless order which has specified that a strike out is the sanction for failure to comply, the court must proceed on the basis that the sanction of strike out contained in the unless order was properly imposed as a proportionate sanction for failure to comply. It will, therefore, be a comparatively rare case in which the applicant can persuade the court, absent a material change of circumstances, that it would now be appropriate to grant relief from the sanction as being disproportionate.

26 I turn, therefore, to apply the three stage approach. The first stage is to enquire whether the breach is serious or significant. I have no doubt that in this case the breach ought properly to be categorised as very serious. The starting point is that breach of an unless order will almost always be treated as serious. It is a failure to comply with a court order in the knowledge that the court has already attached sufficient importance to the need to comply with it so as to impose the sanction of strike out as the proportionate consequence of non-compliance....”

68. The Bank submitted that if a breach is found, the claim has already been struck out under the automatic sanction in the Ambrose Order. Ms. Ambrose considered and determined that to be the appropriate sanction for failure to comply with the Claimants' obligations under that Order. There was no appeal from Ms Ambrose's

Order. The Court has no discretion about the conclusion that the claim has been struck out. The only discretion it has is to consider whether or not to relieve the Claimants of the consequences of their breach. I accept that submission.

69. I therefore turn to the three stages: first is the breach serious or significant?
70. In my judgment the breaches of this “unless order” cannot be characterised as trivial or unimportant. They are serious and significant. It seems to me that the Claimants have, to a degree, been selective about which documents they had disclosed. That is not unintentional, A good example of this can be shown by the materials, which they clearly regarded as relevant to the quantum issues, which were not included in the disclosure made pursuant to the Ambrose Order, but were provided to their expert on the basis that the documents were relevant to the exercise he had to perform. The explanation that disclosure of these could wait until production and service of the Claimants’ expert report does not stand scrutiny. It is to be remembered that at the material time, the Claimants were legally represented.
71. Secondly, is there an explanation for the breaches? Mr Poore urges me to take account of the fact that this was an extremely complicated exercise which he carried out in good faith. The fact is the Ambrose Order made clear what had to be done. He objects to its ambit, submitting that it goes beyond the terms of the DRD. There was, however, no appeal from its terms. The Claimants had the benefit of legal advice until 12 February 2021, well after the deadline for compliance with the Ambrose Order, and instead of addressing all of the complaints made by the Bank, Mr Poore’s primary position throughout the hearing was that there was no substance in the points taken by the Bank. For example, I still have no clear idea of the explanations required to be given in relation to the matters set out at sub-paragraphs 2.4.1-2.4.3 of the Ambrose Order. There was a period of nearly three months from the date of the Application to the first day of the hearing, during which time the deficiencies in the compliance with the Ambrose Order could have been remedied. They were not. I therefore do not regard this as being a reasonable explanation for the breaches.
72. I turn finally to the third question to be considered: taking all the circumstances of the case, should the relief be granted? I do not accept that the breaches can be characterised as minor or unintentional. At a time when the Claimants had the benefit of legal advice, this important exercise does not appear to have been taken seriously, given the gravity of the situation. Documents which were clearly disclosable and regarded as significant were not disclosed, yet they were provided to the Claimants’ expert. Information which was ordered to be provided was not. I take account of Mr Poore’s poor health, but he had access to both Mr Simpkins and MKL to assist him in this exercise and he is certainly not reluctant when it comes to the production of numerous witness statements. The fact is the Claimants did not properly address the task in hand. I do not find any of the matters set out in Poore 7 as amounting to a “change in circumstances”, so as to justify granting relief from sanctions. Assuming in their favour that the Claimants were acting in good faith, in my judgment that is simply not enough to justify the exceptional course of not imposing the sanction of strike out as the proportionate consequence of non-compliance. This is particularly so given, the history of frequent non-compliance by the Claimants with earlier Orders of this Court during this litigation.

Conclusion

73. I find that due to the Claimants' failure to comply with the terms of paragraphs 1 and 2 of the Ambrose Order, paragraph 4 thereof is engaged and the Claimant's Particulars of Claim and Reply are struck out and the Claimants' claim is dismissed. In the exercise of my discretion, I refuse to grant any relief from sanctions.
74. I would ask that the parties use their best endeavours to agree a draft Order, reflecting the outcome and I will hear any consequential matters when the judgment is handed down on Thursday 29 July 2021 at 10.30am.



ANNEX

**IN THE HIGH COURT OF JUSTICE BUSINESS AND
PROPERTY COURTS OF ENGLAND AND WALES LONDON
CIRCUIT COMMERCIAL COURT (QBD)**

LM-2020-000006

BEFORE CLARE AMBROSE

(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

19 November 2020

BETWEEN:

Claimants

- (1) GOLDEN AGE MODELS LIMITED**
- (2) QUENTIN POORE**

-and-

Defendant

SANTANDER BANK PLC

ORDER

UPON the Defendant's application dated 7 October 2020 for unless orders (the "**Application**")

AND UPON the Court considering that it is not appropriate for the Claimants to rely upon multiple witness statements of fact from Mr Poore and that the ninth witness statement of Mr Poore ("**Poore 9**") is not appropriate, as it includes submissions and references to without prejudice material

AND UPON hearing counsel for the Defendant and the Claimant's solicitor **IT IS ORDERED THAT:**

Unless Orders

1. By 4pm on 17 December 2020 the Claimants are to carry out a reasonable and proportionate search for, and to disclose by way of supplemental disclosure certificate and list, all relevant documents in their control falling within each of the following categories (insofar as such documents have not already been disclosed by list):
 - 1.1 Any non-quantum documents (i) within the Model C requests for Issues 1, 2, 5, 6, 7 and 8 of the approved Disclosure Review Document or (ii) that are relevant to Issue 3 of the approved Disclosure Review Document (in respect of which Model D disclosure has been ordered).
 - 1.2 Any electronic documents (i) within the Model C requests for Issues 1, 2, 5, 6, 7 and 8 of the approved Disclosure Review Document or (ii) that are relevant to Issues 3 and 4 of the approved Disclosure Review Document (in respect of which Model D disclosure has been ordered). The search for these documents shall involve the engagement of specialist technical expertise insofar as necessary.
 - 1.3 Any purchase and sales records (which may, insofar as is necessary, be suitably redacted to protect customer sensitive information) between 2011 and 2015.
 - 1.4 Any stock records between 2011 and 2015.
 - 1.5 Any relevant documents within the Claimants' possession or control held on MKL Accountants' server (the "**MKL Server**"). The search for these documents shall involve the engagement of specialist technical expertise insofar as necessary.
2. By 4pm on 17 December 2020 the Claimants are to file and serve a witness statement addressing each of the matters set out at subparagraphs 2.1 to 2.5 inclusive below:
 - 2.1 Explaining the nature and extent of the failure of the Claimants' computer systems in 2016 and identifying the extent to which the Claimants remain able to access electronic documents in their possession or control (howsoever created or stored). A full explanation as to why any documents are not available shall be given.

- 2.2 Identifying (i) when the Claimants first became aware of the ransomware attack on the MKL Server; (ii) the extent to which the Claimants (or their accountants) remain able to access documents relating to the Claimants held on the MKL Server that are in the Claimants' accountants' possession or control; (iii) the nature of the documents relating to the Claimants held on the MKL Server and (iv) any steps that can be taken to recover those documents, along with the time and cost implications of taking those steps. A full explanation as to why any documents are not available shall be given.
- 2.3 Confirming what steps (if any) have been taken to comply with the Claimants' obligation to preserve documents and when any such steps were taken.
- 2.4 Explaining the extent of the searches that the Claimants have carried out pursuant to sub-paragraphs 1.1 to 1.5 inclusive above. That explanation shall identify:
 - 2.4.1 the location(s) of the documents searched; and
 - 2.4.2 the method(s) by which documents were searched including identification of custodians, date ranges, document types and keyword searches; and
 - 2.4.3 details of the review carried out for relevance on behalf of the Claimants.
- 2.5 Explaining how and why two different versions of the email dated 2 March 2011 timed at 14:33 came to be provided at document references GAM15 and GAM16 of the Claimants' extended disclosure documents.
3. By 4pm on 3 December 2020 the Claimants are to comply with paragraph 7 of the Order of HHJ Kramer QC and pay to the Defendant the sum of £14,575.53.
4. Unless the Claimants comply with each of the orders set out at paragraphs 1 to 3 above, the Claimants' Particulars of Claim and Reply shall be struck out without further order and the Claimants' claim will be dismissed.

Witness statements

5. The eight statements of Mr Poore that were served on 4 November 2020 (including, for the avoidance of doubt, Poore9) shall, for the avoidance of doubt, not stand as the Claimants' evidence in chief or as witness statements served in these proceedings. Any reference in those documents to without prejudice material should be redacted.

6. The Claimants have permission to file and serve a single witness statement from Mr Poore setting out Mr Poore's evidence on behalf of the Claimants, such single statement to stand as the Claimants' evidence in chief. That witness statement shall not make any reference to without prejudice material. The statement ought to comply with the rules. It should not exceed 30 pages and should not contain argument or submission. The statement must be verified with a Statement of Truth in the correct form. It must be served by no later than 4pm on 17 December 2020.

Directions to trial

7. The procedural deadlines in the Order of Julia Dias QC dated 20 May 2020 be varied as follows:

Step	Old deadline	New deadline
Cs' expert reports	25 November 2020	17 February 2021
D's expert reports	13 January 2021	7 April 2021
Meeting of experts	20 January 2021	14 April 2021
Experts' Joint Statement	27 January 2021	21 April 2021
Short supplemental expert reports	17 February 2021	12 May 2021
Cs to serve trial bundles	22 February 2021	19 May 2021

Trial (5 days)	22 March 2021	14 June 2021
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8. Within 7 days of this order the parties are to approach the Court's listing office to obtain a trial date.

Costs

9. The Claimants to pay the Defendant's costs of the Application on the standard basis by no later than 4pm on 17 December 2020, such costs assessed in the sum of £28,018.21.