Neutral Citation Number: [2019] EWHC 4 (QB)

Case No: HQ15P03208
and HQ17X03043

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 January 2019

Before:

DEPUTY MASTER HILL QC

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Between:

AZT

Claimant

-and-

THE HOME OFFICE

Defendant

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Graham Denholm (for the **Claimant**)
Russell Fortt (for the **Defendant**)

Hearing date: 20 December 2018

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Approved Judgment

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

DEPUTY MASTER HILL QC:

Introduction

1. This is a case involving two linked claims. The first (HQ15P03208) is a claim for damages for false imprisonment arising out of the Defendant's detention of the Claimant from 23 July 2009 to 25 May 2010 and from 31 July 2012 to 10 October 2013. The second (HQ17X03043) is a similar claim relating to the Claimant's detention from 16 March 2017 to 24 May 2017 (albeit that it was originally commenced in the Administrative Court as a judicial review claim, challenging the Claimant's then detention). Both claims allege breach of the '*Hardial Singh*' principles approved by the Supreme Court in *Lumba v Home Secretary* [2012] AC 245. The case is currently listed for trial for 4 days in the week commencing 1 July 2019.

2. By an application issued on 31 October 2018, the Claimant seeks various orders relating to disclosure, an amended Part 18 Request or Notice to Admit Facts and the time for the parties to serve their witness statements. Due to what are said to be serious concerns over the Defendant's position with respect to disclosure to date, the Claimant also argues that if the disclosure orders are not complied with, the Defendant should be debarred from further defending the claim. The Claimant also seeks his costs of and occasioned by the application on an indemnity basis.

3. The application notice originally came before me in late November 2018. There was some lack of clarity as to whether the application was one which the parties were content to have dealt with on the papers. However, once it became apparent that the application was contested, I listed it for a hearing. The application is supported by several witness statements provided by Janet Farrell, the Claimant's solicitor. The Defendant's solicitor, Jaymini Katira, has provided a statement responding to the application. The Claimant has also provided a bundle of documents which I have considered. At the hearing it became apparent that there was a considerable measure of agreement between the parties, save for the issues around debarring and indemnity costs which fall to me to determine. This judgment focusses on those issues.

The agreed order

4. In order to consider the arguments in respect of debarring and indemnity costs it is necessary to look carefully at what the parties have now agreed in terms of the orders sought by the Claimant. The agreement is that I should order the following:

> "*1. The Defendant is required to carry out a search <u>of email</u> of all relevant teams and departments which it is reasonable to suppose may contain information which may:*
>
> *a) Enable the Claimant either to advance his own case or to damage that of the Defendant; or*
>
> *b) Lead to a train of enquiry which has either of those consequences.*

2. *The Defendant shall by 4.30pm on 1 February 2019 serve (i) a third List of documents of any previously undisclosed emails in these claims and (ii) a witness statement from the individual with responsibility for carrying out the search and compiling the revised List confirming his/her position, the extent of the search and that electronic disclosure is now satisfied in respect of both claims.*

3. *In order to set the parameters of the search referred to at paragraph 2 above:*

   a) *By 4.30 pm on 27 December 2018 the Defendant shall provide to the Claimant its proposals for its search of its email systems, including the matters set out in Practice Direction 31B, paragraph 8, specifically the categories of custodian of potentially relevant emails, the proposed date ranges for the searches, and the proposed Keyword Searches;*

   b) *By 4.30 pm on 4 January 2019 the Claimant will respond to the Defendant's proposals; and*

   c) *By 4.30 pm on 18 January 2019 the parties will contact the Court jointly, indicating whether the parameters for the search have been agreed, and if not setting out the areas of disagreement on which directions are sought under Practice Direction 31B, paragraph 17;*

4. *The Claimant's request for copies of documents from the Defendant's List in paragraph 2 above to be made by 4.30 pm on 8 February 2019.*

5. *The Defendant do by 4.30pm on 15 February 2019 provide copies of the documents requested pursuant to paragraph 4 above.*

6. *The Defendant shall by 4.30pm on 1 February 2019 provide:*

   a) *a copy of the email/fax/letter sent by the Defendant to the healthcare provider at the IRC as referenced in the GCID note of 24 April 2017;*

   b) *a copy of the email response received by the Defendant from the healthcare provider at the IRC as referenced in the GCID Note of 24 April 2017, ensuring that the identity and role of the author of that response is left unredacted;*

   c) *a copy of the email/fax/letter sent by the Defendant to the healthcare provider at the IRC as referenced in the GCID note of 17 May 2017;*

   d) *a copy of the response from the healthcare provider at the IRC to the email at (3) ensuring that the identity and role of the*

author of that response is left unredacted, and if none was received, confirmation of the same;

e) a copy of the pro forma completed and returned by CCD recording their view on the Claimant's section 4 NASS accommodation needs (referred to in email from NASS on 21 April 2017);

f) a copy of the updated pro forma completed and returned by CCD recording their view on the Claimant's section 4 NASS accommodation needs (referred to in email chain between CCD and NASS dated 22 -23 May 2017); and

g) Emails of 17 – 18 May 2017 provided by way of disclosure on 7 November 2018 with the names of recipients/authors unredacted.

7. The Claimant to serve any amended Part 18 request or Notice to Admit Facts by 8 March 2019.

8. The Defendant to respond to the Claimant's Part 18 request and Notice to Admit Facts referred to at paragraph 7 above by 29 March 2019.

9. Paragraph 9 (a) of the Order of Deputy Master Hill QC of 26 June 2018 be varied such that the deadline for parties to serve on each other copies of the signed statements of themselves and of all witnesses on whom they intend to rely and all notices relating to evidence is extended until 4.30pm on 30 April 2019.

10. The Defendant do pay the Claimant's costs of and occasioned by this application.

The procedural background

6. It is necessary to set out the procedural history in some detail.

7. The claims were issued, respectively, on 27 July 2015 and 26 April 2017.

8. On 3 November 2017 in the course of a standard case management order, the parties were ordered to (i) give standard disclosure within 6 weeks of the Case Management Conference ("CMC") listed on 18 October 2017; and (ii) serve and file with the Court a list of issues relevant to the search for and disclosure of electronically stored documents, or confirm that there were no such issues, following Practice Direction 31B, within 11 weeks of the CMC.

9. On 1 February 2018 the Defendant served its disclosure statement and list by way of standard disclosure. The list of documents ran to some 542 items. The box referring to searches for electronic documents was not ticked.

10. On 2 February 2018 the Claimant's solicitor wrote to the Defendant's solicitor indicating that the list appeared to be "*substantially incomplete*" and "*the Disclosure Statement incorrect*". This was because it included no documents other than the "GCID" records which were dated after 2 July 2015, whereas the third period of detention in issue was from March to May 2017 and the Claimant himself had been provided with documents by the Defendant during that period of detention, so some such further documents plainly existed. The letter also pointed out that the disclosure statement did not list documents related to another set of proceedings against the Defendant which plainly also existed.

11. On 9 February 2018 the Claimant's solicitor wrote again to the Defendant's solicitor, reiterating the concerns about the contents of the standard disclosure and stating that the disclosure listed included "*a surprisingly low number of relevant emails*". This was a concern, the letter said, because it was understood that the Defendant's immigration department operates a large database for dealing with these cases, and regularly uses email to communicate internally and externally on matters of relevance to these claims, including for example the seeking and confirmation of approval of detention and deportation decision making from senior managers, corresponding between different teams, correspondence with the health care departments in detention, correspondence with its contractors, with airlines and with the relevant Embassy. The Claimant suggested that to avoid late disclosure further disrupting the timetable of the claim, the Defendant should final an Electronic Documents Questionnaire ("EDQ") pursuant to Practice Direction 31B.

12. Having received no substantive engagement with these issues by the Defendant, on 13 March 2018 the Claimant served the Defendant with a draft application requiring the Defendant to conduct a further search for documents post-dating July 2015, serve a revised List of Documents addressing the lacunae in their disclosure to date, serve an EDQ, provide a witness statement from the individual responsible for the search and provide specific disclosure of one particular document. In addition, the Claimant sought a debarring penalty given what Ms Farrell describes at paragraph 7 of her fourth statement as "*the very substantial delay that has already occurred in these claims and the Defendant's non-compliance with Directions*". The application was issued on 29 March 2018, sealed by the Court on 3 April 2018 and duly listed for hearing before me on 28 June 2018.

13. At around this time the Defendant's solicitor had to take some periods of unplanned leave and a colleague provided some cover for her. However, from the Claimant's solicitor's perspective, little progress was made with respect to the disclosure issues. She signed her second witness statement on 21 June 2018, at paragraph 8 of which she stated that the Defendant had provided "*no meaningful response to this application (other than to indicate that they are in prideciple opposed to it*)"e. She continued that "*No steps have been taken to rectify the significant deficiencies in the disclosure exercise (which fell due on 1 February 2018 following the late service of the Defence) and no substantive response has been provided on that issue. No response has been provided as to the Defendant's position on the specific disclosure identified, the issue of electronic disclosure, the Notice of Admit Facts, or the failure to respond (in breach of the Directions) to the Claimant's invitation to ADR made on 9 February 2018*". She noted that the original trial window of August 2018 had slipped to October 2018 and

was now proposed for May 2019, due to delays by the Defendant in providing its Defence and complying with its disclosure obligations.

14. Shortly before the 28 June 2018 hearing, the Defendant consented to the order sought by the Claimant, save for the debarring provision. At the Claimant's request, however, the consent order drawn up included the following preamble: "*UPON the Court noting that in agreeing to the terms herein the Claimant has agreed to the Defendant's request not to pursue its application of 3 April 2018 for a debarring order in relation to the disclosure provisions at para. 3, but expressly reserves the right to seek a debarring order immediately if that provision is not complied with*".

15. The consent order was duly approved by me and sealed on 2 July 2018. It required the Defendant to conduct a further search for documents post-dating July 2015, serve a revised List of Documents addressing the lacunae in their disclosure to date, serve an EDQ, provide a witness statement from the individual responsible for the search and provide specific disclosure of one particular document by 26 July 2018. The costs of the application were to be the Claimant's in any event.

16. On 26 July 2018 the Defendant provided a revised disclosure list. This included 413 items. Some were duplicates of those on the original disclosure list; some were new. The Defendant later indicated that it proposed to rely on both lists.

17. On the same date a witness statement from Steve Taylor was provided. Mr Taylor was described as a Litigation Senior Caseworker within the Defendant's UK Visas and Immigration Department. The statement said at paragraph 6: "*I am completing this statement on behalf of a colleague who carried out the searches, but is currently out of the office. To the best of my knowledge at the time of disclosure the following sources were checked for relevant documents/information: the Home Office files relating to the Claimant [and] the Defendant's Case Information Database. I can confirm that disclosure was initially provided on 1 February 2018. All documents have now been provided for all three periods of detention as requested by the Claimant and disclosure has now been satisfied*".

18. On the same date an EDQ was also served. This confirmed at paragraph 3 that email was in use during the date range in issue. However, it was said that the Defendant was not searching for relevant documents stored on email. At paragraph 6 in answer to the question, "*Do you consider Keyword Searches should be used as part of the process for determining which Electronic Documents you should disclose?*" the box "*No*" was completed. At paragraph 10 in answer to the question, "*Do any of the sources and/or documents identified in this Electronic Documents Questionnaire raise questions about the reasonableness of the search which ought to be taken into account?*" the box "*No*" was completed. The Defendant's counsel argued that this was an error, and that in fact the Defendant's position at this time was that it was not proportionate to conduct searches of emails.

19. On 16 August 2018 the Claimant's solicitor wrote to the Defendant's solicitor expressing a range of concerns about the disclosure position. First, it was pointed out that Mr Taylor was not the person who had carried out the search and thus he was not qualified to provide the statement. Second, concerns were expressed that the EDQ made clear an email search had not been carried out when certain keywords would

make such a search reasonable, and when a limited number of emails had been provided but which were unlikely to be the full amount. Third, the lack of detention review documents was noted given that "*the detention review process is central to the question of liability*". It was pointed out that only one such document had been provided for the 2017 period of detention when there should have been at least three on file, and when a further one had been disclosed during the judicial review proceedings but not this claim. A submission in support of the Claimant's release, prepared by a Home Office representative, had also been referred to but not provided.

20. On 25 September 2018 the Claimant's solicitor wrote to the Defendant's solicitor indicating that, having now had the chance to consider the material provided, the Claimant's earlier concerns about the disclosure position appeared to be well-founded. It was pointed out that certain documents which were specifically expected by way of disclosure had not been provided and these were sought. The concerns about the failure to conduct an email search were repeated, not least because the material that had been disclosed in relation to the third period of detention made clear that further emails existed which had not been provided. The idea of key search terms was again raised.

21. Aside from proposing an extension of time for witness statements to be served, it does not appear that the Defendant engaged with the issues set out in the above two letters, such that the Claimant's solicitor issued the current application on 31 October 2018.

22. On 7 November 2018 the Defendant provided some further disclosure. There was no updated disclosure list or disclosure statement provided with the documents. Once the duplicates had been removed this amounted to 68 pages of relevant material, the majority of which was in email form. The Defendant's solicitor asked if the Claimant's solicitor was now satisfied that email disclosure had been satisfied.

23. On 16 November 2018 the Defendant's solicitor wrote inviting the Claimant to "*provide some further clarification regarding what you seek and/or your line of enquiry so I can discuss further with my client...At the moment the request is too wide and my client will face difficulties in providing all the information requested*".

24. On 21 November 2018 the Claimant's solicitor replied, indicating that the Defendant appeared to be conflating specific disclosure requests with the Defendant's standard disclosure obligations. She continued "*All relevant documents should have been disclosed many months ago when the disclosure exercise was first completed. The very recent disclosure provided has taken three attempts (including two Court applications) to obtain and is highly material to the 2017 claim. That is a significant concern as the Claimant simply does not know what other emails your client may have in their possession of relevance to his claims and in line with your client's disclosure obligations he should be on notice of this by now…we are very concerned about how difficult it has been to obtain documents pertaining directly to the possibility of our client's much earlier release from detention in 2017, and to his proposed deportation to Tunisia*".

25. On 17 December 2018 Ms Farrell signed her fifth witness statement indicating that "*At the time of writing, I do not know what the Defendant's position is on any aspect of the current draft Order*". She explained why the items of specific disclosure were sought. Ms Farrell also expressed concern that some of the recent disclosure was "*highly*

relevant to the claim and should have been disclosed on 1 February 2018". This included "*highly relevant discussion and decision making about the Claimant's detention and the possibility of his release, the medical evidence and his vulnerability and what that meant for the legality of the continuing detention, the assessment of his risk of re-offending and the travel document it was said he would be removed to Tunisia on*". Overall she said "*…it is hard to think of more highly relevant material than that which is now disclosed at this late stage. Almost all of it is in email and/or email attachment form*".

26. On the same day Ms Katira for the Defendant provided her statement. This referred to the "*further disclosure requested by the Claimant*". It expressed concern about how this might be managed given the large amounts of disclosure the Defendant holds. She said that not all case handlers were still working for the Defendant and it would take some time to identify each of them and them search their email accounts. She continued by saying that "*We are agreeing search terms of key words to assist with the requested disclosure to ensure that all matters are reviewed in full*". The statement concluded by saying that "*The proposed Order does not impact the trial date as advised, as there is still sufficient time to allow my Client to discharge the final disclosure requested by the Claimant*".

The parties' submissions

27. The Claimant's position was summarised in Ms Farrell's fifth statement, where she referred to the "*protracted and costly difficulties*" in obtaining disclosure from the Defendant to date. It concluded by saying that it was her hope that a debarring provision would "*concentrate minds [in the Defendant] and provide an incentive for [the disclosure] provisions to be complied with once and for all*". Otherwise, she highlighted a considerable risk that the Part 18 Request or Notice to Admit Facts and the time for the parties to serve their witness statements could slip further and place the trial date in jeopardy.

28. Relying on the procedural history set out above, the Claimant's counsel argued that for the last 11 months Ms Farrell has been taking "*diligent and patient*" steps to move matters forward, but that as the Defendant continues to be in breach of its basic obligations under the CPR Part 31, a debarring order and indemnity costs are appropriate.

29. Counsel for the Defendant, Mr Fortt, stressed that this was a complex claim concerning events as far back as 2009, and that a large amount of disclosure had already been provided. He pointed out that the Defendant does not have a facility to conduct a general email search and thus the search needs to be narrowed. He argued that the Claimant had failed to engage in attempts to narrow the ambit of the search and assist with the staged approach envisaged by Practice Direction 31. He stressed that the Courts have recognised the need to ensure the disclosure obligation is discharged in a proportionate way, as CPR 31.7(2) and cases such as *Hands v Morrison Construction Services Ltd* [2006] EWHC 2018 make clear. He said that the Defendant has not wilfully disregarded orders of the Court.

30. Further, Mr Fortt argued that an unless order containing a debarring provision is a form of conditional strike out. Relying on *Marcan Shipping Ltd v Kefalas* [2007] EWCA

Civ 463, he argued that the Court should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. At paragraph 36 of the judgment in that case Moore-Bick LJ made clear that such an order 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*" such that he found 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*"". Mr Fortt argued that the issues in this case are a classic example of the sorts of problems which arise in trying to restrict electronic searches to manageable levels, which did not merit a debarring order. He also argued that the threshold for an order for indemnity costs was not met.

Discussion

(i) The Defendant's approach to its disclosure obligations to date

31. I have set out the procedural history at some length above because of the potential seriousness of the orders sought by the Claimant, particularly that in respect of debarring.

32. From that history it is hard not to have considerable sympathy with the position expressed by Ms Farrell in her witness evidence and in the Claimant's counsel's submissions.

33. In my view the Defendant should have appreciated from the inception of these claims (the first of which was commenced as long ago as July 2015), that emails were likely to contain relevant material that would fall to be disclosed pursuant to the general disclosure obligation. However, the Defendant does not appear to have brought any significant thinking to bear on this issue until 16 November 2018, ahead of the hearing of this application, and even then the approach was a limited one.

34. The disclosure lists provided in February and July 2018 fail to make proper disclosure of email material. They were supported by statements of truth when it is clear that full searches of potentially relevant email material had not been carried out. The format of the July 2018 disclosure list was additionally unhelpful in a case of this complexity in not indicating which were new items and which were not.

35. The EDQ when it was belatedly provided simply advanced that emails were not going to be searched without explaining why. Although Mr Fortt sought to persuade me that the "*No*" box in question 10 had been ticked in error, and that it was apparent to both parties that the Defendant's position was that proportionality precluded any email searches being carried out, that was not understood to be the case by the Claimant's solicitor nor is that apparent from the contemporaneous correspondence. Had the Claimant's solicitor understood by the time the EDQ was served that the Defendant was raising a broad proportionality defence to the provision of electronic disclosure, I have no doubt she would have applied to the Court for further directions under Practice Direction 31B, paragraph 17.

36. The witness statement from Mr Taylor was plainly insufficient to comply with the terms of the 2 July 2018 order, or provide any convincing reassurance that the disclosure obligations had been complied with.

37. The Defendant has taken no real initiative in narrowing the parameters of the search of its email material, but has sought, incorrectly in my view, to shift responsibility for this exercise to the Claimant. I consider that there is force in Ms Farrell's characterisation of the Defendant's approach as confusing the general disclosure obligation on the Defendant with the requests for specific disclosure made by the Claimant.

38. The net result is that it appears highly likely that full disclosure has still not been provided by the Defendant. That much is clear from the fact that highly relevant material has only just been provided, the fact that particular items which the Claimant has identified are still missing, and generally by the failure to conduct a comprehensive email search.

39. The Defendant's failure to comply fully with its disclosure obligations is a particular concern given that this is a case involving the Defendant having responsibility for the Claimant's detention. In that context, the Defendant has in its possession documentation to which the Claimant would otherwise not have access. In those circumstances he and the Court must be able to rely on the Defendant to discharge its disclosure obligations fully.

40. The Defendant's failure has also had practical consequences, in terms of delay, cost, and the shifting of the trial window on more than one occasion.

(ii) Indemnity costs

41. I dealt with this issue first because the test for indemnity costs imports a lower threshold than that for debarring.

42. Under CPR 44.2(4), in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including the conduct of the parties and whether a party has succeeded on part of its case.

43. CPR 44.3(1) provides that where the court is to assess the amount of costs, it will assess those costs on the standard basis or the indemnity basis. Under CPR 44.3(3) the latter approach means that the court will resolve any doubt which it may have as to whether costs were reasonably incurred or where reasonable in amount in favour of the receiving party.

44. The case law summarised at paragraph 44x.4.3 of the White Book makes clear that while a judge has a considerable discretion as to whether to make an order for costs on an indemnity basis, what is critical is that there is some conduct or circumstance which takes a case "*out of the norm*".

45. My interpretation of the procedural history as set out above leads me to conclude that the Defendant has engaged in multiple breaches of the standard processes for disclosure, and of court orders, and that this has caused considerable additional cost and delay, including to the trial. On that basis I am satisfied that the "*out of the norm*" threshold is met. Accordingly, the Defendant will be ordered to pay the Claimant's costs of and occasioned by this application on an indemnity basis.

(iii) Debarring

46. The CPR permits a Court considering a procedural default to make an unless order. This is to the effect that, if the terms of the order are not complied with by the time specified in the order, stated consequences will follow. One of the examples given in Practice Direction 40B, paragraph 8.2 is to the effect that "*Unless the claimant serves his list of documents by [time and date], his claim will be struck out and judgment entered for the defendant*".

47. Here, the Claimant seeks an unless order that would prevent the Defendant from further defending the claim if the disclosure terms of the agreed order are not complied with. In my view Mr Fortt is right to characterise this as a conditional strike out order.

48. Although *Marcan* stresses that the Court retains jurisdiction to grant a defaulting party relief if the order is not complied with, such an unless order is plainly one with potentially very serious consequences. For this reason, *Marcan* makes clear that the Court must only make such an order after very careful consideration, and where it is satisfied that all the circumstances of the case make such a sanction appropriate.

49. *Marcan* stresses that such an order is not appropriate for "*good housekeeping purposes*". I do not consider that this is an accurate way of characterising the need to regulate the Defendant's conduct here. The Defendant's repeated failings with respect to disclosure go well beyond mere "*housekeeping*" issues for the reasons set out above. I note that in the case from which this phrase emanates, *Keen Phillips v Field* [2007] 1 WLR 686, the procedural order that had been breached was the requirement to provide a transcript or an agreed note within a reasonable time of a hearing, in default of which permission to appeal would be refused. This is of a very different flavour to the disclosure issues at the heart of this case.

50. Other cases make clear that a conditional or actual strike out order can be appropriate in response to serious disclosure failings. For example, in *Workman v Forrester* [2017] EWCA Civ 73, the defendants had persistently failed to comply with a disclosure order made after default judgment was obtained. The district judge ordered that unless the disclosure order was complied with, there would be judgment against the defendant for a certain sum (of over £1 million) plus interest and costs. Such an order, although more onerous than the usual order, was found by the circuit judge and the Court of Appeal to have been justified given that the defendant's failure to comply with the disclosure order had been calculated to frustrate proceedings to his own advantage. Similarly, in *Hayden v Charlton* [2011] EWCA Civ 791, a strike out order was upheld where claimants in a libel claim had engaged in deliberate and wholesale non-compliance with the rules and orders of the court, which resulted in a serious delay to the progress of the claims including the loss of the trial window, where there had been no previous unless order.

51. The White Book, paragraph 3.4.4 stresses that in many cases an alternative to a strike out order is appropriate. These alternatives might include costs orders, payments into court and awarding interest at a higher or lower rate. For this reason, in *Candy v Holyoake* [2017] EWHC 373 (QB), [2017] 2 WLUK 561, Warby J considered that although the defendant was in serious breach of their obligations to make disclosure under a consent order, it was not a just and proportionate response to strike out their

defences. The admitted faults and the gravity of their failures could be reflected in costs orders. It was not suggested that the admitted defaults had prevented the possibility of a fair trial.

52. Overall, I remain of the view that the Defendant has been in serious breach of its disclosure obligations to date. However, it has now started to engage with the process of agreeing search parameters and has committed to a tight but achievable timetable for providing full disclosure by 1 February 2019. If that is complied with the trial fixture should be maintained. Although the trial window has moved before, a trial fixture has not yet been lost, and I take that into account. It cannot be said at this stage that a fair trial is impossible. It is not said that the Defendant has acted in this way to manipulate the Court process to its advantage. I have made an indemnity costs order which is one way of responding to the Defendant's conduct and which should assist in focussing their minds on the imperative to comply with their disclosure obligations. For these reasons I am not persuaded that the high threshold for a debarring order is yet met.

53. However, if there is any further slippage to the timetable, the trial fixture is likely to be at risk. I suspect that any further failings with respect to disclosure will receive short shrift, especially if there is a consequential application to break the trial fixture as a result. This judgment should assist any future judge or Master in fully understanding the procedural history.

Conclusion

54. For all these reasons I am persuaded that the Defendant should pay the Claimant's costs on an indemnity basis but that a debarring order is not yet appropriate.

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