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Cases No: CL-2010-000804 and 2011 Folio 1082

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

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

Date: 3 October 2017

Before

Sir Richard Field (sitting as a Deputy Judge of the High Court)

Between:

MICHAEL WILSON & PARTNERS, LIMITED

Claimant

-and-

(1) THOMAS IAN SINCLAIR
(2) SOKOL HOLDINGS INC.
(3) EAGLE POINT INVESTMENTS LIMITED
(4) THE BUTTERFIELD BANK (BAHAMAS) LIMITED

Defendants

And between:

MICHAEL WILSON & PARTNERS, LIMITED

Claimant

-and-

(1) THOMAS IAN SINCLAIR
(2) SOKOL HOLDINGS INC. **Defendants**

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Brian Doctor QC (instructed by **Michael Wilson & Partners Ltd**) for the **Claimant**

The 1st Defendant was unrepresented and appeared in person
The 2nd Defendant was unrepresented and appeared by one of its Directors, Mr Brian Savage
The 3rd and 4th Defendants did not appear and were unrepresented
Hearing dates: 11 & 12 September 2017

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APPROVED JUDGMENT

Sir Richard Field:

Introduction

1. On 11 and 12 September 2017 the Court heard two applications made by the Claimant ("MWP"). The first application ('the unless order application") was for an order that unless the 1st and 2nd Defendants (together "the Sinclair Defendants") pay sums due under costs orders made against them in the instant proceedings ("the Max Action") totalling, with interest, £1,173,111.53, within 14 days, they were to be barred from defending the claim made herein against them. The second application ("the disclosure application") sought an order for disclosure against the Sinclair Defendants consequent on an order of Flaux J dated 18 May 2015 and sealed on 8 June 2015. This application succeeded and the parties were directed to agree the order, failing which the order was to be settled by the Court.

2. In this judgment I deal mainly with the unless order application. However, I also take the opportunity to expand somewhat on the reasons I gave in the course of the hearing for granting the disclosure application.

3. The Claimant brings two claims in this court, the Max Action, CL-2010-000-804, and "the Temujin Action", CL-2011-1082. The background to these actions is as follows. The Claimant provides legal and business consultancy services in Kazakhstan. Mr Michael Wilson is its Managing Director. In about the first half of 2005, the 2nd Defendant ("Sokol"), a company incorporated in

Delaware, USA, acting by its Managing Director and major shareholder, the 1st Defendant ("Mr Sinclair"), instructed the Claimant to act on its behalf in respect of a transaction ("the Max 1 transaction") by which Sokol acquired certain Kazakhstan oil field assets which were sold on to Max Petroleum plc ("Max"), a company listed on the AIM in London. The MWP partner in charge of carrying out Sokol's retainer of MWP for the Max 1 transaction was Mr John Forster Emmott.

4. Shortly before the conclusion of the Max 1 transaction, on the instructions of Mr Sinclair, certain members of Sokol's deal team were rewarded with shareholdings in Max. Some 134.1 million shares were issued on 4 August 2005 to 25 allottees (including Sokol). 14.75 million of these shares (the "Max shares") were issued to the 3rd Defendant ("EPIL"), the trustee of a trust in which Mr Emmott is interested. US$950,000 was also paid to EPIL in connection with the Max 1 transaction.

5. In June 2006, Mr. Emmott left MWP to work for a competing firm known as "Temujin" that had been set up by two previous employees of MWP, Mr Nicholls and Mr Slater. Temujin acted for Sokol (acting by Mr Sinclair) in respect of a number of natural resource projects.

6. Mr Emmott's relationship with MWP was governed by an agreement that contained an arbitration clause. On 14 August 2006, MWP brought a claim in arbitration proceedings against Mr Emmott claiming that the Max shares issued to EPIL were for the benefit of Mr. Emmott as his reward for his participation in and contribution to the Max 1 transaction and that, since Mr. Emmott was involved in that transaction as the agent and employee of MWP,

the Max shares and the US$950,000 were received by Mr Emmott in breach of the fiduciary and contractual duties he owed to MWP. MWP further claimed that: (i) the Sinclair Defendants wrongly participated in Mr Emmott's alleged breaches of duty; and (ii) Mr Emmott had been party to an actionable conspiracy with Mr Sinclair and Sokol to form and divert work to Temujin. It was Mr. Emmott's case in the arbitration that the Max shares were intended for Mr. Sinclair's benefit and that they were simply warehoused by EPIL because Mr. Sinclair did not have his own offshore holding arrangements set up in time.

7. MWP invited Mr Sinclair to join in the arbitration as a party in order that the claims in respect of the Max shares and the US$950,000 could be determined conclusively as between the parties concerned, but he refused. To a significant extent, Mr Sinclair financed Mr Emmott's defence in the arbitration.

8. On 22 February 2010, the arbitral tribunal ("the tribunal") issued its Second Interim Award ("the liability award") in which it found, amongst other things, that: (1) Mr. Sinclair had not given Mr. Emmott any Max shares and was under no legal obligation to do so; and (2) Mr. Emmott had no interest in any of the Max shares and had not made a profit, secret or otherwise, for which he would be made liable to account to MWP. However, Mr. Emmott was held liable to account for US$250,000 of the US$950,000 but not the balance. The tribunal also held that MWP had no claim to any of the 14.75 million Max shares held by the trustee of Mr. Emmott's Bahamian trusts, these shares being held to the order of Mr. Sinclair.

9. In paragraph 5 of its Seventeenth Procedural Order dated 24 March 2010, the tribunal stated that the parties were "authorized and instructed to inform the relevant Bahamian Court and the relevant Trustees of the dismissal of MWP's claim to any interest in shares in Max Petroleum."

10. By its award on quantum issued on 5 September 2015 ("the quantum award"), the tribunal awarded sums to both sides giving rise to a net award in favour of Mr Emmott of £3,209,613 and US$841,213, plus interest.

11. The Max Action was commenced on 12 October 2010. Proceedings were served on the Sinclair Defendants in the jurisdiction and the pleadings closed on 22 February 2011. Mr Emmott is not sued by MWP in the Max Action but he was joined in as a party under CPR Part 20 by the Sinclair Defendants and subsequently by MWP after the Sinclair Defendants discontinued their Part 20 claim against him.

12. On 8 June 2011, Andrew Smith J dismissed MWP's applications to challenge the tribunal's award under sections 68 and 69 of the Arbitration Act 1996 and in September 2011 EPIL transferred the Max shares to Mr. Sinclair.

13. On 26 June 2015, Burton J dismissed MWP's appeal against the tribunal's quantum award and gave Mr Emmott leave to enforce that award as a judgment of the Court ("the enforcement judgment"). MWP's application for permission to appeal Burton J's order was refused by the Court of Appeal (Longmore LJ) on 19 October 2015.

14. In the Max Action, MWP claims, inter alia: (1) that the Max shares and the US$950,000 were opportunities belonging to MWP which Mr. Emmott

wrongly exploited for his personal benefit in breach of his contractual and fiduciary duties to MWP; (2) alternatively, that the Max shares and the US$950,000 were secret commissions or bribes paid to Mr. Emmott; (3) that the Sinclair Defendants procured the issue of the Max shares and the payment of the US$950,000 for Mr. Emmott's benefit knowing and intending that Mr. Emmott would thereby breach his duties; (4) declarations against, inter alios, the Sinclair Defendants that the Max shares and the US$950,000 were held by EPIL on constructive trust for MWP; (4) damages for fraud and equitable compensation for dishonest assistance in Mr. Emmott's breaches of his fiduciary and contractual duties against the Sinclair Defendants.

15. The Sinclair Defendants roundly deny the claims made against them, alleging (inter alia) that the Max shares were issued to EPIL for the sole benefit of Mr. Sinclair and held by EPIL on bare trust for Mr. Sinclair. They also deny that they made or procured the payment of the US$950,000.

16. In July 2012, the Sinclair Defendants applied to Teare J to strike out the claim made against them in the Max Action on the ground that the claim was an abuse of process given that the same allegations as are made by MWP in the Max Action were heard and rejected in the arbitration. In a judgment handed down on 21 September 2012, Teare J acceded to that application and struck out the claim in respect of the Max shares and the US$950,000, leaving only a claim in debt based on an invoice.

17. Teare J gave MWP permission to appeal the strike out order. On 21 January 2013, the Court of Appeal (Rix LJ) ordered MWP to pay £339,000 into court as security both for the costs of the appeal ordered by Teare J and in respect of

the Sinclair Defendants' costs of their applications for security for costs. The sums making up the £339,000 were not paid into Court within the times ordered and on 17 July 2013, on the application of the Sinclair Defendants, Lewison LJ struck out MWP's appeal and ordered MWP to pay the Sinclair Defendants the separate sums of £40,000 and £125,000.

18. On 23 July 2015, the Court of Appeal overturned the order of Lewison LJ and MWP proceeded in early November 2016 to appeal against Teare J's strike out order. Earlier, the £339,000 ordered by Rix LJ to be paid into court had been received by the CFO on 21 May 2013. On 13 January 2013, the Court of Appeal allowed MWP's appeal and made extensive orders as to repayment by the Sinclair Defendants and costs that were to be paid by the Sinclair Defendants to MWP within 14 days. These costs, which totalled £1,046,274.25, were as follows:

    1. £215,503.94 on account of the costs of the strike-out application.

    2. £188,842.99 on account of the costs of the appeal.

    3. £269,744.82 on account of the costs of MWP's application to the Court of Appeal to revoke the order of Lewison LJ.

    4. Repayment of the sums of £40,000 and £125,000 ordered to be paid to Mr Sinclair and Sokol by Lewison LJ and the sum of £39,000 ordered to be paid by Rix LJ.

19. The Sinclair Defendants had also been ordered by Knowles J on 23 October 2016 to pay £5000 on account of costs and to pay the costs of their Counterclaim that had been withdrawn on 3 August 2015. On 14 July 2017 those latter net costs were certified in the amount of £83,182.50.

20. As recorded in paragraph 1 above, the total due by way of costs and interest thereon under the Judgments Act is £1,173,111.53.

21. A petition to the Supreme Court seeking permission to appeal the judgment of the Court of Appeal was dismissed on 5 September 2017.

22. At some point prior to the instant hearing, Sokol's registration as a Delaware company was annulled on the ground that it had failed to file the necessary annual reports and pay the required fee. Mr Savage stated in a witness statement that the required annual reports had been filed, the fees due paid and a Revival for Void form had been faxed to the Delaware Secretary of State shortly before the hearing and that he had been informed on 7 September 2007 by a Registered Agent provider that Sokol was in Good Standing according to the State of Delaware website.

The authorities on the approach to be taken where costs orders are not paid by parties to ongoing litigation.

23. In *Crystal Decisions UK Limited v Vedatech Corp* [2006] EWHC 3500 (Ch) Patten J said:

> [9]. ... The rules of court under the CPR do not prescribe any particular procedure or conditions which have to be satisfied on an application of this kind. The consequences of a failure to comply with an order for costs made during the course of the action in relation to the future conduct of the action is therefore a matter to be dealt with as part of the inherent jurisdiction of the court.
>
> [10]. It is perfectly true, of course, that parties in the position of the claimants would, in these circumstances, have other remedies available to them. Those might include proceedings for contempt, but equally they might involve a more routine enforcement of the judgment for costs by, for example, seeking an order for payment and a charging order against any known assets. In the present circumstances, however, where they are faced with defendants who are not resident within the jurisdiction, and have no assets here, those remedies are likely to be of limited value.
>
> [16] In any event I take the view that orders of the court, even in relation to interim costs, require to be complied with and that, unless there is some overwhelming consideration falling within Article 6 [ECHR] that compels the court to take a different view, the normal

> consequence of a failure to comply with such an order, is that the court, in order to protect its own procedure, should make compliance with that order a condition of the party in question being able to continue with the litigation.

24. In dismissing Vedatech Corp's application for permission to appeal the unless order granted by Patten J, Chadwick LJ (with whom Laws LJ agreed) said:

> But thirdly – and, to my mind, most importantly - the court's ability to make interlocutory costs orders following, in particular, the Access to Justice reforms in 1998, is a sanction which is available to it in order to encourage responsible litigation. The court marks what it regards as an irresponsible application by an immediate order for the payment of costs. That is intended to bring home to a party - when considering whether to make an application - that an unsuccessful application may carry a price which will have to be paid at once. If the court is not in a position to enforce immediate interlocutory orders for the payment of costs which it was thought right to make, then the force of that sanction is seriously undermined. It is important that, in cases where the court thinks it right to make an order for immediate payment on an interlocutory application, that it does have the power - and can exercise the power - to ensure that order is met. For the reasons which Patten J explained, the only effective sanction in a case of this nature is to require payment of interlocutory costs as the price of being allowed to continue to contest the proceedings. Unless the party against whom an order for costs is made is prepared to, or can be compelled to, comply with, that order, the order might just as well not be made. [17]

25. In respect of paragraph 16 of Patten J's judgment quoted above, Chadwick LJ said:

> For my part, I would hold that - whether or not a statement in such general terms can be supported – the proposition can be supported in a case (such as the present) where there is no other effective way of ensuring that the interim costs order is satisfied. That, of course, is always subject to what the judge referred to as the overwhelming consideration falling within Article 6: that orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice. But, for the reasons that the judge explained and to which I have already referred, this was not such a case. [18]

26. In *Musion Systems v Activ8-3D* [2012] EWPCC 5 the Defendants were in default of an order to pay the costs of the adjournment of the trial and the Claimant sought an order immediately barring it from defending the claim.

HHJ Birss QC (as he then was) cited the paragraphs in Chadwick LJ's judgment in *Crystal Decisions* set out above and went on to say:

> I derive the following principles as being applicable to the case before me:
>
> i) The matter is always one for the court's discretion and all relevant circumstances fall to be considered;
>
> ii) If the court is not in a position to enforce interlocutory costs orders the force of the sanction is seriously undermined;
>
> iii) Other options apart from the order sought must be considered
>
> iv) It is always important to have regard to Art 6 ECHR. Orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice. [24]

27. HHJ Birss QC accepted the proposition that where there was an impending trial, an unless order was appropriate rather leaving the applicant to enforce the costs order by bringing insolvency proceedings and went on to make an unless order debarring the Defendants from defending the claim unless they paid the costs of the adjournment within 7 days. In his view, bearing in mind the observations of Peter Gibson LJ in *Keary Developments v Tarmac Construction Ltd* [1995] 3 All ER 534 that the court should consider not only whether the party can fund litigation out of its own resources but whether it can raise money from other sources such as backers, the Defendants' assertion that they were unable to pay the costs was not sufficiently cogent for him not to make an unless order.

28. In *Gamatronic (UK) Limited v Mr Robert Hamilton and Ms Jayne Mansfield*, 4th May 2016 (Case No. HQ 13 X 0094), Mrs Justice Cox agreed with HHJ Birss QC's summary of the relevant legal principles and adopted what Lord Diplock had to say in *Yorke Motors v Edwards* [1982] WLR 444 at 449 C-E

regarding an assertion of an inability to pay in satisfaction of a condition for leave to defend, namely, that the onus is on the defendant who makes such an assertion to put sufficient and proper evidence before the court and make full and frank disclosure.

The applicable principles

29. In my judgment, the following principles are applicable when dealing with an application that a party to on-going litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings:

> (1). The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
>
> (2). The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3). Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of

the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.

(4). A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.

(5). Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

(6). If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order.

The parties' submissions.

MWP's case

30. Mr Doctor QC on behalf of MWP argued that, to the extent that the Sinclair Defendants might be asserting that they lacked the wherewithal to pay the

costs orders, there was insufficient evidence to support this assertion and there being no Article 6 implications, the court should take the same approach as that taken in *Crystal Decisions UK Limited v Vedatech Corp* and make an unless order debarring both Mr Sinclair and Sokol from defending the claims made against them in the Max and Temujin Actions unless the total sum due under the costs orders was paid within a relatively short period of time.

The Sinclair Defendants' case

31. It was submitted on behalf of Mr Sinclair and Sokol that it would be unreasonable and unfair for the Court to make a debarring order for the following reasons:

(1) MWP had not complied with the judgment enforcing the quantum award made by the arbitral tribunal in favour of Mr Emmott, with the consequence that Mr Emmott has been unable to repay the money advanced by Mr Sinclair to fund his defence in the arbitration. Further and in the alternative, MWP should be denied the order it seeks simply on the ground that it comes to Court with unclean hands.

(2) Any money paid to MWP under the costs orders in question would not remain in the hands of MWP but would be made the subject of a 3rd Party Debt Order in favour of Mr Emmott.

(3) MWP's financial situation is so dire that Mr Sinclair and Sokol would be unable to recover the costs they had been ordered to pay to MWP when they finally succeeded in the defending the Max Action and therefore should not be debarred from defending MWP's claim in

that action. There was a good chance that the Sinclair Defendants would succeed in their defence of the Max Action because in the course of giving the lead judgment in the Court of Appeal allowing MWP's appeal against the order of Teare J, Simon LJ said that it would be for the trial judge to determine the extent to which the liability award could be deployed at the trial. MWP's dire financial situation has recently been revealed in an application by MWP for a stay of an order made by Sir Jeremy Cooke removing the usual liberty to pay due debts arising in the ordinary course of business from a freezing order obtained against MWP by Mr Emmott. In support of this stay application MWP has stated through Mr Wilson that if no stay be granted it would become insolvent and that a related company, Kazholdings Inc, was a secured creditor of MWP for a debt of US$54 million.

(4). The Sinclair Defendants should also not be debarred from defending the Max Action because if that defence succeeded Mr Sinclair had a substantial claim against MWP on its cross undertaking for damages suffered by reason of a freezing order it had obtained against him.

(5). Notwithstanding the restoration of MWP's claim in the Max Action by the Court of Appeal, the continuation of that claim against the Sinclair Defendants is fundamentally unfair given the tribunal's liability award who heard both Mr Emmott and Mr Sinclair in evidence.

Discussion

32. In my judgment, none of the submissions advanced by Mr Sinclair and Sokol, whether taken singly or together, amounts to a good reason for not imposing an unless order barring the Sinclair Defendants from defending the Max Action unless they pay the sums due under the immediate costs orders made against them.

33. £958,091 of the £1,046,274[1] costs orders sought to be enforced by MWP arise from the ultimate failure of the Sinclair Defendants' applications to strike out the Max Action culminating in MWP's successful appeal against the decision of Teare J. Throughout the hearing of these applications and appeals, the Sinclair Defendants were represented by experienced leading counsel, Mr Philip Shepherd QC, and it is therefore to be readily inferred that they must have appreciated the risk of costs orders payable within a short period of time being made against them should they lose the strike-out application or lose the appeals by MWP against the orders of Lewison LJ and Teare J. Further, through Mr Shepherd, they had the opportunity to submit to the Court of Appeal for the reasons they now rely on to avoid an unless order that costs orders payable as you go ought not to be made against them. It follows that, either no such submission was made to the Court of Appeal when it could have been, or such a submission was made and it was rejected by the Court. The Sinclair Defendants' case resisting the unless order application is therefore in substance an appeal against the costs orders made by the Court of Appeal which appeal would have stood almost no chance of success had it been

[1] i.e. 91.5%

brought, either because the cost orders had been made in conformity with the Court's normal practice and in the exercise of the Court's discretion or because no such submission was made to the Court when it ought to have been and in any event there was no merit in the appeal.

34. The Sinclair Defendants implied that they lacked the means to pay the costs awarded against them. However, neither Mr Sinclair nor Sokol put sufficient evidence before the Court to support the suggestion of impecuniosity they somewhat obliquely trailed at the hearing.

35. Neither Mr Sinclair nor Sokol is resident within the jurisdiction. Mr Sinclair testified that he resides in Bahrain; Sokol is a Delaware corporation. Mr Sinclair said that he had assets within the jurisdiction in the form of shares in an English company, Eurasian Fertilisers Group plc, but he did not state what they are worth and their ownership is not admitted by MWP. In these circumstances, the chances are remote of MWP recovering the costs due to it through the mechanisms of execution before the Max Action ought to continue towards to trial, or at all.

36. In advancing the submission that it would be unfair to debar them from defending in circumstances where MWP is itself in serious default on the judgment enforcing the quantum award, the Sinclair Defendants effectively invited the Court to draw up a consolidated balance sheet showing, on the one hand, the sums due or likely to be due by MWP to various parties arising out of the arbitration and other judicial proceedings MWP has launched in connection with the events alleged in the Max Action and, on the other hand, the sums owed to MWP arising out those proceedings by Mr Sinclair, Sokol,

Mr Emmott and the other defendants in the Max and Temujin Actions. (The sums likely to be recovered but not yet due were the orders for costs and damages on the cross-undertaking that would follow on from the success of the Sinclair Defendants' defence in the Max Action).

37. In my judgment, such an approach is impermissible in the circumstances of this case. This is because the equitable basis for a set-off is predicated on there being debts going both ways between the same parties and there is no justification on the facts of this case for substituting a vague notion of fairness for the doctrinal requirements of equitable set-off. It follows that regard should be had only to the state of account directly between MWP and each of Mr Sinclair and Sokol. Thus, the fact that MWP's failure to comply with the enforcement judgment may be preventing Mr Sinclair from recouping the loan made to Mr Emmott is not a reason for not making an unless order. Nor can the Sinclair Defendants rely on the possibility that Mr Emmott may attach the costs debt owed by Mr Sinclair to MWP or on the possibility that MWP may succeed in attaching the loan debt owed by Mr Emmott to Mr Sinclair.

38. I also reject the Sinclair Defendants' submissions predicated on the alleged strength of their defence in the Max Action arising out of Simon LJ's observation in allowing MWP's appeal against Teare J's strike out order that it will be for the trial judge to decide whether and if so for what purposes the liability award could be relied on at the trial of the Max Action. The paragraph in question in Simon LJ's judgment is paragraph 102:

The admissibility of the award in the litigation

> This is the question identified in [14] above at (1)(b). Mr Samek submitted that the rule in Hollington v. Hewthorn (see above) would preclude the admission of the award in the present litigation; whilst the Judge considered that Mr Emmott could not be cross-examined by MWP in a way which was inconsistent with the award, on the basis of an issue estoppel. Since this point does not strictly arise at this stage, I would be hesitant to express even a provisional view on these matters. Much will depend on the shape of the case as it develops, for example, who seeks to rely on the award and for what purpose. It will be for the Commercial Court to determine in due course the issues that arise in relation to the award and how they should be dealt with.

39. The Sinclair Defendants appeared to be suggesting at the hearing that this passage comprehended the possibility of the trial judge dismissing MWP's claim in the Max Action on the basis that it was inconsistent with the liability award. This suggestion is misconceived. The Court of Appeal unmistakably held that the liability award did not render the Max Action an abuse of process and for that reason set aside Teare J's strike-out order. That finding cannot be circumvented or challenged at the trial. How the liability award might otherwise impact the trial is profoundly uncertain and it is quite impossible to derive from Simon LJ's observations the conclusion that the prospects of success of the Sinclair Defendants' defence are so good that justice and fairness require that those Defendants should not be required to pay the costs ordered against them as a condition of being allowed to defend MWP's claim.

40. Nor is it open to the Sinclair Defendants to submit that, given the liability award, MWP's claim is so unfair that the Sinclair Defendants should not be debarred from defending it even though the cost orders against them remain unpaid.

Conclusion on the unless order application

41. There is but a remote prospect of MWP recovering the £1,173,111.53 due or any significant part thereof through the mechanisms of execution whether before the Max Action ought in fairness to continue towards trial, or at all. The Sinclair Defendants have also failed to adduce proper evidence to support a case of impecuniosity. Article 6 ECHR is not implicated. Further, the Sinclair Defendants' various submissions that it would be unfair to require payment of the costs as a condition of defending the Max and Temujin Actions are not sustainable for the reasons given in paragraph 33 and 36-39 above. It follows that this is a case where the only effective sanction is to impose an order debarring the Sinclair Defendants from defending the Max Action and there are no good reasons for not adopting this course.

42. The order sought in MWP's unless order application notice is an order that unless the Sinclair Defendants pay the costs due to MWP within 14 days they shall be debarred from defending the claim in the Max Action. In his skeleton argument, Mr Doctor sought an unless order debarring the Sinclair Defendants from defending both the Max Action and the Temujin Action, but he advanced no submissions at the hearing as to why MWP should be permitted to seek an order not pleaded in the application notice that the Sinclair Defendants should be debarred from defending the Temujin Action or as to the justification for such an order when the outstanding costs orders were made in the Max Action and not in the Temujin Action. In these circumstances, I shall order that unless the Sinclair Defendants pay £1,173,111.53 within 28 days they shall be debarred from defending the Max Action and I will permit Mr Doctor to serve short submissions on the justification for extending the debarring order to the

Temujin Action as well as the Max Action. The Sinclair Defendants will of course have the right to serve written submissions in reply.

The Disclosure Order

43. The Max Action and the Temujin Action are being case-managed together. When it came to disclosure, the Sinclair Defendants objected to making standard disclosure on the ground that they had already made extensive disclosure in previous sets of proceedings. On 18 May 2015, Flaux J ordered that: (1) By 1 June 2015 MWP will serve on the Defendants a schedule ("the Disclosure Schedule") identifying the categories and date ranges of documents that it contends fall within the ambit of standard disclosure in the Max and Temujin actions that have not previously been disclosed to MWP in any of the following namely (i) the 1782 proceedings brought by MWP in Colorado against the Defendants, (ii) the London arbitration between MWP and John Forster Emmott and/or (iii) in the proceedings brought by MWP against Mr Nicholls and Mr Slater and others in New South Wales.

(2) By 29 June 2015 the Defendants will give standard disclosure of the documents in the Disclosure Schedule unless the Defendants have applied to the Court under the liberty to apply that is hereby given to the parties.

44. On 1 June 2015, MWP served its Disclosure Schedule to which the Sinclair Defendants' solicitors objected in a letter to the Commercial Court Listing Office dated 29 June 2015. The principal complaint made was that MWP had ignored the disclosure in the 1782 proceedings in Colorado. However, the

Sinclair Defendants' solicitors subsequently came off the record and no further action was taken by or on behalf of the Sinclair Defendants to exercise the liberty to apply conferred by the order of 18 May 2015.

45. At the hearing the Sinclair Defendants vehemently insisted that they had disclosed the documents covered by the Disclosure Schedule in the 1782 proceedings.

46. It was my view that, since the Sinclair Defendants had not exercised the liberty to apply within the time allowed under the 18 May 2015 order, the Sinclair Defendants were obliged to make disclosure of the documents covered by the Disclosure Schedule which have not already been disclosed in the 3 sets of proceedings specified in the order of 8 June 2015. However, I indicated that the Sinclair Defendants could identify by reference to the disclosure lists served in the previous proceedings the documents within the Disclosure Schedule that had been disclosed in the previous proceedings. I gave that indication in the hope that, if it were taken up, it would forestall any dispute as to whether the Sinclair Defendants were in breach of my order if they did not separately list the previously disclosed documents. Identification of the documents previously disclosed may also have a bearing on the costs of the disclosure application.