Neutral Citation Number: [2024] EWHC 3180 (TCC)

Case No: HT-2022-000043

and

Case No. HT-2022-000363

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 11/12/2024

Before :

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

(1) MORNINGTON 2000 LLP (t/a STERILAB SERVICES)

(2) SANTE GLOBAL LLP

Claimants

- and –

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

Sarah Hannaford KC, Rose Grogan and Ben Graff (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**

Michael Bowsher KC and Lara Kuehl (instructed by **The Government Legal Department**) for the **Defendant**

Hearing date: 25 and 26 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR ROGER TER HAAR KC

Mr Roger ter Haar KC :

Introduction

1. There are three sets of proceedings before the Court:

   (1) The first claim relates to breaches of the Public Contracts Regulations 2015 ("the Regulations") in relation to the allocation of orders and/or direct contracts for the supply of lateral flow testing devices ("Tests") for the detection of Covid-19 ("the Procurement Claim");

   (2) The second claim relates to the allegedly wrongful rejection by the Defendant of 68.4 million Tests ("the Wrongful Rejection Claim");

   (3) The third claim (which the Claimants say arises from disclosure given by the Defendant in the first and second claims) relates to alleged further breaches of the Regulations in relation to the allocation of orders and/or direct contracts for the Tests and alleged unequal treatment of bidders in relation to alleged breaches of Chinese labour law ("the Third Claim").

2. Before me there were three applications:

   (1) The Defendant's application to strike out the Claimants' first and second claims;

   (2) The Claimants' application for disclosure guidance;

   (3) The Claimants' application for directions in relation to the form and management of the Third Claim.

The factual background

3. In July 2021 the Claimants participated in a call-off competition under the DPS[1] Agreement ("the Procurement") and were the successful second highest ranked bidder. There were 3 successful bidders. The parties entered into a call-off contract dated 6 September 2021 ("the Contract") pursuant to which the Claimants agreed to supply Tests to the Defendant on receipt of committed orders, based on allocated volumes divided between the top three ranked bidders in accordance with a procedure set out in the call-off competition Invitation to Tender ("the Allocation Procedure"). It appears that the Defendant entered into similar contracts with the first and third ranked bidders (Medco Solutions Ltd ("Medco")) and Tanner Pharma UK Ltd ("Tanner") at or around the same time.

4. The Second Claimant engaged MP Bio, a company registered and operating in Germany, as its sub-contractor and the Legal Manufacturer of the Tests. On the same

[1] The expression "DPS Agreement" refers to a dynamic purchasing system agreement dated 24 May 2021 between the Claimants and the Defendant

day, MP Bio engaged Boson, a company registered and operating in China, as its sub-contractor and the Physical Manufacturer of the Tests.

5. On 30 September 2021, the Defendant placed a committed order for 68.4 million Tests from the Claimants ("the Committed Order"). The Tests were manufactured by Boson at its manufacturing facility in China between 11 October 2021 and 7 November 2021. At or around the same time, the Defendant also placed orders with Medco and Tanner, reflecting their shares in accordance with the Allocation Procedure.

6. On 7 October 2021, the Defendant informed the Claimants that he had commissioned a BSCI[2] audit of Boson's manufacturing facility in China. The audit was carried out by a company called QIMA Limited ("QIMA" and "the QIMA Audit"). The Claimants believe that similar audits were also carried out for other DPS suppliers, including Medco, Tanner and the fourth ranked bidder, Innova Medical Group Inc. ("Innova") (although they say that the audit reports for these other DPS suppliers have not been disclosed by the Defendant).

7. The QIMA audit report concluded that Boson had been awarded an overall rating of "D". When the Defendant provided a copy of the QIMA Audit to the Claimants on 26 October 2021, it stated: "*unfortunately, the overall rating is D which is failure*". It is the Claimants' case that there is no such thing as a "*fail"* within the context of BSCI audits (as such audits are aimed at continuous improvement in working standards) and they say that the tender documents did not include a standard at which an audit would be considered to "*fail"*. The Claimants do not accept the findings of the QIMA Audit or that the Defendant was entitled to "*fail*" Boson.

8. By notice of 12 November 2021 ("the Rejection Notice"), the Defendant purported to reject the Tests already delivered and the further Tests due to be delivered pursuant to the Committed Order, namely the 68.4m Tests. The Rejection Notice did not particularise the legal (or factual) basis of the purported rejection of the Goods by the Defendant. Instead, the Defendant's purported rejection of the Tests was said by the Defendant to be based on (a) alleged "*breaches of labour law, health and safety and worker payment obligations*" at Boson's premises, which had purportedly been identified in the QIMA audit report and (b) the fact that such alleged breaches had not been identified by Boson in the Standard Selection Questionnaire for the call-off competition. The Claimants dispute that the findings of the QIMA audit amount to breaches of Chinese labour law (as alleged by the Defendant) and/or that the QIMA audit gave rise to grounds lawfully to reject the Tests (for the reasons set out in paragraph 28 of the Wrongful Rejection POC [PCMB/12/95]). Amongst other things, the Claimants place reliance on two other audits of Boson's manufacturing facilities which were conducted at or around the same time (there is also another audit conducted on behalf the Defendant himself) and the existence of a local licence issued by the local district in China which the QIMA auditor had failed to take into account.

9. The Defendant puts in issue (by requiring the Claimants to prove) the authenticity of the local licence and there is also a factual dispute between the Parties as to whether the local licence (if it was authentic and in existence at the time of the audit) was shown to the QIMA auditor.

[2] BSCI is an acronym for Business Social Compliance Initiative

10. From 18 October 2021 the Defendant placed orders for further Tests from Medco, Tanner and Innova (the fourth ranked bidder), by way of further committed orders and direct contract awards, but did not place any further orders with the Claimants.

11. Some of the additional orders and direct awards were set out in two Contract Award Notices dated 17 January 2022 and 24 January 2022 in which the Defendant stated that (1) he had increased the maximum volume of Tests and had fully utilised the volume of Tests; (2) he had awarded a direct contract to Innova; and (3) it had made further direct contract awards to Innova, Medco and Tanner in purported reliance on Regulation 32(2)(c) of the Regulations.

12. The Claimants say that, having considered disclosure in the first and second claims, they discovered that the Defendant had disapplied the Allocation Procedure, placed yet further orders with Innova, Medco and Tanner, agreed to a substantial price increase with Medco, extended an existing contract with another contractor (SureScreen) and that audits of Innova, Medco and Tanner found that they had all breached Chinese labour law.

The First and Second Claims

13. On 15 February 2022, the Claimants issued the Procurement Claim, which alleges breaches of the Regulations arising out of the Defendant's failure to place orders with the Claimants in accordance with the Allocation Procedure and the Defendant's decisions to allocate additional volume and make direct awards to Medco, Tanner and Innova [PCMB/1/5].

14. On 30 September 2022, the Claimants issued the Wrongful Rejection Claim, alleging that the Defendant was not entitled to reject the 68.4m Tests which were the subject of the Committed Order and that the Rejection Notice was invalid [PCMB/11/83].

15. The Procurement Claim and the Wrongful Rejection Claim are being managed together by order of O'Farrell J dated 17 October 2022 [PCMB/21/193].

Waksman J.'s Order for Disclosure

16. A CMC in respect of the first and second claims took place before Waksman J. on 9 June 2023.

17. At the CMC the trial of the first and second claims was listed for 12 days (excluding 2 judicial reading days) commencing on 7 July 2025.

18. Paragraphs 13 to 16 of Waksman J.'s order provided as follows [PCMB/25/203]:

> 13. Disclosure is to be given by each party in accordance with Practice Direction 57AD – Disclosure in the Business and Property Courts.
>
> 14. All references hereinafter to the Disclosure Review Document are references to the document appended to this Order and not to any version filed by the parties in advance of this hearing.

> 15. Sections 1A and 1B of the Disclosure review Document is approved in the form annexed to this Order and Extended Disclosure is ordered as set out therein.
>
> 16. The Issues for Disclosure, the Models of Extended Disclosure and the Model C requests are those endorsed and/or ordered by the Court and set out in sections 1A and 1B of the Disclosure Review Document.

19. Section 1A of the Disclosure Review Document identified the following issues, amongst others [PCMB/25/207-211]:

> 1. The extent to which responses relevant to Xiamen Boson Biotech Co. Ltd. ("Boson") in the Standard Selection Questionnaire were inaccurate, false or misleading (including all documents supporting the statements made in these responses), and, if so, whether Boson, whether Boson and/or the Claimants knew or should have known that such responses were inaccurate, false or misleading.
>
> ….
>
> 3A. The date and circumstances in which the Claimant became aware of the existence of the Intertek Audit Report dated August 2021 and/or whether the Claimants considered the findings to that report to constitute a material change of information provided and/or to render the information in Boson's SSQ false and misleading.
>
> 4. The contractual relationship between the Claimants, MP Bio and Boson whether such contracts were made and evidenced in writing, orally or by conduct.
>
> ….
>
> 9. When were the Goods manufactured?
>
> ….
>
> 12.The basis on which the QIMA Audit was carried out and compiled, including:
>
> - The documents and information requested by QIMA before and during the course of the audit;
> - The documents and information made available by Boson during the course of the audit;
> - How the QIMA report was produced, including notes taken for the purposes of preparing the final and any draft reports;
> - Any correspondence between the Defendant, Uniserve and QIMA relating to the report;

- The reasons for the second QIMA Audit and the reasons why it did not go ahead, including whether and why the Defendant and/or the Auditors were prevented from gaining access to Boson's factory;

- Whether Boson's Licence from the Jimei District Human Resources and Social Security Bureau was provided to and considered by the QIMA auditor.

12A. Why Mr Parsons concluded that Boson would not have sufficient information to enable it to pass the audit and/or why the Claimants withdrew their objection to the QIMA report, including:

- Any correspondence between the Claimants and MP Bio or Boson in relation to the available evidence and information

- Why Boson did not inform the Claimants of the existence of the Licence.

13. Whether the Licence is authentic, how and when it was procured, whether Boson had the benefit of the Licence and the scope/extent of the Licence.

20. It is to be noted that in the Case Management Information Sheet filed by the Claimants they declared that they intended to call one or more witnesses from Xiamen Boson Biotech Co Ltd [PCMB/33/240]. Permission to call witnesses was granted by paragraphs 21 to 24 of Waksman J.'s order [PCMB/25/204].

Mr Jason Coppel KC's Order

21. On 8 March 2024, the Defendant issued an application for a declaration that documents held by MP Bio and Boson were in the Claimants' control for the purposes of their extended disclosure obligations. The Claimants opposed the application and it was heard by Jason Coppel KC (sitting as a deputy High Court Judge) on 18 June 2024.

22. The Judge made a declaration that MP Bio's and Boson's documents which were responsive to the issues in the LOID were in the Claimants' control and ordered the Claimants to serve a disclosure certificate by 27 September 2024 and provide disclosure and inspection by 4 October 2024.

23. The deadlines in that order were extended by consent by 14 days to 11 October 2024 and 18 October 2024 respectively.

24. In his judgment[3], Mr Coppel said this:

[3] [2024] EWHC 1708 (TCC)

21. I apply the six Berkeley Square[4] factors - with the requisite degree of stringency - as follows:

(1) As to the relationship between the parties, I accept that, as compared with previous authorities, this is an unusual case for there to be practical control. However, factor (i) is clear that the nature of the relationship is not determinative and that practical control does not depend upon there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship. There is no reason in principle why a contractor could not enjoy practical control over certain documents held by a sub-contractor or a sub-sub-contractor. Moreover, it seems to me that the relationship between Santé, Bio and Boson was a close one in the sense that they participated in what was in substance a joint venture, in seeking to be awarded contracts for the supply of lateral flow tests. And that it has been close during this litigation, which had at its commencement, and continues to have, a strong flavour of being a joint enterprise. The fact that one or more of Boson's employees will be giving evidence for the Claimants is indicative of that. In other words, the relationship between the parties on the Claimants' side has gone beyond a standard, arm's length contractor/sub-contractor/sub-sub-contractor relationship.

(2) In my judgment, the balance of the evidence shows that there is an arrangement or understanding that Boson will search for relevant documents or make documents available to be searched. Boson has an ongoing commitment to do this in the contractual assistance clause in its contract with Bio, and Bio has an ongoing commitment to secure that Boson does so, insofar as this is constitutes assistance (Boson clause) or reasonable assistance (Bio clause) with the claim. These are commitments which have been honoured by Boson prior to and during the litigation, resulting in Boson making available documentation which is critical to the claims, and also by Bio. **If Santé's need was for a search of Boson's documents so as to produce a document or documents which would be favourable to the claims, I have little doubt that Santé would consider that Boson was obliged to conduct that search and would expect it to do so on the basis of the arrangement or understanding between the parties thus far. I have also little doubt that that search would take place. The contractual assistance clauses are, however, broader in their effect and would extend to searches for documents, favourable or unfavourable, which are necessary to the fair disposal of the claims. I would reject the proposition that assistance or reasonable assistance is confined to making available or searching for documents which are helpful to Santé's claims.**

[4] This is a reference to *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch)

(3) The Defendant does not suggest that all documents held by Bio and Boson are within Santé's control but only the documents responsive to categories in the DRD, which have been decided to be necessary to the fair disposal of the claims such that a search for them must be carried out. These are documents which are concerned with a dispute between Santé and the Defendant regarding whether the goods to be supplied by Boson via Bio would have been supplied in accordance with the contract with the Defendant.

(4) The contractual assistance clauses are the starting point for inferring the arrangement or understanding which I find to be present in this case, but there are significant other factors which give rise to that inference, including in particular the evidence of past access to documents being provided by Boson. This may, as the Claimants submitted, have occurred only during a small number of discrete periods but the Claimants do not rely upon any instances where Boson has refused to provide access to documents and it seems to me very likely that if more requests had been made by Santé they would have been satisfied by Boson. This is a highly relevant factor, and there are others, including the initial and ongoing cooperation between the Claimants and Boson for the purposes of pursuing the claims. These matters taken together are "more specific and compelling" than there merely being a close commercial relationship between Santé, Bio and Boson which – see the dictum in Airfinance (§9 above) - would be insufficient to establish the necessary control. I do not accept that there are so many other cases in which similar factors would be present as to create a floodgates problem of the type I was warned about by Ms Hannaford.

(5) Contrary to Ms Hannaford's submissions, it is not necessary for the Defendant to establish that Santé, or Bio, has free and unfettered access to Boson's documents (see Pipia, §§48 and 50-51, where Andrew Baker J explained that free and unfettered access was not a necessary precondition for control and that "*how, under the consent given, the disclosing party will get hold of [the] documents*" did not go to the existence of control but to "*what the disclosing party can be expected and required to do so as to discharge any disclosure obligation to conduct a search for [the] documents*"). I am satisfied that there is an understanding that access will be permitted and that Boson will cooperate in providing the relevant documents or copies of them or direct access to them. That documents may have been provided previously on request, rather than by Boson permitting direct third-party access to its documents, does not, contrary to Ms Hannaford's submissions, establish that searching of Boson's documents would not be permitted. It is for that reason also that I would reject Ms Hannaford's submission that the declaration sought by the Defendant cannot be granted because it is unrealistic for the Claimants to carry out Model D disclosure in relation to Boson's documents (whereas a less onerous, request-based approach might be permitted). It would be wrong for me to accept, on the current

> evidence, that Boson will not make its documents available for searching when requested to do so by Santé or Bio (as opposed to providing specific documents or categories of documents in response to a request). Making its documents available for searching would be providing assistance, and reasonable assistance, in relation to and in connection with Santé's claim that the goods were to be supplied in accordance with the contract. **If Boson refuses, that will need to be explained to the Defendant and ultimately to the Court, with a degree of openness which has thus far been somewhat lacking in the explanations from the Claimants' side. Any refusal to cooperate by Boson will no doubt be a matter which can be taken into account by the Court at trial in assessing the credibility of the evidence given on behalf of the Claimants, in particular by Boson's employees.**
>
> (6) For the reasons already given, I find that the arrangement or understanding in this case has not been and will not in future be limited to a specific request and is more general in its nature.

22. Finally, I make clear that I consider it appropriate to make the declaration sought by the Defendant in relation to Bio as well as Boson, notwithstanding that most of the Defendant's submissions were directed at Boson rather than Bio. The evidence does also support there being a similar arrangement or understanding with Bio as with Boson, which has given rise to the provision of documentation via Bio's solicitors (albeit that Bio might be expected to have many fewer documents which are relevant to the proceedings than Boson). Norton Rose's letter of 5 June 2024, providing a purchase order and quality agreement between Bio and Boson, professed to find "unclear" the connection between that documentation and the dispute between the Claimants and the Defendant, and not to accept that it was "reasonable assistance" for Bio to provide the contractual documentation between itself and Boson. The connection between that documentation and the claims is perfectly obvious to me: the Court at trial will certainly wish to be fully informed of, and to understand, the contractual relationships between the Claimants', Bio and Boson which were put in place in order to discharge the Claimants' obligations under their contract with the Defendant. I find it surprising and a little concerning that such a manifestly weak point was taken. Nevertheless, the documentation was provided and I would expect that other requests for assistance to Bio which are necessary for the fair disposal of the claims will also be satisfied.

23. There is also a practical reason to include Bio within the scope of the declaration Whilst I accept the Defendant's submission that there has in practice been a direct relationship between Santé and Boson, the precise terms and nature of the relationships between the parties on the Claimants' side remains opaque and it may be that the requests to Boson for the actions necessary to ensure compliance with the Claimants' disclosure obligations will need to go through Bio, which will provide reasonable assistance to Santé by making the requests of Boson and

> procuring that Boson complies with them. If documents are then provided by Boson to Bio, rather than to Santé, there must be no doubt that they remain within the scope of the Claimants' disclosure obligations.
>
> (The emphasis added in bold type above is mine).

25. The declaration which he granted was as follows [PCMB/28/221]:

> Documents within the possession of (i) MP Biomedicals Germany GmbH ("MP Bio"); (ii) Xiamen Boson Biotech Co. Ltd. ("Boson") which respond to the issues identified in the Disclosure Review Document are within the control of the Claimants for the purposes of their extended disclosure obligations under Practice Direction 57AD ….

26. The Claimants sought permission to appeal this Order. Permission was refused both by Mr Coppel and by the Court of Appeal.

The Defendant's Strike Out Application

27. The first application before me is the Defendant's application to strike out the first and second claims.

28. This is supported by Mr Kelsey's Second Witness Statement.

29. The grounds of the application are summarised in Mr. Bowsher KC's skeleton argument:

> 9. In breach of both the Waksman Order and the Coppel Order, as well as rules of the Court (including their duties to the Court to take reasonable steps to preserve documents as soon as they became aware that they might become party to proceedings), Santé have not collected/preserved documents held by Boson and MP Bio, or undertaken any Model D searches (or any searches at all) of the Boson/MP Bio Documents and have therefore not given extended disclosure of the Boson/MP Bio Documents.
>
> 10. As a result of Santé's breaches of their disclosure obligations, a fair trial is no longer possible. There is no other remedy available, other than striking out the claims, that will adequately address the extreme unfairness caused by the fact that: (i) Santé has had access to all the documents held by Boson and MP Bio which they consider helpful to their claims (and without which they could not have brought their claims at all); yet (ii) it now appears that potentially adverse documents on which the SoS' defences in both claims may turn will never be disclosed.

30. I return below in greater detail to the arguments on both sides as to the application, but first set out the relevant legal principles. As to this there is no real dispute between the

parties, but understandably each party places different emphasis on matters set out in the authorities.

The Law: Disclosure and Preservation of Documents

31. Mr Bowsher submits as follows in his skeleton argument:

> 32. For the purposes of PF57AD, a party gives disclosure by stating "that a document that is or was in its control has been identified or forms part of an identified class of documents and either producing a copy, or stating why a copy will not be produced" (§1.4, Appendix 1 of PD57AD, at §1.4)(White Book, Vol 2, p582) …. Santé were under a duty to the Court, pursuant to PD57AD §3.1(1)(White Book, Vol 2, p562) …. from the moment that they became aware that they "may become [parties] to proceedings" (i.e., pre-action), to take reasonable steps to preserve documents within their "control" that may be relevant to any issue in the proceedings.
>
> 33. The duty to preserve documents includes the duty to take all the steps at PD 57AD §4 …. (including notifying third parties who may hold documents relevant to an issue in the proceedings PD 57AD §4.2(3) [AUTH/797]).
>
> 34. The duty to preserve documents is an important part of disclosure and is well known to all litigants (and existed in the preceding pilot scheme (PD 51U which operated from 1 January 2019 to 1 October 2022) – and Lewis Silkin was also subject to their own duty to explain the duty of preservation to Santé (PD 57AD §4.4).
>
> 35. Further, Santé was required to confirm in writing when serving their particulars of claim that steps had been taken to preserve relevant documents in accordance with the duties under PD 57AD §3.1(1).

32. I accept that those paragraphs accurately set out the obligations a party is under in respect of preservation of documents, but, as I set out below, what matters more in this case is what happened after the two relevant orders for disclosure.

The Law: Applications to Strike Out under CPR r. 3.4

33. In her skeleton argument, Ms Hannaford KC submitted as follows:

> 85. The correct approach to an application for strike out under CPR r. 3.4(2)(c) was set out by Richards LJ in *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 at paragraph 44 as follows:
>
> > (1) The principles governing applications for relief from sanctions in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537 and

Denton v TH White Ltd [2015] 1 All ER 880 are relevant to the question of whether the sanction of a strike-out should be imposed for non-compliance with a court order. The *Mitchell/Denton* principles are: (1) the significance and seriousness of the default; (2) if the default is significant and serious, whether there is a good reason for it; and (3) consideration of all of the circumstances of the case to enable the court to deal justly with the application..

(2) However, the question for the Court in an application for strike out is materially different because the proportionality of the sanction is in issue, whereas in a relief from sanctions case the Court must proceed on the basis that the sanction was properly imposed.

(3) Striking out a statement of case 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.

86. A claim should not be struck out for a failure to comply with an order for disclosure and/or inspection unless this failure would jeopardise the fairness of the trial:

(1) In *Arrow Nominees v Blackledge* [2000] 2 BCLC 167, Chadwick LJ held at paragraph 54:

> *"I adopt, as a general principle, the observations of Millet J in Logicrose Ltd v Southend United Football Club Ltd (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him."*

(2) Ward LJ added at paragraph 72:

> *"…there is still every indication that* [the trial judge] *regarded the risk of a fair trial not being possible as the factor of crucial, even overriding, weight. It undoubtedly is a factor of very considerable weight. It may often be determinative. If the court is satisfied that the failure to disclose a document or the effect of a tampered document can no longer corrupt the course of the*

> *trial, then it would be a factor of much less and perhaps even little weight in considering a strike out…."*

(3) In *Hayden v Charlton* [2010] EWHC 3144 (QB) at paragraph 75, the Court considered that the factors which are of particular importance are:

> (a) Whether there has been a deliberate and wholesale non-compliance with the rules and orders of the court, amounting to a total disregard of the court's orders.
>
> (b) Whether the offending party's conduct of the litigation and their breaches of the case management directions of the court are contrary to the overriding objective and have resulted in a serious delay to the progress of the actions (including by jeopardising the trial window).
>
> (c) Whether there has been any proper explanation for these failures.
>
> (d) Whether the failures follow a pre-existing pattern for the offending party's conduct.
>
> (e) Whether the offending party's conduct has had a significant prejudicial and oppressive effect on the innocent party.

(4) In *Candy v Holyoake* [2017] EWHC 373 (QB), Warby J refused to strike out the Defendants' statements of case notwithstanding that they admitted that they had been guilty of *"serious and significant breaches of their duty of disclosure"* (see paragraph 11). This was for the reasons set out in paragraph 14, which included:

> *"(1) Striking out a case is the ultimate sanction, which is only appropriate in the most serious of cases. It involves, on the face of things, a deprivation of the Convention right to a fair trial.*
>
> *(2) It is not suggested that the admitted defaults have a made a fair trial impossible in this case.*
>
> *(3) I am not persuaded that I should conclude at this stage, without cross-examination, that the defendants' failures are evidence of a wish to ensure there is no fair trial, or that they amounted to deliberate suppression of documents, as alleged by Mr Candy. Nor do I see any other sufficient ground for concluding that the entry of judgment on the merits is the right response to these procedural failures."*

(5) The Judge added at paragraph 34 of *Candy* that a key consideration in determining this application was whether the failures to provide disclosure were the result of deliberate suppression. As to

whether he should make such a finding on a summary application, the Judge said:

> *"The standard of proof is the ordinary civil standard, but the gravity of the allegation means that the court should take account to the extent appropriate in the circumstances, the improbability of such serious misconduct. Also relevant is the fact that I am invited to reach these serious conclusions on the basis of the documents alone, without hearing those accused under cross-examination. There are circumstances in which a court can properly reject an explanation given in a witness statement, without cross-examination of the witness. That would be so if the explanation offered lacked any reality, for instance because it was inherently improbable or because it was inconsistent with a document of established authenticity. It is however a relatively unusual case in which the court is justified in taking that course. I do not consider this to be such a case."*

(6) Further, the Judge explained at paragraph 38 that applying the *Denton* test, the sanction of strike out could not be justified:

> *"Adopting the Denton three part test, the breaches were serious and significant; the explanations given are not "good" ones, because they do not involve serious oversights so far as the emails are concerned – but the explanations are innocent rather than guilty ones, which I do not feel justified in rejecting on this application; and having regard to all the circumstances, the striking out and the entry of judgment without a trial would represent an excessive, disproportionate, and inappropriate sanction. That is all the more so when I consider, as I must, that this is not a case where the defendants are seeking relief from a sanction that has already been justifiably imposed. The question is the logically prior one of whether a sanction should be granted."* [emphasis added]

(7) In *Active Media Services Inc v Burmeister Duncker & Joly GmbH & Co KG* [2021] EWHC 232 (Comm) (a case where documents were deliberately destroyed, but the claim was not struck out), the Court summarised the applicable principles at paragraph 302 - 314 and emphasised that:

> (a) There are only a limited number of cases where applications have been made to strike out proceedings for concealment or destruction of documents. Even where a party's actions may amount to contempt, the action should not be struck out unless it is impossible to conduct a fair trial (see paragraph 305).
>
> (b) The question is whether the remedy of strike out is proportionate and fair in all the circumstances of the case or

whether some other remedy will safeguard the position of the innocent party (see paragraph 307).

(c) If a fair trial is still possible, the Court should consider how to deal with deliberate destruction of evidence. Where there is no evidence on a particular point, the Court may rely on inferences (see paragraph 310).

(8) Disclosure is a means to the end and the end is a fair trial. The Court is not to allow a contest over a piece or area of disclosure to be viewed as though that is the dispute between the parties. Further, the overall requirement is always informed by what is reasonable and proportionate: *The Republic of Mozambique v Credit Suisse International* [2023] EWHC 514 (Comm) (see paragraph 37).

(9) The seriousness of the breach, the extent if at all to which it is excusable and the consequences of the breach will be very important factors, but the overriding criterion is for the sanction to be proportionate and just: *Byers v Samba Financial Group* [2020] EWHC 853 (see paragraph 123).

(10) There is a high bar for strike-out: see *Al-Najjar v Majeed* [2022] EWHC 363 (Ch) at paragraph 7. By way of example, the Court has declined to strike out a party's case even in circumstances where the disclosure failures in question related to the deliberate destruction of documents (see *Active Media*).[5]

86. In summary, when considering whether a claim should be struck out for failure to comply with an order for disclosure:

(1) The *Mitchell*/*Denton* test is relevant, namely (a) the significance and seriousness of the default; (b) if the default is significant and serious, whether there is a good reason for it; and (c) consideration of all of the circumstances of the case to enable the court to deal justly with the application (*Walsham*).

(2) However, the remedy of striking out must be proportionate and just, should not be deployed unless its consequences can be justified, is only appropriate in the most serious of cases, should not be used unless it is impossible to conduct a fair trial and is a high bar (*Walsham*, *Byers*, *Candy*, *Arrow Nominees*, *Active Media* and *Al-Najjar*).

(3) Particularly important factors include: (a) whether the breach is deliberate and constitutes wholesale non-compliance amounting to a disregard of the court's orders; (b) whether the conduct is contrary to

[5] See also Hollander, *Disclosure* 6th Ed. at 17-07: *"Although the court has the express power to strike out a statement of case of a defaulting party for the breach of any rule, practice direction or court order, such an order will generally be made only where there has been a deliberate and continuing refusal to provide disclosure or where the default has made the fair trial of an action impossible or prevented the court from doing justice."*

> the overriding objective (including whether it has caused serious delay); (c) whether there is an explanation for the failures; (d) whether the behaviour is part of a pattern of conduct; and (e) whether the party's conduct has a significant prejudicial and oppressive effect on the innocent party (*Hayden).*

34. Mr Bowsher did not dissent from the applicability of any of the above principles, but emphasised the passages from the authorities emphasising the importance of whether a fair trial can take place (the emphasis in bold is Mr Bowsher's):

> 40. The Court should strike out all or part of a claim where the fairness of a trial has been put in jeopardy:
>
> a. The Court's foremost concern must be the fairness of the trial and one of the things required for a fair trial is disclosure of relevant documents - *Mozambique v Credit Suisse International* [2023] EWHC 514 (Comm)**….**:
>
> (i) §9-§10: *"The Court's concern, front and centre, is that any trial is a fair trial. That is what the public are entitled to; and it is what the rule of law requires…. Trust in the Court is earned and, in every case, the Court must continue to earn it. It is trust based on delivery of a fair, independent hearing and decision. And one of the things that the Court insists on to achieve a fair decision is disclosure of relevant documents"*;
>
> (ii) §38: *"Non-compliance with the court's orders or with the disclosure process is an important matter in its own right. Here of course the importance is, again, in the context of fairness of trial."*
>
> b. The withholding of positive supportive documentary evidence may not be sufficiently remedied by the sanction of adverse inferences at trial and strike out may in some cases be the most appropriate sanction: *Mozambique v Credit Suisse* at …. §40-§43: "…*it may be difficult and sometimes, perhaps impossible to rely on the sanction of adverse inferences given the matrix of allegation and cross-allegation*".
>
> c. In *Byers v Samba Financial Group* [2020] EWHC 853 (…. at §120 to §124), Fancourt J formed the view that disclosure was necessary to the fair trial of the action and therefore refused to revoke or vary the order for standard disclosure. He held that:
>
> (i) §124: ***"it clearly would not be just to allow the Bank to defend any factual issue where it might have relevant documents that it should have disclosed****. The risk of whether the Bank's documents might be relevant to such issues would clearly have to fall on the side of the Bank"*;

> (ii) When deciding whether to make a full or partial debarring order, it was only proper to except certain issues from a debarring order **"*if [the Court] is satisfied, first, that such issues can fairly be tried without the Bank's disclosure; second, that such an exception [of certain issues] would be in the interests of justice and fair to both parties**; third that the conduct of the Bank is not so inexcusable that a full debarring order is deserved and proportionate; and fourth that making exceptions from the debarring order in that way does not undermine the authority of the Court.* ***There must clearly also be some sensible purpose served by having a trial of certain issues only***" (**§124**).

d. In *Arrow Nominees v Blackledge & Ors* [2000] EWCA Civ 200, a case involving fabrication and destruction of documents (but still relevant on points of principle), Chadwick LJ said ….:

> "*54… the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld.* ***But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe**, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice,* ***the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice***."

e. The jurisdiction to strike out a case/debar a party from running its case can be exercised even where no unless order has previously been made, if the fairness of the trial has been put in jeopardy: *Al-Najjar v Majeed* [2022] EWHC 363 **….**

The Law: Res judicata and interlocutory decisions

35. An important issue in respect of the Defendant's application is the status of Mr Coppel's order granting a declaration. It is the Defendant's submission that this was a binding decision to which the principles of *res judicata* apply. In respect of the relevant law, Mr Bowsher submitted (again the bold emphasis is his):

> 41. The abuse of process principles from *Henderson v Henderson*[6] (that a party should not be raise in subsequent proceedings matters which could and should have been raised in earlier proceedings) and *Hunter v*

[6] 3 Hare 100.

Chief Constable of the West Midlands Police[7] (the Court should prevent misuse of its procedure in a way which, while not inconsistent with the literal application of the rules, would nevertheless bring the administration of justice into disrepute – e.g., by a collateral attack on a previous decision of the Court) are well-known.

42. Those principles apply equally to interlocutory decisions and applications as to those which are final – *Koza Ltd v Koza Altin* [2020] EWCA Civ 1018 (Popplewell LJ) at …. §42:

> "*Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that* ***if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearin****g…. In every case the principles are those identified [above], the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that* ***to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions****."*

Were the Claimants in breach of an order of the Court?

36. The Parties are agreed that I should apply the principles in *Mitchell v News Group Newspapers* and *Denton v TH White Ltd* as explained by Richards LJ in *Walsham Chalet Park Ltd v Tallington Lakes* (paragraph 85 of Ms Hannaford's skeleton argument set out at paragraph **[33]** above and paragraph 38 of Mr Bowsher's skeleton argument).

37. It is the Defendant's case that the Claimants were in breach of the orders of Waksman J. and Mr Coppel as well as being in breach of general obligations as to preservation of documents.

38. I am not persuaded that the Claimants were in breach of any obligation to preserve documents. This case is developed at paragraphs 55 to 62 of Mr Bowsher's skeleton argument.

39. The obligation to preserve documents in the possession of a third party is to be found in paragraph 4.2 (3) of PD 57AD and is an "obligation to take reasonable steps so that

[7] [1982] AC 529.

agents or third parties who may hold documents do not delete or destroy documents that may be relevant to an issue in the proceedings."

40. What the Defendant seems to me to be suggesting is not that documents should have been, but were not, preserved in particular by Boson, but rather that the Claimants should have taken steps to get Boson's documentation into their physical possession – but that seems to me to go further than required by PD 57AD.

41. There is at present (and probably will never be) any evidence that Boson has failed to preserve any relevant documentation. The difficulty seems to me rather that Boson is now unwilling to co-operate, as I explain below. Accordingly, I do not accept that the Defendant has shown that the Claimants were in breach of any duty to preserve documents.

42. Were the Claimants in breach of one or other or both of the Orders relied upon?

43. It seems to me that the central issue is the effect of the Order of Mr. Coppel.

44. He came to a clear decision that for the purposes of disclosure obligations under Practice Direction 57AD, Boson's documents were within the control of the Claimants. I have set out his reasoning at length above.

45. The Claimants' position is that they were not in breach of Waksman J.'s order and that they have sought to comply with Mr Coppel's order.

46. In my judgment the effect of Mr Coppel's decision was to answer an issue raised between the Parties as to the effect of Waksman J.'s order, namely did the Claimants have control over Boson's documents so that the requirements in his order extend to require the Claimants to disclose Boson documents? (The same issue arose in respect of MP Bio's documents).

47. The effect of Mr Coppel's judgment was to resolve that issue in the Defendant's favour. Thus it was resolved against the Claimants that documents in the physical possession (or under the control) of Boson should be disclosed by the Claimants.

48. That decision is binding upon me and the Parties and the Claimants cannot go behind it.

49. The simple fact is that the Claimants have not carried out a PD 57AD disclosure exercise in respect of documents held by Boson.

50. Accordingly, I am required to turn to the principles set out in *Denton* and *Mitchell*.

Was the Claimants' breach serious and significant?

51. The Claimants contend that the breach of Mr Coppel's order was not serious or significant. Ms Hannaford's skeleton argument makes the following submissions:

> 93. It is submitted that the Claimants' conduct demonstrates that they have sought to comply with the Coppel Order.

94. First, in relation to MP Bio's documents:

(1) They have obtained agreement from MP Bio to allow the Claimants access to search its documents (despite MP Bio's views that (a) the Coppel Judgment is not binding on MP Bio; and (b) it is no longer obliged to provide any assistance because the Sub-Contract has expired.

(2) The reason why MP Bio's documents have not been provided to date is that MP Bio, acting through solicitors, Norton Rose:

(a) Has said that it will be necessary to carry out an initial review of MP Bio's documents to identify and withhold any sensitive or privileged material.

(b) Has raised concerns about the Claimants' solicitors' access to privileged documents and insisted that an ethical wall arrangement is used by its e-disclosure providers.

(3) Further, negotiations have been made more difficult by the fact that the parties are no longer in a commercial relationship with one another because the Sub-Contract between MP Bio and the Claimants has expired and the relationship has deteriorated, as explained by Mr Haughton at paragraphs 32 – 38 ….

(4) Accordingly, the Claimants have been required to correspond with Norton Rose at length and to take steps to set up e-disclosure arrangements that are acceptable to MP Bio in order to reassure it (and its legal advisors) on these matters.

(5) This has taken time, but the Claimants remain confident that they will be in a position to provide relevant documents for inspection.

95. Second, in relation to Boson's documents:

(1) The Claimants wrote to MP Bio asking for its assistance in achieving co-operation from Boson and subsequently wrote directly to Boson requesting its prompt assistance to enable the Claimants to comply with their disclosure obligations. This request was refused with Boson stating that it did not *"need or intend to comply with any request made by Sante for assistance in this matter"* (see paragraph **Error! Reference source not found.** above).

(2) The Claimants wrote to Boson on two further occasions to seek to persuade it to change its mind, including by offering to pay its costs of providing assistance, but they have received no response (see paragraphs **Error! Reference source not found.** to **Error! Reference source not found.** above).

(3) The Claimants have obtained MP Bio's agreement to procure Boson's assistance and MP Bio has contacted Boson to ask for its cooperation.

(4) The Claimants are dependent on Boson's co-operation as they do not have any ability to access Boson's premises without permission in order to obtain the documents themselves (see Lewis Silkin's letter of 11 September 2024 at paragraph **Error! Reference source not found.**). Therefore, as a result of Boson's refusal to co-operate, the Claimants have been unable to provide any of Boson's documents to date. This notwithstanding, the Claimants have been clear that they will continue to take steps to obtain these documents (see Disclosure Certificate [AB/4/390, 401]) and have sought Disclosure Guidance from the Court on this topic (see Section E below).

96. Further, the Claimants have been transparent with the Defendant and the Court as to the steps that they have taken (see Section D3 above). This has included (1) multiple letters to the Defendant's solicitors explaining steps taken and progress to date and (2) the provision of the Disclosure Certificates which listed documents for disclosure by category at Appendix A, and (3) an explanation in the Disclosure Certificates (in accordance with paragraph 12.3 of PD 57AD) as to why MP Bio and Boson's documents are not available to be provided to the Defendant by way of inspection.

97. It is submitted that these actions are indicative of a party that is making every effort to obtain the documents covered by the Coppel Order. In the circumstances, it is submitted that the Defendant cannot credibly suggest that the Claimants have committed a serious and significant breach of Coppel Order.

There is a good reason for the Claimants' position

98. It is submitted that there are good reasons for the Claimants' position (i.e. their inability to provide the MP Bio documents (so far) and to obtain the Boson documents). As set out above, and in the statements of Mr Haughton and Mr Taylor, the reasons why documents have not been provided to date are not due to any lack of effort on the Claimants' part but rather because (a) securing MP Bio's cooperation has been a long and difficult process; (b) it has not yet been possible to secure Boson's co-operation; and (c) the Claimants do not have any other means of obtaining these documents.

52. In the Defendant's submissions, the case is that the breach is serious and significant concentrates upon the absence of Boson's documents rather than any absence of MP Bio's documents. As to the latter, whilst there have been delays, it now appears that disclosure of MP Bio documents will now take place.

53. Insofar as Boson's documents are concerned, the position as to what has already been produced appears to be as follows:

(1) Some documentation was produced during the course of the QIMA Audit;

(2) I understand Mr Coppel to have accepted in paragraph 15 of his judgment Mr Bowsher's submission that Boson had produced some documentation which is favourable to the Claimants' cause;

(3) Some other documentation has probably been provided, but limited in nature and not including any adverse documents.

54. At the time when Mr Coppel made his decision, the expectation was that witnesses from Boson would be called at the trial of these proceedings. This is clear, not only from the information given by the Claimants before the CMC, but also from paragraph 21(1) of Mr Coppel's judgment where he said:

> Moreover, it seems to me that the relationship between Santé, Bio and Boson was a close one in the sense that they participated in what was in substance a joint venture, in seeking to be awarded contracts for the supply of lateral flow tests. And that it has been close during this litigation, which had at its commencement, and continues to have, a strong flavour of being a joint enterprise. The fact that one or more of Boson's employees will be giving evidence for the Claimants is indicative of that.

55. This is no longer the expectation. For the purpose of resisting the Defendant's application, the Claimants filed a witness statement from Mr Taylor, a partner in the firm of solicitors representing the Claimants. In paragraph 42 of that statement, he said:

> I understand from Mr Haughton of Santé that, at the time of filing the CMIS on 2 June 2023, it was Santé's expectation that the relevant individuals from Boson would likely be willing to attend the trial as witnesses of fact. However, I also understand that this was based on the historic relationship between Santé and Boson and this was not discussed with Boson prior to the filing of the CMIS. As set out above, the relationship between Santé and Boson has since diminished to a significant degree, and there is no longer any commercial relationship between the parties. Therefore, as matters currently stand, Santé does not presently consider that any such individuals from Boson will voluntarily attend as witnesses of fact (particularly given the events relating to Santé's disclosure efforts described below)….

56. The difficulties in obtaining documents from Boson has been summarised in the passage from Ms Hannaford's skeleton argument which I have quoted at paragraph 51 above.

57. In my judgment, the question of how serious and significant the Claimants' breach was depends to an extent upon what happens evidentially at trial. Before explaining why I say that, I should set out a further extract from Mr Bowsher's skeleton argument setting out the Defendant's case as to the significance of the absence of disclosure emanating from Boson:

80. To a large extent, whether Sante's breach was deliberate or otherwise is neither here nor there. The critical factor here is that a fair trial of issues which might turn on Boson documents is no longer possible, and it is hard to see what point there would be in a trial after removing those issues. See the dicta in all the cases at paragraph 40 above about the fact that the Court's foremost concern at every stage must be to ensure a fair trial, and that disclosure of all relevant documents is a critical part of ensuring a fair trial.

81. At a bare minimum, applying the dicta in the cases at paragraph 40 above, Santé cannot be allowed to run a case in respect of any issue on which Boson is likely to hold relevant documents. Once those issues are removed, the Court must then consider whether there is any sensible purpose in having a trial of the remaining issues (***Byers v Samba*** – see quote at paragraph 40(c) above).

82. As Jason Coppel KC pointed out **[APP/297] §3**, Boson's "*role is central to the key disputes*" and Boson's documents are of "*particular significance*" in relation to the issues 1, 4, 12 and 13. Even if only those 4 issues identified by Jason Coppel KC as being ones where Boson's documents were particularly significant were stripped out of the claims, it is hard to see what (substantively) would really be left:

a. Issue 1, identified by Jason Coppel KC, is the extent to which responses relevant to Boson in the Standard Selection Questionnaire were accurate. If it assumed that they were not accurate, then the SoS has strong grounds for arguing that Santé should never have been admitted to the procurement process in the first place.

b. Issue 4, identified by Jason Coppel KC, is the contractual (including informal contracts or any agreed orally or by conduct) relationship between the Claimants, MP Bio and Boson. Santé's case is that Boson was not their sub-contractor and therefore did not fall within the provisions of the contracts with the SoS entitling the SoS to terminate the contracts. Bizarre though it may be, it seems likely that Boson holds documents relevant to this issue that Santé do not have in their own possession:

(i) It seems very unlikely that MP Bio and Boson (a German and Chinese company respectively) documented a £98 million contract to manufacture Tests as thinly as they are said to have done (see paragraph 18 - 23 above), especially when this is compared to the contract (for the same Tests) between the MP Bio and Santé **[APP/35]**.

(ii) 3 contractual documents have been disclosed so far (see paragraphs 18 – 23 above). Santé only disclosed 2 of those documents in response to the application before Jason Coppel KC and after almost a year of correspondence in which the SoS refused to accept Santé's initial assertion that the Boson Letter was the only contract. 2 of the 3 contractual documents

> disclosed do contain provisions enforceable only by Santé (see paragraph 19 and 23), yet Santé claims not to have had the Purchase Order in its possession before it was provided in 2023 by MP Bio/Boson.
>
> (iii) Given how thin the contracts are, it seems likely that there are other contractual documents within Boson's possession which provide for Santé to have rights (and therefore support the argument that Boson was in reality Santé's sub-contractor) but which, somehow, Santé do not have in their own possession.
>
> (iv) It would therefore have to be assumed in the SoS' favour that Boson was in fact Santé's sub-contractor.
>
> c. Issue 12 relates to the basis on which the QIMA audit was carried out (i.e., whether it was reliable) including the documents and information made available by Boson during the audit. Santé's own disclosure include documents indicating that Santé believed that Boson had falsified workers records after the event in order to fix the holes in their records identified by the QIMA record. In the absence of disclosure from Boson, it must be assumed that Boson did not provide any documents or information to the QIMA auditor other than what she properly took into account in her audit – i.e., Santé cannot be permitted to challenge the factual findings in the QIMA Audit.
>
> d. Issue 13 relates to the authenticity of the Jimei Licence. In the absence of documents from Boson, it must be assumed that this was not authentic (and it should be noted that Santé themselves thought it was a "*fake*" in 2021 (see paragraph 28 above). Therefore, Boson did not have the benefit of the Jimei Licence in relation to any breaches of Chinese labour laws.
>
> 83. If all the above issues are assumed in the SoS' favour, the factual substance of both claims is entirely removed. If it is assumed that the statements in the SSQ were false (issue 1), Boson was Sante's sub-contractor (Issue 4), the factual findings in the QIMA audit must be accepted (Issue 12) and the Jimei Licence was not authentic (Issue 13), it is impossible to see how there would be any prospect of Santé succeeding at trial on either the Procurement Claim or the Wrongful Rejection Claim. In those circumstances, Santé should not have been admitted to the DPS in the first place (because false statements were made in the SSQ) and, in any event, the SoS was entitled to reject the Tests (under the terms of the contract between the SoS and Santé) and not to allocate further contracts.

58. I return to the significance of what will happen eventually at trial.

59. The original expectation was that Boson witnesses would attend to give evidence. In that situation the sort of documentation referred to in Section 1A to the DRD discussed

by Mr Bowsher in the passage I have quoted at paragraph 57 above would be highly material for the Defendant to test and for the Court to assess, the evidence of such witnesses.

60. In that situation there would be a significant risk of the Defendant not having a fair trial if such witnesses were to attend without disclosure having been given.

61. In paragraph 21(5) of Mr Coppel's judgment, Mr Coppel said:

> If Boson refuses, that will need to be explained to the Defendant and ultimately to the Court, with a degree of openness which has thus far been somewhat lacking in the explanations from the Claimants' side. Any refusal to cooperate by Boson will no doubt be a matter which can be taken into account by the Court at trial in assessing the credibility of the evidence given on behalf of the Claimants, in particular by Boson's employees.

62. Referring to this passage, Ms Hannaford suggests that the ability of the Court to draw adverse inferences renders the Claimants' breach less serious, since a Court could remedy or mitigate the effects of such breach by drawing adverse inferences.

63. I agree that a Court could resolve the difficulties created by Boson's failure to co-operate by drawing adverse inferences, or, perhaps more likely, by reaching findings of fact on the basis that the Claimants had failed to prove their case in relevant respects, such as whether the Jimei licence was shown to the QIMA auditor.

64. However, if the Court did not do so, perhaps because it took a favourable view of the credibility of Boson witnesses notwithstanding the absence of disclosure, then it seems to me that the Defendant might well feel that he had not had a fair trial.

65. Of course, these problems would be avoided if disclosure from Boson were to be forthcoming, but the evidence and submissions put forward by the Claimants suggests that that is unlikely. There is also a risk that it might be forthcoming but at a very late stage.

66. The other possibility is that no Boson witnesses are called. In that situation, the Defendant would be able to put forward the arguments put forward in paragraph 82 of Mr Bowsher's skeleton argument, quoted at paragraph **[57]** above, to the effect that in the absence of such disclosure the Claimants' case must, to a greater or lesser extent, fail factually.

67. Ironically, in that situation, it might be that the Defendant would be better off without the disclosure than with it. However, I do regard the inability of the Defendant to put forward its defence without the documents which the Claimants had been ordered to disclose as being a serious and significant consideration.

68. It seems to me that at the heart of the matter is that the Claimants did not put before the Court at the time of the hearing before Mr Coppel the evidence now produced which might have suggested that the relationship between the Claimants and Boson was not as close as he found it to be. However, his findings were what they were, and they are res judicata.

69. I accept that the evidence does not show a deliberate refusal by the Claimants to disclose Boson documents, but there was a failure to do so which was serious and significant in its effects.

Was there a good reason for the default?

70. In his judgment, Mr Coppel was critical of the steps taken by the Claimants to explain the process of disclosure before the date of his judgment (see the passage quoted by me at paragraph **[61]** above).

71. I have also commented above that at the heart of the matter was that the Claimants did not put before the Court at the time of the hearing before Mr Coppel the evidence now produced which might have suggested that the relationship between the Claimants and Boson was not as close as he found it to be.

72. It is also of significance that on the evidence of Mr Taylor referred to at paragraph 55 above, the Claimants put information before the Court at the time of the CMC which had not been confirmed by the sort of elementary inquiries of Boson which might have been expected: that information was not corrected when the matter later came before Mr Coppel – hence his conclusion which I have cited at paragraph 61 above.

73. Further it seems to me that the following passage from Mr Bowsher's skeleton argument is significant:

> 47. It should also be noted that:
>
> a. One of Santé's main arguments before and during the June 2024 Hearing as to why it should not be ordered to search and give disclosure of the Boson/MP Bio Documents was because Santé had offered to make voluntary requests of documents or categories of documents from Boson and MP Bio [APP/247-248] §39-46 (and the possibility of such voluntary requests being an alternative to disclosure was relied upon repeatedly in Santé's oral submissions at the June 2024 Hearing).
>
> b. It would have been highly improper for Santé to have asked the Court to treat such voluntary requests as a reasonable alternative to disclosure without informing the Court (and the SoS) that the contractual assistance clauses had expired and that they had no ongoing commercial relationship with MP Bio and Boson.[8] These matters, both individually and taken together, would have been of great importance as they would have meant that the offer by Santé to make voluntary requests was not a meaningful offer.

[8] I note that Ms Hannaford submitted to me, as appears to be the case, that at the hearing before Mr Coppel the learned deputy judge was informed that the MP Bio contract had expired.

74. In my judgment it is relevant that before Mr Coppel the Claimants were submitting that voluntary disclosure was likely to be forthcoming from Boson, and now rely upon the refusal by Boson to provide documents as being a good reason for their breach.

75. In the circumstances, I do not accept that the Claimants have established that there was a good reason for the breach. An alternative way of expressing my conclusion is that the Claimants have not established a reason for the breach which does not involve an attempt to persuade this Court that full effect should not be given to Mr Coppel's decision.

What is the just order in all the circumstances?

76. I have set out at paragraph 33 above paragraph 85 of Ms Hannaford's skeleton argument. She emphasised the following points:

> (2) However, the question for the Court in an application for strike out is materially different because the proportionality of the sanction is in issue, whereas in a relief from sanctions case the Court must proceed on the basis that the sanction was properly imposed.
>
> (3) Striking out a statement of case 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.

77. On my analysis, the central vice of the failure to give disclosure of the Boson documents is that there might be an unfairly one-sided evidential position at trial if Boson witnesses were to be called.

78. I have the impression that if the Claimants' representatives had carried out more thorough inquiries earlier it might or would have become apparent that Boson's willingness to co-operate was strictly limited to disclosure of documents which would support the Claimants' case.

79. Thus the breach was either inevitable, or earlier enquiries might have persuaded Mr Coppel to reach a different conclusion. Either way, the present position seems to me to be an unfortunate position to which the Claimants have considerably contributed.

80. What is to be done?

81. I accept Ms Hannaford's submission that on the authorities a strike out of a claim is an extreme remedy only to be deployed if its consequences can be justified.

82. I do not think that such an extreme remedy is justified in this case at this time.

83. I canvassed a possible course with the Parties to which, as I understood it, neither party vigorously objected: namely to vary Waksman J.'s order so that the Claimants cannot call evidence from any Boson witnesses except with permission from the Court. This would mean that the Court would be able to assess the position having regard, firstly, to the stage in the proceedings at which such an application is made, and, secondly, as to whether disclosure has been forthcoming from Boson.

84. It seems to me that this would remove from the proceedings the risk of an unfair trial which I accept presently exists.

85. Accordingly I shall make an order to that effect.

86. Although not canvassed with the Parties, I will order, for the avoidance of doubt, that no Boson documents which have not so far been disclosed or are otherwise in the possession or control of the Defendant can be relied upon without agreement or express permission from the Court. If such documents emerge from MP Bio, then it is likely that the Court will find it easy to grant such permission.

Disclosure Guidance

87. Ms Hannaford explains this application made by the Claimants as follows:

> 130. The Claimants are seeking guidance from the Court on the additional steps that could be taken to secure Boson's co-operation in light of the Coppel Order pursuant to paragraph 11 of PD 57AD. The relevant background is set out in the Application Notice dated 14 November 2024 [AB/10/670] and the correspondence summarised above in section D2. In summary:
>
> (1) The Claimants have written to Boson to seek its co-operation and made offers of assistance, including an offer to pay Boson's legal costs.
>
> (2) The Claimants have also asked MP Bio for co-operation in obtaining assistance from Boson. MP Bio have agreed to assist and have also written to Boson.
>
> (3) Boson has stated it will not co-operate and has not responded to follow-up letters from the Claimants.
>
> (4) The Claimants have served Disclosure Certificates in respect of the Boson documents and explained why they are not in a position to provide inspection.
>
> (5) Boson is a Chinese Company and alternative means of obtaining disclosure responsive to the LOID are not available. For example, a third-party disclosure order is not available outside of the jurisdiction (see *Gorbachev v Guriev and others* [2022] EWCA Civ 1270 at 82 and 85).
>
> (6) In the circumstances, the Claimants may need to apply to the Court to reconsider its decision on control on the basis of new evidence as to Boson's cooperation (see paragraphs **Error! Reference source not found.** and **Error! Reference source not found.** above).
>
> 131. In the circumstances, the Claimant has sought the Court's assistance by way of a Disclosure Guidance Hearing. The Defendant has not responded to the Disclosure Guidance Application nor has it suggested

> any further steps that the Claimants could or should take. The Claimants would therefore be very grateful for guidance from the Court as to what, if anything, can be done.

88. Applications for guidance under paragraph 11 of PD 57AD are in my experience unusual.

89. They must be particularly unusual where neither party can suggest any guidance which might usefully be given.

90. On my own motion and experience, I cannot suggest any way of conjuring documents from a reluctant Chinese sub-sub-supplier which has not been considered by either Party.

91. I decline to give guidance, having none to give.

Directions in the Third Claim

92. The final matter in which I am asked to give directions relates to the Third Claim in which the Claimants allege that in the course of disclosure in the first and second claims they discovered breaches of the Defendant's procurement obligations.

93. The Claimants started separate proceedings in respect of the Third Claim in order to preserve the very strict limitation period applicable to procurement claims.

94. The parties are now agreed that it makes sense for the Third Claim to be brought together with the existing procurement claim by way of an amendment to the pleadings in the first claim, the original Procurement Claim.

95. I agree.

96. It is also now agreed between the parties that to the extent that the first and second claims survive the Defendant's strike out application (which, as set out above, they do) all three claims should be heard together.

97. I agree with the parties, not least because I do not see how quantum can realistically be determined without considering all three claims together.

98. In the event, the argument before me came down to whether the Third Claim should be heard with the first and second claims at the trial presently fixed to be heard in July 2025.

99. Unfortunately, if the trial cannot be held in July 2025, it will have to be held in June or July 2026, given the other trials already in the Court's diary.

100. As I indicated to the parties during the oral hearing, with much reluctance I have concluded that this trial cannot be got ready with fairness to both parties by July 2025.

101. The timetable starts with consideration of the date for service of a defence to the amended pleading. The difference between the Parties was small: 6 December or 16

December 2024. The significance of that difference was whether a reply could be served before the seasonal holidays.

102. In my judgment, it would be unjust to require the Defendant to plead to the new claim as early as 6 December 2024.

103. Even if that date were to be set, the next issue is disclosure.

104. Mr Bowsher suggested a Defence by 16 December: I have indicated that I accept that that date would be reasonable.

105. He then suggests the Reply would be served in early January 2025. On the supposition of a 16 December Defence, that is reasonable.

106. This then leads, on Mr Bowsher's submissions, to an agreed DRD at the beginning of February 2025. This is probably realistic.

107. This would then be followed by disclosure at the beginning of June 2025. I think this is a little too pessimistic, but not by a lot. Perhaps mid-May could be achieved.

108. It might be possible for production of witness statements to be progressed to an extent simultaneously with the disclosure process, but it could not be completed until disclosure had been completed.

109. Expert reports in their final form would have to follow disclosure and witness statements.

110. I do not see how this can be achieved in time for a July 2025 trial.

111. Accordingly, with considerable reluctance, I conclude that the July 2025 trial date must be vacated, to be refixed for June 2026.