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Case No.'s: BL-2020-000832

BL2020-000829

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 27 July 2021

Before :

Mr. Justice Fancourt

Between :

(1) Kathleen Jefferies
(2) Jake Robinson

Claimants

- and -

News Group Newspapers Ltd

Defendant

Sara Mansoori and Ben Hamer (instructed by Taylor Hampton Solicitors Ltd) for the
Claimants

Anthony Hudson QC and Ben Silverstone (instructed by Clifford Chance LLP) for the
Defendant

Hearing dates: 26th and 27th July 2021

Approved Judgment

Mr. Justice Fancourt :

1. I have before me applications by two claimants in the mobile telephone voicemail interception litigation (“MTVIL”), Mr Jake Robinson and Ms Kathleen Jefferies, against News Group Newspapers Limited, (“NGN”), for what in MTVIL is termed “claimant-specific disclosure”, to distinguish it from disclosure in relation to the generic claim brought against NGN.
2. These claimants and numerous others have brought claims against NGN for invasion of privacy in their private telephone messages (both left and received), with unlawful information gathering alleged to have led to the publication of articles about the claimants in the News of the World and The Sun newspapers.
3. For each individual claim relating to unlawful information gathering and articles published about an individual there is also a generic claim based on allegations of institutionalised phone hacking and unlawful information gathering followed by destruction and concealment of data in an attempt by NGN to hide the unlawful activity that had allegedly been going on. Proof of the generic claim, even if it does not relate to publications against the claimants specifically, will form the basis of a claim for higher and/or aggravated damages against NGN by each claimant.
4. There has been substantial rolling disclosure in relation to the generic claim. All the generic disclosure that has accumulated to date has been made available to each individual claimant. In the current tranche of MTVIL claims, there have been numerous applications for further generic disclosure, often based on information newly obtained by previous disclosure applications or by new witness evidence. That process is by and large completed, so far as the trial due to start in November this year is concerned.
5. What is outstanding is claimant-specific disclosure in relation to five claims by Mr Jake Robinson, Ms Kathleen Jefferies, Mr Paul Gascoigne, Dr Evan Harris and the Duke of Sussex.
6. In respect of all the other claimants, the basis of claimant-specific disclosure has now been agreed. Electronic disclosure has been by a process of agreeing search terms and custodians to be searched on a Relativity database. Hitherto the custodians have been in two categories. First, a list of “standard custodians” comprising individuals at NGN at the time (1996-2011), who came to prominence during the criminal trials and the early course of the civil litigation and were, therefore, considered appropriate custodians generally in relation all claimants’ allegations. Second, what are called “nexus custodians”, being those individuals other than the standard custodians, that individual claimants can show are likely to have had some involvement, small or large, conscious or unconscious, in the alleged unlawful information gathering in their cases, such that their emails received or sent may well have relevant information in them.

7. To date these persons have generally, though not exclusively, been executives, editors or managers in NGN and journalists, but these claimants seek to extend that to include administrators and assistants at various news desks at the newspapers, and personal assistants of some of the editors.
8. These groups of custodians are particularly important, the claimants say, because the data relating to more important persons alleged to have been knowingly involved in unlawful information gathering, including the editors of the newspapers at the time, have been destroyed. The claimants say deliberately destroyed.
9. Secondary sources of information captured in emails of staff, such as administrators working on news features or sports desks, are, therefore, potentially important to the claimants in seeking to prove their cases. That is because they may have been and in some cases are already shown by disclosed documents to have been involved in dealing with requests for payment from private investigators and “blaggers”, or in passing on or complying with instructions from journalists or editors.
10. The list of standard custodians for claimant-specific disclosure is now somewhat historic. It was created by, if not in, 2017 and was based on a list of names that had accumulated by about 2013, namely those who at a relatively early stage of the litigation in relation to the News of the World had had their data extracted from databases for the purpose of interrogation and search. Relatively fewer names for The Sun, only 10, were added in 2017.
11. The list of 64 standard custodians has remained constant since then, and most of the claimants have been content to have searches carried out in those names and in the names of nominated nexus custodians. Many claims in tranche 4 of the MTVIL, indeed all but the 14 claimants that remain, have settled on that basis. However, these five claimants are not content with that approach. They recognise that many, in some cases, most of the names on the standard custodians list were likely to have had no contact with the subject matter of their individual claims and so searches in those names were pointless. On the other hand, there were other names that they said should be searched as standard custodians, and they propose lists of nexus custodians that were different from the list that the defendant originally proposed.
12. Another material factor is the way that the generic claim has developed over the last three years. Greater generic disclosure has now placed more focus on the exercise of uncovering cash payments made to private investigators and “blaggers” for unlawful information gathering, which tend to show, it is argued, that NGN knew it was acting illegally on a large scale and tried to conceal what it was doing.
13. There is now, therefore, significantly more focus on the way that cash payments were allegedly channelled, with editorial approval, through different desks in the newspapers that were not necessarily linked to the desk that commissioned information for an article in dispute. As a result, the claimants now seek disclosure against some administrators and assistants rather than journalists and editors.

14. Search terms have been agreed in the cases of Robinson, Jefferies, Harris and Gascoigne, but not yet in the case of the Duke of Sussex, although based on previous cases it is likely that they will be in due course.
15. What is in dispute is the identity of custodians to be searched. These fall into two classes. First, identified custodians whose data has already been extracted and placed on the Relativity database and is, therefore, relatively easy to search. Second, identified custodians whose data has not yet been extracted, which would require a lengthier and more expensive process of extraction before carrying out searches.
16. It is suggested that the exercise of extraction, which is carried out by PricewaterhouseCoopers, not by NGN's solicitors, could take up to two weeks per five custodians and cost about £25,000 in total. But there was no specific evidence to support these figures or estimates, and the claimants say that the figures are inconsistent with previous estimates and the time periods implausibly long, though they also note that the expense is, in relative terms for this litigation, not great.
17. Given the shortage of court and judge time before the end of this term, it was agreed by the parties that rather than attempt and fail to resolve the applications of all five claimants in a day, two of them would be nominated by the claimants' lead solicitors in an attempt to have a sufficiently rigorous assessment of the evidence and arguments, and hopefully distil some principles or an approach that could then readily be applied to the other three cases so that they can be resolved by agreement too.
18. Having given a direction to that effect on 16 July, I was informed on 22 July, in the claimants' skeleton argument, that the Robinson case had just settled. I was also informed earlier in the week that it would not in any event be possible to deal with the other three claimants at the hearing yesterday and today because their counsel, Mr Sherborne, was not available for this hearing. The arguments on behalf of Ms Jefferies have been advanced at this hearing by Ms Sara Mansoori and opposed by Mr Anthony Hudson QC. The position is, therefore, that only the disputed custodians for Ms Jefferies remain to be determined today.
19. There were originally six "unextracted" custodians and eight "extracted" custodians. Of these, one unextracted custodian, Sarah Roberts, is said should be a standard custodian, and five extracted custodians, Emma Smith, Deborah Keegan, Cheryl Carter, Belinda Sharrier and Caren Cornwell are said should be standard custodians.
20. Things moved on since my directions on 16 July in another respect. NGN has now carried out the searches on the agreed search terms on all the extracted custodians for the Jefferies, Robinson and Harris cases, despite having opposed doing so for months. Why they chose to do so only at this stage has not been explained. Their evidence was that, although there have been positive hits as a result of the searches, no document identified was relevant to the claim. It then transpired, as a result of correspondence between the solicitors when the claimants asked for the search results, that there had been hundreds of positive hits on those

custodians but still allegedly no relevant documents. The number of hits does need to be reduced for false positives and so-called “family” hits, but there is still a significant number of positive results, particularly for certain proposed custodians.

21. NGN submits that the positive search results have been correctly tested for relevance, applying a generous test and that there is no reason to think that errors have been made, given that the nexus between the named custodians and Ms Jefferies is tenuous and in some cases non-existent. I accept that in some cases the negative result is unsurprising, but I am nevertheless a little surprised that, where other named custodians are concerned, not one of the many positive results has any relevance to the claims of Ms Jefferies, Mr Robinson or Dr Harris. This may well be correct, and Mr Hudson gave some examples of cases where there was plainly no relevance despite a correct positive hit. But I can see scope for a different approach to relevance on NGN's side from the claimants' side, where NGN is largely focused on the specific allegations in the claimant-specific particulars of claim relating to articles about the claimant or their associates, and the claimants are trying to piece together the jigsaw of NGN's alleged unlawful information gathering affecting the claimants and their associates.
22. The claimants criticise NGN's approach to relevance on the basis that it is looking for evidence on the face of the documents of either unlawful information gathering or material that relates to an article of which a claimant complains. The claimants say that relevance is much wider in this case because of the jigsaw approach needed as a result of the destruction of data, to seek to recreate what was happening at the time both generally and in individual cases. The claimants argue that there is relevance if the document contains information that may enable a claimant to add a piece to the jigsaw and, in particular, if it relates indirectly to unlawful information gathering from the particular claimant or their associates, even if not directly related to one of the articles.
23. NGN submitted that what was done was to apply a generous test for standard disclosure, and that the documents were reviewed by qualified lawyers for “any documents that could potentially be relied on by the claimants in their claims”. However, there was no evidence from NGN's solicitors as to the particular approach that they had taken in addressing the question whether documents could potentially be relied on by a claimant. NGN submitted that no order should be made for verification and, further, that the negative results should inform the decision on whether to order further extraction and searches in the names of other custodians.
24. The claimants submit that there is likely to have been a flawed approach to relevance and they point out that this has happened previously in this litigation, in 2017 and 2018, and that a sample of documents was required to be produced for inspection on those occasions, which revealed relevant documents that should have been disclosed and on the basis of which the managing judge then ordered production of all the positive search results, regardless of relevance. That is said to have been the same team at Clifford Chance that are now acting for NGN. The claimants, therefore, submit that this sampling should be ordered again and they provided a list of seven out of the total number of 15 extracted custodians across all three claims whose positive hits should be produced to the claimants.

25. I agree with the claimants that there is enough doubt to justify a limited process of verification of results because it is surprising if not one document out of hundreds has any relevance. I also agree with the claimants that a wider test of relevance is appropriate, and I am not clear that NGN's solicitors have been applying that wider test. The test is not whether a document on its face relates to an article of which a claimant complains or demonstrates unlawful conduct: it is sufficient if a document contains something relating to a payment to a contributor or supplier for a publication or intended publication, or for the acquisition of information, about a claimant or one of his or her associates.
26. However, I consider that the appropriate order to make is to require a senior member of NGN's solicitors team, not necessarily a partner, to review a quantity of the positive hits and then make a witness statement confirming that there are no documents to disclose or disclosing those that there are, and confirming accordingly whether the hits have been assessed in accordance with the principle that I have described and with a view to disclosing, as Mr Hudson put it, any document that could potentially be relied upon by the claimants in their claims.
27. The number of custodians to be reviewed in this way will be two for each of Ms Jefferies and Dr Harris, which the claimants may select. This process must be completed within seven days of nomination of the custodians. If it emerges that there are documents that should have been disclosed, the court will then consider what further order to make in terms of reviewing other samples, or all the remaining documents, or disclosing them all to the claimants.
28. Turning to the unextracted custodians, of whom there are six in the Jefferies claim, I bear fully in mind NGN's argument that the disclosure now sought is in addition to substantial volumes of other disclosure (not including emails on databases) that the claimants have already received, as well as all the generic disclosure. In my judgment, the following principles will apply in determining whether there should be an order for extraction of data and searching against the agreed search terms.
29. First, as to standard custodians, there is no reason for the identity of standard custodians to be ossified, and it may be that the list is out of date and needs reviewing later. Names on the list are supposed to be custodians that may well have relevant documents in any individual claimant's case, such that searching in their name is proportionate. The list of names should not be varied, unless the variation is appropriate generally, not just for the claims of particular claimants.
30. At this stage of trying the current tranche 4 claims, where only four claims still have live disputes about claimant-specific disclosure, it is not necessary or appropriate to change the approach or the list of standard custodians. The right approach is to see whether any of the six custodians, or other custodians in other cases, should be searched on the facts of the particular cases. Of course, until a review of the list of standard custodians is made, it is beneficial that the claimants indicate which of the standard custodians should not be searched and claimants should continue to do so.

31. Second, there is no presumption against administrative staff or assistants being either standard custodians or nexus custodians.
32. Third, where an administrator or assistant was dealing at the relevant time with payments or requests on the desk from which articles of which a claimant complains were commissioned, or from which a payment relating to an article about which the claimant complains was processed, that is a strong pointer in favour of searching in that person's name but not necessarily conclusive.
33. Fourth, where an administrator or assistant has dealt with a payment or request for payment in relation to an article about the claimant themselves, that is likely to be sufficient nexus absent some evidence as to why further relevant documents in that person's emails cannot be expected.
34. Fifth, in other cases, for example where there is evidence that a person has dealt with a payment relating to an article about an associate, the test is potential relevance in the broader sense that I have summarised above and then proportionality. The terms of paragraph 5.5 of CPR Practice Direction 31A are, in my judgment, apposite. I accept that a train of enquiry approach to disclosure is appropriate, given the allegations in and the nature of this case and the jigsaw exercise that the claimants have to conduct to find documents.
35. Sixth, however, evidence of involvement of a custodian in processing only one cash payment in respect of an article about an associate is not enough on its own to justify a search, unless there is a real likelihood of unlawful information gathering in relation to the claimant at the same time because of the strength of the association or the content of the article.
36. Seventh, there must always be potential relevance to the claimants' allegations of unlawful information gathering. It is not sufficient that the documents may be relevant to unlawful information gathering generally or only to an associate's own complaints.
37. Eighth, and finally, potential relevance can be established by other means, apart from evidence of involvement in payments for articles. It may be appropriate to search in someone's name if it can be shown that they were so centrally involved in alleged payments for unlawful information gathering that they may well have documents relating to a claimant's claim, even if no actual nexus can be established. That is, after all, the basis on which a list of standard custodians was originally produced.
38. Having identified those principles, I turn to the particular case of Ms Jefferies' custodians. The articles of which she complains range from 1996-2009. The last article about Prince Andrew on which she complains is dated 2002. All the articles on which she relies were, I am told, commissioned by the news desks of The Sun or the News of the World.
39. The individual custodians are the following.

40. First, Vicky Waite. She was a contributions assistant at The Sun on the news desk from 2001-2007 and then on the picture desk from 2007-2011. She is said to have processed a lot of payments to private investigators, including suspicious payments on the tab 87 and tab 6470 lists prepared by NGN. The only evidence relied on, in relation to Ms Jefferies, apart from this general picture, is that Ms Waite processed a cash payment for a story about Prince Andrew on 26 July 2006 concerning the spending of £6,000 on a short helicopter flight. The evidence is that Ms Jefferies was romantically involved with the Prince in the 1980s and has remained a close friend since, and that they were in close communication at the time of this article. There are no articles on which Ms Jefferies relies in 2006 but there are articles in 2004 and 2007.
41. It seems to me inherently unlikely that Ms Jefferies was involved in the helicopter article, but it is evidence that Ms Waite handled payments for an article about Prince Andrew. Ms Jefferies had a close relationship to the Prince at the relevant time, such that it is likely that she would have been seen as a potential means of finding out information about him and indeed a person of interest in her own right. Since Ms Waite was an assistant on the news desk for seven of the relevant years, there is, in my judgment, sufficient case made of a real possibility that her emails contain information relevant to Ms Jefferies' claim.
42. Second, Sarah Roberts. She was a contributions assistant on The Sun news desk 2008-2010 and then a news desk administrator in 2011. The evidence concerns one payment on 6 August 2010 for an article on the arrest of a suspect for a raid on Prince Andrew's home. Again, it is inherently unlikely that Ms Jefferies was involved in any way with that story. At that time, Ms Jefferies was engaged in litigation in the Court of Appeal concerning her child and articles about that were published at the time. Ms Jefferies does not complain about those articles but does complain in other respects about what happened to her at that time.
43. 2010 was almost a year after the last article on which Ms Jefferies relies and eight years after the last article relating to Prince Andrew on which she relies. By this stage, the connection with provision of information about Prince Andrew is rather tenuous but Ms Jefferies does appear by then to have been a subject of interest in her own right.
44. In my judgment, this custodian falls just on the wrong side of the line because of the timing of the article and the apparent disconnect at that time between the pursuit of stories about the Prince and stories about her.
45. Third, Alan Johnson. He was a contributions accountants assistant at The Sun between 2004 and 2011 and is alleged to have processed lots of payments of private investigators. The evidence establishes that he processed one payment on 31 August 2005 to a blagger for a "Prince Andrew enquiry". Ms Jefferies' mother had died in June 2005 and she says she was in close contact with the Prince at about that time. The nature of the payment is apparently for obtaining information from someone other than Ms Jefferies. I do not consider that there is enough in the limited facts here to conclude there is a realistic prospect of this custodian having relevant documents.

46. Fourth, Frances Carman. She was the news desk administrator at the News of the World from 1999-2011. She is alleged to have processed invoices for private investigators and authorised payments. All the News of the World private investigator invoices disclosed for Ms Jefferies are addressed to the news desk and so may well have gone through Ms Carman. NGN accepts that there is sufficient nexus between a claimant and desk editors in such circumstances, and it seems to me that to extend it to the desk administrator is a small incremental step. Although there is no link in terms of a disclosed invoice bearing Ms Carman's name, I consider that, by reason of her position on the news desk over all those years, it is likely that there will be relevant documents responsive to a search in her name.
47. Fifth, Lois Robinson. Ms Robinson was an assistant to the contributions clerks and to the desk administrator at The Sun from 2007-2008. She is alleged to have processed payments to private investigators and blaggers. She processed a payment to Paul Thompson, a journalist who is said to have used private investigators on 6 February 2008 for a story about Prince Andrew's tour to the United States. This is not an article about which Ms Jefferies complains and it does not relate to her in any way. It is said that this was a time when Ms Jefferies was being targeted by NGN. Mr Kuttner allegedly came to her hotel to doorstep her. That may be so, but there is no reason to think that this custodian might have further relevant documents.
48. Sixth, Fiona Spink. She was the deputy to the News of the World managing editor, Mr Kuttner, and had sign-off authority and approved many payments. She was also a point of contact for Mr Mulcaire. She approved two payments to Bradley Page in respect of Prince Andrew between 10 September 2000 and 10 October 2000. There is no evidence of what those payments relate to.
49. The Prince and Ms Jefferies are said to have been in communication at about that time, which is said to have been a traumatic time for Ms Jefferies owing to litigation in which she was embroiled. There was only one article complained of in relation to that and it was in May 2000. However, given that Mr Kuttner and Mr Mulcaire both had considerable interest in Ms Jefferies, and Ms Spink acted for both of them, I consider there is sufficient likelihood of some relevant documents being revealed by a search in her name.
50. For the reasons I have given, I consider that in relation to three custodians there is sufficient likelihood of their email data revealing some relevant documents.
51. I turn then to proportionality. The relevant factors seem to me to be the potential significance of this disclosure for Ms Jefferies' case, the potential significance of the data to be extracted for others' cases, the cost and time required to extract the data and conduct the searches, and what, if any, impact it will have on the parties' preparation for trial.
52. It is hard to assess the significance of the disclosure, because it is unknown what will emerge. But if documents relating to payments that relate to Ms Jefferies do emerge, they are likely to be of some significance in helping her to piece together the facts and establish her case. In each case the data will have to be extracted is relevant to the application of at least one other

claimant, Dr Harris, the Duke of Sussex or Mr Gascoigne, and in the case of Vicky Waite all three of them.

53. The cost will be relatively small, given that the cost for extracting up to 18 was estimated to be £25,000, and three can be done within the one to two-week estimate made by PricewaterhouseCoopers. Thereafter, as NGN has recently demonstrated, the search and review exercise can be done quickly. Although this will mean that disclosure will not be completed in Ms Jefferies' claim for some weeks, the parties have agreed that exchange of witness statements will be deferred until disclosure is complete and have already agreed later dates in September for witness statements in the Gascoigne and Duke of Sussex claims.
54. Although the disclosure will, therefore, be relatively late, it is not so late that it will prejudice preparation for trial in November. I therefore conclude that an order to extract the email data of Vicky Waite, Frances Carman and Fiona Spink and then search it using the agreed search terms is not disproportionate, and I will make that order.