Neutral Citation Number: [2020] EWHC 1689 (QB)

Case No: QB-2018-006323

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2020

**Before** :

**MR JUSTICE NICOL**

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**Between :**

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| **John Christopher Depp II** | **Claimant** |
| **- and -** | |
| **(1) News Group Newspapers Ltd.** | **Defendants** |
| **(2) Dan Wootton** | |

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**David Sherborne and Kate Wilson** (instructed by **Schillings**) for the **Claimant**
**Adam Wolanski QC and Clara Hamer** (instructed by **Simons Muirhead and Burton**) for the **Defendants**

Hearing dates: 25th June 2020

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# Approved Judgment

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

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MR JUSTICE NICOL

## Mr Justice Nicol :

1. I have set out the background to this libel action in my previous judgments.

2. The application presently before me is by the Defendants for a declaration that the claim stands struck out because of the Claimant's alleged failure to comply with my earlier 'unless' order for disclosure.

3. On 26th February I heard a pre-trial review. At that stage the trial was due to commence on Monday 23rd March 2020. Most of the hearing that day was occupied with an application by the Defendants for disclosure. In my judgment, handed down on 6th March 2020 I agreed that the application succeeded to some extent. The same day I made what I described as the 'disclosure order'.

4. Part of the Defendants' application concerned a libel action which Mr Depp had brought against his ex-wife Amber Heard in the state of Virginia, USA. As I have previously explained, the articles which give rise to the present libel action concerned their marriage and what was alleged to be physical violence by Mr Depp against Ms Heard. The Defendants have alleged that their article was true, and they rely substantially on a number of witness statements from Ms Heard in support of that plea. The Virginia libel action arises out of an article which Ms Heard wrote for the *Washington Post* and which Mr Depp alleges contained similar imputations of physical violence by him against her.

5. In respect of the Virginia libel action, a complication was said to have arisen in that some of the documents were protected by an order of the Virginia Court in favour of Ms Heard. My order of 6th March 2020 had to take account of this. The Claimant's solicitors had previously been Brown Rudnick, but on 11th February 2020 the Claimant instructed Schillings in their place.

6. My order of 6th March 2020 included the following at paragraph 3:

> 'In respect of all documents which have been disclosed by either party, or by any non-party, in the US Proceedings Depp v Heard (CL - 2019 0002911) ("the US libel claim documents"), in the event that the Defendants do provide to the Claimant's solicitors written notification from Amber Heard personally or through her lawyers that Amber Heard has provided her consent to disclosure of such documents pursuant to the Protective Order of Chief Judge Bruce D. White of the Circuit Court of Fairfax County in Virginia, USA dated 25 September 2019:
>
> > a. Within 48 hours of such notification the Claimant do provide a witness statement verified with a statement of truth from him personally confirming that he has provided all the US libel claim documents to Schillings;
> >
> > b. Within 72 hours from the step in paragraph 3(a) above, Schillings do confirm in a witness statement verified by a statement of truth that they have conducted a review of the US libel claim documents which have not yet been disclosed to the Defendants and ascertained which of those documents fall within the scope of CPR 31.6; and

> c. In so far as the Claimant has not hitherto disclosed to the Defendants any of the US libel claim documents which fall within the scope of CPR 31.6, the Claimant, through his solicitors, Schillings, do disclose all such documents by list, and provide copies of all such documents, within 72 hours of the step in paragraph 3(a) above.'

7. Ms Heard gave her consent (on which paragraph 3 of the Disclosure Order was dependent) on 8th March 2020.

8. On 10th March 2020 the Claimant applied for an extension of time within which to comply with various parts of the Disclosure Order. On 10th March 2020 I varied the Disclosure Order as follows.

   i) The time for compliance with paragraph 3 was extended to 13th March 2020 (see paragraph (5) of the order of 10th March 2020).

   ii) By paragraph (10) of the order of 10th March I said,

   > 'Unless the Claimant complies with ... (5) ... above the claim is struck out.'

9. On the present application, the Defendants accept that the Claimant made the witness statement required by paragraph 3(a) of the Disclosure Order and that Schillings made the witness statement required by paragraph 3(b) of that order, but, they submit, the disclosure which was made as a result of paragraph 3(c) of the Disclosure Order was incomplete.

10. The Defendants rely on the evidence of Jeffrey Smele, a partner in Simons Muirhead and Burton, the Defendants' solicitors. Mr Smele explains that he has been in contact with Charlson Bredehoft Cohen and Brown ('Charlson Bredehoft') who are the US attorneys instructed by Ms Heard for the purpose of the Virginia libel proceedings.

11. Charlson Bredehoft have informed Mr Smele that, no later than 18th February 2020 in the Virginia libel proceedings Mr Depp disclosed what is called 'an extraction report' which sets out, among other things, information regarding texts sent to and from the Claimant's mobile phone.

12. Some of the entries from the extraction report were included in the disclosure made by the Claimant in response to paragraph 3(c) of my disclosure order, but not a series of texts between Nathan Holmes and the Claimant which Mr Smele has called 'the Australian drug texts'. It is convenient for me to use that label, but I do so without, at this stage drawing any conclusion as to the significance of these text messages.

13. It is the Defendants' contention that these text messages fell within CPR r.31.6 because they were documents adverse to the Claimant's case and, to some extent, supported the Defendants' case and, in consequence the Australian drug texts came within r.31.6(b)(i) and (ii). The extraction report had, as I have said, been produced in the Virginia libel proceedings sometime before 18th February. Mr Wolanski QC for the Defendants submitted, without contradiction by Mr Sherborne for the Claimant, that they must have been in the Claimant's possession, custody or control.

14. Consequently, the Defendants contend that the Claimant failed to make proper disclosure of the Virginia libel trial documents and, as a result of paragraph (10) of my order of 10th March 2020, the claim is struck out.

15. Mr Sherborne's contention in summary is that the Australian drugs texts were not disclosable under r.31.6, there has been no failure to comply with the 10th March order and, therefore, the Defendants' application should be refused.

16. That was the shape of the argument which I heard at the hearing on 25th June 2020. However, Mr Sherborne intimated that, if I was against him and found that the Claimant was in breach of the order of 10th March, the Claimant would expeditiously apply for relief from sanctions. The adjourned trial is due to start on 7th July 2020. Plainly, any such application would need to be made very fast. Mr Sherborne would need to know whether his argument today had succeeded before the Claimant made such an application. I asked him what would be a reasonable time for the application notice to be served (at least in draft) together with any evidence in support. Mr Sherborne suggested 36 hours after the draft of this (reserved) judgment was distributed. Mr Wolanski did not object to that time scale which I also agree would be reasonable.

17. Rule 31.6 states,

> 'Standard disclosure requires a party to disclose only –
>
> (a) The documents on which he relies; and
>
> (b) The documents which
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction.'

18. Mr Sherborne relied on *Shah v HSBC Private Bank Ltd* [2011] EWCA Civ 1154 in which the Claimant was claiming compensation from the bank for its delay in executing certain transactions. The Bank's position was that the delay was required by the Proceeds of Crime Act 2002 because it suspected money-laundering. The Claimant wanted to know the identity of the bank officials who had suspected money-laundering. The bank had disclosed the nature of the information but had redacted the names of the officials. At first instance Coulson J. held that the names of the officials were disclosable but public interest immunity allowed the bank to conceal their names. The Court of Appeal concluded that the names were not disclosable under r.31.6 and the issue of public interest immunity did not therefore arise.

19. Importantly, the case is a reminder that the test for standard disclosure under the CPR is narrower than the rules relating to discovery under the Rules of the Supreme Court.

20. The Court quoted from Lord Woolf's report which led to the CPR (at [32]) and which now appears in the commentary in the White Book at 31.6.3 (though, as the Court observed somewhat laconically, 'without attributing its source'). Coulson J. had asked himself whether the names of the Bank employees were 'relevant'. The Court of Appeal observed that the word 'relevant' does not feature in r.31.6. Since the CPR constituted a deliberate move away from earlier authorities (such as *Companie Financiere et Commerciale v Peruvian Guano Co* (1882) 11 QBD 55) it was dangerous to rely on authorities which pre-dated the CPR - see for instance [23]. Mr Sherborne submitted that the effect of *Shah* was that it was insufficient that a document *may* assist the opposing litigant: it must do so [28]-[29].

21. Mr Sherborne also argued that a party's 'case' was to be derived from the pleadings rather than the witness statements. The essential issue in this case, he submitted, was whether Mr Depp had subjected Ms Heard to physical violence. The defence of truth on which the Defendants rely will turn on that question.

22. I did not understand Mr Wolanski to dispute these propositions of law, although he did comment that it was not necessary that the document in question conclusively proved the case of the party receiving disclosure. In this regard, I agree with Mr Wolanski. I note that the report of Lord Woolf described the second category of documents covered by the RSC (and which Lord Woolf intended should still be covered by the CPR) as,

> '*Adverse documents*: these are documents which *to a material extent* adversely affect a party's own case or support another party's case. [my emphasis].'

23. The Re-Amended Defence pleads, as I have said, that the words complained of were true in the meaning that,

> 'the Claimant beat his wife Amber Heard causing her to suffer significant injury and, on occasion leading to fearing for her life.' (Re-Amended Defence paragraph 8).

24. The third sentence of paragraph 8.a of the Re-Amended Defence pleads,

> 'Throughout the relationship the Claimant was controlling and verbally and physically abusive to Ms Heard particularly when he was under the influence of drink and/or drugs.'

25. Particulars are then given of 14 incidents. These include alleged assaults of Ms Heard by the Claimant while they were in Australia in March 2015 – see Re-Amended Defence paragraphs 8.a.8-8.a.11 together with further details in the Confidential Schedule to the Re-Amended Defence. The Defendants allege that these incidents began on or around 3rd March 2015. At 8.a.8 it is pleaded,

> 'The Claimant subjected Ms Heard to a 3-day ordeal of physical assault which left her with injuries including a broken lip, swollen nose and cuts all over her body. On the first day there was an argument about the Claimant's drug use after the Claimant took out a bag of MDMA (ecstasy) and Ms Heard confronted him about his drug-taking. The Claimant argued that MDMA was not on his "not allowed" list which Ms Heard disputed.'

26. In his Re-Amended Reply the Claimant denies that he ever subjected Ms Heard to physical violence. He has never done more than grab her arms to restrain her from hitting him which, the Claimant says, she often did. He denies the third sentence of paragraph 8.a of the Re-Amended Defence (which I have quoted above) – see Re-Amended Reply paragraph 2.2.

27. The Claimant responds specifically to the allegations that he assaulted Ms Heard in Australia. He admits that they travelled together to Australia in March 2015, but the allegations in paragraphs 8.a.8-8.a.11 are otherwise denied – see Re-Amended Reply paragraph 2.2H. In connection with drugs, the Claimant pleads at paragraph 2.2H4,

> 'For the avoidance of doubt, it is expressly denied that the Claimant took MDMA, that Ms Heard found a bag of MDMA or that there was any conversation about MDMA.'

28. The Claimant pleads (see Re-Amended Reply paragraph 2.2H1) that the incident in which his finger was injured took place on 8th March 2015 and was preceded by an argument with Ms Heard concerning his wish to enter into a post-nuptial agreement with her. The pleading says, 'This caused Ms Heard to go into a prolonged and extreme rage.'

29. Although both Mr Wolanski and Mr Sherborne referred me to various passages in the witness statements of the Claimant and Ms Heard, I note that the White Book says at 31.6.3,

> 'Whether a document falls within [the first two categories of Lord Woolf's summary and of which disclosure was still intended to be required under the CPR] is to be judged against the statements of case and not by reference to matters raised elsewhere, including in witness statements *Paddick v Associated Newspapers Ltd* [2003] EWHC 299 (QB).'

I respectfully agree with that observation. When this judgment was circulated in draft, Mr Wolanski commented that he had only been able to read *Paddick* after the hearing (it had not been cited in advance of the hearing and was not available at the hearing itself) and he did not accept that it correctly stated the law. However, he recognised that this did not affect my judgment. I, therefore, simply note his reservation.

30. I turn to the Australian drug texts. These were all between the Claimant and a Nathan Holmes, whom Mr Smele describes as the Claimant's assistant. The texts on which the Defendants rely were exchanged between Mr Holmes and the Claimant between 25th February and 7th March 2015.

31. Mr Smele exhibits to his witness statement the extraction report which shows, as well as the content of the texts, the date and time on which they were sent (and whether by Mr Holmes or by the Claimant), and the date and time on which they were read.

32. Mr Wolanski took me through the texts on which he relied for the proposition that these were either adverse to the Claimant's case or supportive of the Defendants' case. It is not possible to go through each of the texts individually, particularly as it is important for the draft of this judgment to be distributed as soon as possible in view of

the imminence of the trial as well as the other outstanding matters which need to be addressed before then, if indeed the trial is to proceed.

33. Instead, it is sufficient for me to identify the reasons why Mr Wolanski submits that the texts ought to have been disclosed and selectively illustrate the points he seeks to make. I shall, of course, turn later to what Mr Sherborne had to say about them.

34. It was Mr Wolanski's case that the texts show the Claimant asking Mr Holmes to provide him with MDMA pills. He gives the example of text 30 sent by the Claimant on 27th February 2015 saying,

> 'Disappearer!!! We should have more happy pills!!!?? Can you???'

35. Mr Holmes quickly replies (text 31),

> 'Yes we can !! I'm giving them to Stephen to give you. Yay xx'

36. On 2nd March 2015 the Claimant texts Mr Holmes asking,

> 'Where is the other one?'

37. Mr Holmes replied immediately (text 44),

> 'There was two G in that jar. Are you out? The guy only carried 2 a day and more tomorrow. He said it's because if he's caught with more than 2 it's 20 years in prison .... I can try another guy and get one more for when you pick Malcolm up.'

38. This was immediately followed by text 45 in which Mr Holmes said, 'I'm going to meet the man now you will have it when you get here.' And text 46, in which Mr Holmes said, 'Then I'm getting more in the morning'. One second later the Claimant texted 'Go'.

39. However shortly after that in a series of texts (48-52) Mr Wolanski submitted, the Claimant appeared to be exasperated and impatient with Mr Holmes. In text 52 he said,

> 'Fucking give me the goddam numbers. I'll take care of this shit!!! Don't bother.'

40. As part of what appears to be Mr Holmes' attempt to placate the Claimant, he says at text 54,

> 'Where are you now? If they don't have it, I can't get it. It's someone that works on the film not a professional dealer. I will bring it to you.'

41. Mr Holmes tries to apologise at text 72 and says he is sorry. The Claimant responds at text 73,

> 'No you're not. Why?? That is not a part of the job description. And I'm telling you now. Any ONE of ANY of you guys start to lecture me. (and text 74 continues) I just do not want to hear it [Claimant's emphasis.'

42. The Claimant appears to continue this theme at text 77 saying,

> 'I'm a grown man and I will NOT BE JUDGED [Claimant's emphasis].'

43. And in a series of texts (79-82) the Claimant says,

> 'AND I WILL NEVER EVER LIVE IN THIS WORLD CAGE ANY LONGER. [Claimant's emphasis]'.

44. On 7th March 2015 the Claimant texted Mr Holmes,

> 'Also ... May I be ecstatic again??? Helps ... color me deceased.'

45. A little later and still on 7th March the Claimant texted Mr Holmes (text 105),

> 'Need more whitey stuff ASAP brotherman ... and the e-business!!! Please I'm in a bad bad shape. Say NOTHING to NOBODY!!!!'

46. Mr Wolanski submitted that these texts were adverse to the Claimant's case on the pleadings and supportive of the Defendants' case because:

i) They tended to show that the Claimant was seeking a supply of ecstasy shortly before the journey to Australia and, very likely, had obtained that drug.

ii) They also tended to show that the Claimant was seeking a supply of cocaine ('whitey') at about the same time and felt he was in urgent need of it.

iii) They tended to show the Claimant's exasperation when challenged about his use of drugs which supported Ms Heard's account in paragraph 8.a.8 of the Re-Amended Defence.

iv) The timing of the texts was significant. They all took place a few days before the pleaded assaults in Australia, whether the incident in which the Claimant cut his finger was as the Claimant said on 8th March or a little earlier.

47. Mr Sherborne submitted that none of the texts contradicted the Claimant's pleaded case or, in terms, supported the case of the Defendants. Furthermore, if the disclosure obligation was as wide as the Defendants submitted, it would be disproportionate, given that the central issue in relation to the truth defence was whether the Claimant had beaten Ms Heard and none of the Australian drugs texts were directly concerned with that issue. Further, so far as the texts spoke of the Claimant trying to acquire cocaine, this was irrelevant since the Claimant's alleged use of cocaine was no part of the Defendant's pleaded case.

48. Mr Sherborne submitted the Claimant has not denied that he took drugs and that he did so and drank during their relationship. He refers me to the following in the Claimant's 2nd witness statement (his trial witness statement) which includes,

> '20. It has been well-reported and I have been open about my challenges with alcoholism and addiction throughout my life....
>
> 21. My addiction over the years has been to Roxicodone pills. ...

> 22. I have taken other drugs in my life and I did take other drugs during the course of our relationship but I never suffered addiction with those drugs...
>
> 25. After this, for the most part of our relationship with very occasional lapses I would use marijuana and drink wine... At times we took drugs together: MDMA mushrooms and cocaine. However these were not common occurrences....'

49. Mr Sherborne submitted that it could not be said that anything to do with drugs was disclosable under r.31.6. He also emphasised that the overriding objective meant that the obligation to make disclosure had to be considered through the prism of proportionality. The *Shah* case had emphasised that the obligation of disclosure was narrower under the CPR than it had been previously. He submitted that the texts between Mr Holmes and the Claimant did not bear on any of the issues on the pleadings. The texts may have shown that the Claimant was trying to acquire MDMA, but they did not show that he had succeeded. Still less did they show (as the Defendants allege) that he had a bag of MDMA pills with him and that this was the cause of the argument between the Claimant and Ms Heard. Given the Claimant's past problems with drugs, it was not surprising that he was making inquiries about possible sources of drugs.

50. In my judgment the Defendants are right. The Australian drug texts were adverse to the Claimant's pleaded case and / or were supportive of the Defendants' pleaded case.

i) I agree that the timing is significant. The exchanges with Mr Holmes began shortly before the alleged incidents in Australia. Even if the Claimant is correct about the date when he suffered injury to his finger, they continued up until 7th March, i.e. the day before the date on which the Claimant says his finger was injured.

ii) As I have said, it is not necessary that the documents in issue demonstrate the falsity of the disclosing party's case or the truth of the receiving party's case. It is sufficient, as Lord Woolf said in his report, if the documents 'to a material extent' adversely affect the disclosing party's case or support the case of the receiving party. I agree with Mr Wolanski that the Australian drug texts do this. They do so in the ways that Mr Wolanski has submitted.

iii) I have applied the test in r.31.6 and not the earlier authorities.

iv) I do not accept that it would disproportionately extend the duty of disclosure to treat it as extending to the Australian drug texts. Substantial resources have been devoted by both parties to this litigation which they both, understandably, regard as important. In my judgment which led to the Disclosure Order, I specifically recognised that the US litigation between the Claimant and Ms Heard might have yielded documents which were disclosable in the present proceedings. I do *not* say that the texts were disclosable in these proceedings because they had been disclosed in the Virginia libel action. I had no evidence about the tests which would be applied by the courts of Virginia to determine a party's obligation to disclose or discover documents, but the overlap of subject matter of the two sets of proceedings meant that suitable checks needed to be made and paragraph 3 of my order of 6th March 2020 provided what I considered to be an appropriate system for doing that.

v) I do not agree with Mr Sherborne that the texts regarding cocaine are immaterial to the pleaded cases. References to cocaine (or 'whitey') are not infrequent. In any event, the third sentence of paragraph 8.a alleges more generally that the incidents of violence sometimes followed the Claimant's consumption of drugs (or alcohol). That allegation is not limited to MDMA. The Claimant has denied that sentence in paragraph 2.2 of his Re-Amended Reply.

vi) I also agree with Mr Wolanski that the Claimant's response to what he saw as Mr Holmes lecturing him is supportive of what the Defendants say was his reaction to Ms Heard confronting him about his possession of a bag of MDMA pills.

vii) I have decided this application, as I am required to do, by reference to the parties' pleaded cases. I make it clear that, if and so far as the witness statements are relevant to the present exercise, my decision would have been the same.

51. In reaching this decision, it has not been necessary for me to make any finding regarding the Defendants' allegations as to the Claimant's earlier non-compliance with his disclosure obligations. They were denied by the Claimant.

## Conclusion

52. For all of these reasons I agree with the Defendants that the Claimant failed to comply fully with the obligation in paragraph 3(c) of my order of 6th March 2020.

53. The Defendants have sought a declaration that the case is therefore struck out because of the provisions of paragraph 10 of my order of 10th March 2020.

54. I am not going to make such a declaration at this stage since, as I have said, Mr Sherborne intimated that, if I was against the Claimant on the issue of whether there had been a breach of the disclosure obligation, the Claimant would wish to apply for relief against sanctions. The parties agreed that in circumstances where the trial was imminent it would be reasonable to require any such application to be served in draft, together with any evidence in support, no later than 36 hours after this judgment is distributed in advance. In the event that no such application is made within that time scale, I make it clear that the Defendants have permission to restore their application notice.

55. If the Claimant does apply for relief from sanctions, I will hear that application on Monday 29th June 2020. If necessary, time will be abridged for me to do so. On Monday I shall also wish to deal with any other outstanding pre-trial matters.