Neutral Citation Number: [2020] EWHC 505 (QB)

Case No: QB 2018 006323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Media and Communications list

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2020

Before :

MR JUSTICE NICOL

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Between :

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

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- -

Eleanor Laws QC and David Sherborne (instructed by **Schillings International LLP**) for the **Claimant**
Sasha Wass QC, Adam Wolanski QC and Clara Hamer (instructed by **Simons Muirhead & Burton LLP**) for the **Defendants**

Hearing date: 26th February 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. The Claimant is an actor. The 1st Defendant is the publisher of the *Sun* newspaper and its associated website. The second Defendant is a journalist employed by the *Sun*. The Claimant has brought this action for libel over articles published on the website beginning on 27th April 2018 and in the *Sun* newspaper on 28th April 2018. The Claim Form was issued on 1st June 2018 and Particulars of Claim were served on 13th June 2018. The original defence was served on 11th July 2018 and the original Reply was served on 20th July 2018. The trial is listed to start on 23rd March 2020 with a 10 day time estimate.

2. On 26th February 2020 I held the pre-trial review. By consent, I gave permission to the Defendants to re-amend their defence. The Claimant had already prepared and served a draft Re-Amended Reply, I made a number of other decisions at the hearing. It is not necessary to say more about them. Much of the time at the hearing was taken up with the Defendants' application for disclosure. I reserved my decision on that issue which I now determine.

3. The online article was originally published under the headline 'Gone Potty: How can JK Rowling be "genuinely happy" casting wife beater Johnny Depp in the new Fantastic Beasts film?' By 28th April 2018 the headline of the online article had been changed to 'Gone Potty: How can JK Rowling be "genuinely happy" casting Johnny Depp in the new Fantastic Beasts film after assault claim?' ('the amended headline') The print copy of the article in the 'Sun' was under the same amended headline and was in substantially the same terms.

4. The Claimant pleads that the meaning of all the articles was as follows,

> 'the Claimant was guilty, on overwhelming evidence, of serious domestic violence against his then wife, causing significant injury and leading to her fearing for her life, for which the Claimant was constrained to pay no less than £5 million to compensate her, and which resulted in him being subjected to a continuing court restraining order; and for that reason is not fit to work in the film industry.'

5. It is clear from the articles that 'the Claimant's then wife' is a reference to Amber Heard who is herself an actor and who was married to the Claimant between 2015-2017.

6. The principal substantive defence on which the Defendants rely is that of truth as contained in Defamation Act 2013 s.2. The meaning which the Defendants will seek to prove is true is that the Claimant beat his wife Amber Heard causing her to suffer significant injury and on occasion leading her to fearing for her life. This defence was pleaded in the original defence of July 2018, although the number of incidents of violence on which the Defendants relied was then much fewer. The Amended Defence was filed and served on 21st June 2019. This added substantially to the number of incidents on which reliance was placed. The draft Re-Amended Defence of 13th February 2020 adds a further alleged incident and amends the detail of some of the others. The Claimant in his draft Re-Amended Reply denies that the articles were true in the meaning alleged by the Defendants. In his Reply, he alleges that it was Ms Heard who assaulted him. It is plain that the truth of the allegations that the Claimant assaulted Ms Heard will be a contested matter at trial.

7. The Defendants' disclosure application notice was issued on 19th February 2020. It was supported by the 3rd witness statement of Louis Charalambous of the Defendants' solicitors, Simons Muirhead & Burton ('SMB' dated 19th February 2020). The Claimant relied on the witness statement of Jenny Afia, of Schillings, who are now the Claimant's solicitors, having taken over from Brown Rudnick on 12th February 2020.

Disclosure to date

8. On 20th June 2019 Master McCloud ordered that there be standard disclosure by exchange of lists by 6th September 2019. Requests for inspection were to be made within 7 days of service of the list and complied with by 7 days thereafter. Master McCloud's order was extended by agreement to 13th September 2019.

9. By CPR r.31.10(5) the list made on disclosure must include a disclosure statement. The prescribed contents of the disclosure statement are set out in r.31.10(6),

> '(6) A disclosure statement is a statement made by the party disclosing the documents –
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> > (a) setting out the extent of the search that has been made to locate the documents which he is required to disclose;
> >
> > (b) certifying that he understands the duty to disclose documents; and
> >
> > (c) certifying that to the best of his knowledge he has carried out that duty.
>
> (7) Where the party making the disclosure statement is a company, firm, association or other organisation, the statement must also –
>
> > (a) identify the person making the statement; and
> >
> > (b) explain why he is considered an appropriate person to make the statement.'

10. Rule 31.10(9) allows a person who is not a party to make the disclosure statement where this is permitted by a Practice Direction. Practice Direction 31A paragraph 4.7 authorises an insurer or the Motor Insurer's Bureau to sign the disclosure statement in certain circumstances that are not relevant here. Paragraph 4.4 of the Practice Directions says,

> 'If the disclosing party has a legal representative acting for him, the legal representative must endeavour to ensure that the person making the disclosure statement (whether the disclosing party or, in a case to which r.31.10(7) applies, some other person) understands the duty of disclosure under Part 31.'

11. As Blackburne J. said in *Arrow Trading and Investments Est 1920 v Edwardian Group Ltd. (No2)* [2004] EWHC 1319 (Ch), [2004] BCC 955 at [45],

> 'The purpose of the rule is to bring home to each party his or her individual responsibility for giving standard disclosure. Except to the extent permitted by the rules, it requires the party himself to make the disclosure statement. This clearly

> has not happened. The petitioners are entitled to complain that it is not. It is not a mere technicality.'

12. It is the Claimant who was obliged by the order of Master McCloud to give disclosure. Accordingly, it was he who was required to make the disclosure statement. However, the disclosure statement which accompanied the Claimant's list on 13th September 2019 was not signed by the Claimant, Mr Depp. It was signed instead by Brown Rudnick. The statement had also been modified to say,

> 'I certify that I understand the duty of disclosure and to the best of my knowledge the Claimant has carried out that duty. I further certify that the list of documents set out in or attached to this form, is a complete list of all the documents which are or have been in the Claimant's control and which he is obliged under the order to disclose.'

13. SMB wrote to Brown Rudnick on 4th October 2019 *inter alia* objecting to this form of disclosure statement. Brown Rudnick did not suggest that they were entitled to sign the disclosure statement in the manner that they did, but said that SMB would be provided with a disclosure statement signed by the Claimant as soon as possible. The Claimant did eventually provide a signed disclosure statement, but not until 9th January 2020.

14. The disclosure which the Claimant did provide on 13th September included a spreadsheet said to contain about 400 text messages. When the spreadsheet was examined by SMB, it was also found to contain approximately 70,000 further messages. In their letter of 4th October 2019 SMB said that these had been examined 'to ascertain whether they had been included as an "obvious mistake"'. They had concluded that some were because they related to a business dispute with another party. Brown Rudnick were asked to confirm the position. That evening and in a follow up letter on 7th October 2019 Brown Rudnick confirmed that the additional text messages had been included by mistake and asked SMB to delete them. Brown Rudnick said that some of the wrongly disclosed messages were protected by legal professional privilege and they were unhappy with SMB's approach, but there is no further application for me to consider in relation to that particular matter.

15. The Claimant made supplemental disclosure on 6th November and 23rd December 2019 and on 13th, 24th, 29th and 30th January 2020 and on 3rd and 20th February 2020. The Defendants gave supplemental disclosure on 14th February 2020. There were other complaints about the Claimant's disclosure process, but, so far as relevant, I can address these below.

The Defendants' application for disclosure

16. It is convenient to consider this category by category. Before doing so, it is relevant to note that there are other relevant proceedings in the USA. First, Ms Heard initiated divorce proceedings against Mr Depp in May 2016 in Los Angeles ('the divorce proceedings'). Second, I was told that Mr Depp had also brought defamation proceedings against Ms Heard. These appear to have been prompted by an article in *The Washington Post*. ('the US defamation proceedings'), but the US defamation proceedings were against Ms Heard and not the newspaper. I was told that the US

defamation proceedings were ongoing. The trial of the US defamation action might be in August or September 2020.

Audio recordings of conversations between the Claimant and Ms Heard

17. Mr Charalambous, a partner in SMB, received an email on 5th February 2020 from Adam Waldman. Mr Waldman is a US lawyer in The Endeavour Partnership and is one of Mr Depp's lawyers in the US. His email said,

> 'It's Adam Waldman writing.
>
> When we last met, you said "amber heard would have to be gone girl" for her abuse allegations to be false. One audio tape alone (plus frankly a mountain of other evidence) has shown her to be so. There are more tapes to come. I assume you were blind sided by these tapes, which Ms Heard has admitted she possesses, because she didn't provide them to you.
>
> If you would like to discuss a way out of the morass for your client, please call me [and a phone number was added].'

18. Schillings initially suggested that, as an offer to compromise, Mr Waldman's email was a form of without prejudice correspondence, but any argument that it is therefore inadmissible has not been pursued.

19. Mr Charalambous says that the reference to an audio tape recording was to a tape which had been provided to the US publisher of *Mail Online* and which had formed the basis for an article on its website on 31st January 2020 under the headline 'Exclusive: "I can't promise I won't get physical again, I get so mad I lose it." Listen as Amber Heard admits to "hitting" ex-husband Johnny Depp and pelting him with pots, pans and vases in explosive audio confession.' According to the article, the recording was of a 'two hour therapy session recorded consensually on Heard's phone.'

20. The same day that Mr Charalambous was emailed by Mr Waldman (5th February 2020) a second article appeared in *Mail Online* under the headline 'Exclusive: "See how many people believe you." Listen as Amber Heard scoffs at Johnny Depp for claiming he's a domestic violence victim, suggesting a court would take her side because she's a slender woman in explosive audio'. This article said that it was based on recordings of conversations between the Claimant and Ms Heard.

21. Mr Charalambous in his witness statement submitted that these audio recordings had not been included in the Claimant's disclosure (until very recently), but should have been. He believes that it is the Claimant who has been responsible for leaking the tapes to *Mail Online* and, furthermore, there may be more such tapes which would be relevant to the issues in the present claim.

22. In her witness statement in response dated 21st February 2020, Ms Afia, of Schillings says,

    i) Mr Waldman received two audio recordings on 27th January 2020.

    ii) He did not possess them prior to that.

iii) He received only those two recordings, not others.

iv) The first recording, if not both, was made by Ms Heard.

v) The Claimant does not hold and has never held any of these recordings.

vi) The two audio tapes were disclosed to the Defendants on 20th February 2020.

vii) Ms Afia understands that Ms Heard's legal representatives have confirmed that they hold the tapes and, therefore, so far as there are any others they are in the possession or control of Ms Heard who has been providing evidence to the Defendants. There is therefore no purpose in requiring the Claimant to disclose them (even if he had any others).

23. On the Defendants' behalf submissions were made by Mr Wolanski QC. He submits that there are more tapes to come. He asks me to note the following:

i) The first article in the *Mail Online* referred to a 'series of taped conversations.'

ii) Later in the article it is said, 'It is understood there are several more tapes out there, each promising further bombshells as the former lovers trade blood-curdling allegations of domestic violence in a civil defamation case brought last year by Depp.'

iii) Still later in the first article it is said, 'Amber Heard recorded multiple conversations between her and Johnny Depp. Depp's attorney Adam Waldman told DailyMail.com in statement. "The tapes containing Amber Heard's chilling confessions of violence further expose and destroy her abuse hoax"'.

iv) The second article said, 'It's understood that she [Amber Heard] and Depp routinely recorded conversations consensually during the breakdown of their marriage, paving the way for yet more bombshell recordings to emerge.'

v) Later in the second article it was said that the tape had been provided to Ms Heard's legal team, suggesting, Mr Wolanski submitted, that it had been unnecessary for the paper to supply Mr Waldman with the tape because he was their source.

vi) Ms Afia's witness statement needs to be read carefully for its limits. Sub-paragraphs (i), (ii) and (iii) in paragraph 22 above concern Mr Waldman. We are told that he received the two recordings on 27th January 2020, and he did not have those recordings prior to that date. We are not told whether he has received any subsequently. Sub-paragraph (v) is referring to the Claimant. We are told he does not hold and has never held any of these recordings. Mr Wolanski asks me to note that 'these' recordings refer to the two audio tapes which have been disclosed. Ms Afia's witness statement is silent as to whether the Claimant (as opposed to Mr Waldman) has any further tapes. There is no witness statement from the Claimant himself on this topic.

vii) Ms Afia exhibits Schillings' third letter to SMB of 20th February 2020 in which Schillings say, 'For the avoidance of doubt, our client does not have (and has never had) the two tapes in his personal possession.' The reference to 'personal

possession' must be, Mr Wolanski submits, a contrast to documents which are within his control and to which the duty of disclosure extends (see CPR r.31.8), so there is a further gap in the evidence from the Claimant as to whether other tapes may be within the Claimant's control if not in his personal possession.

viii) Ms Afia's reference to Ms Heard having access to the tapes is nothing to the point. While she has provided a witness statement which the Defendants have served, she is not a party to the litigation. Accordingly, she does not, but the Claimant does, have disclosure duties.

24. Mr Sherborne, who made submissions regarding disclosure on the Claimant's behalf, argued:

i) The two tapes referred to in the *Mail Online* articles had been disclosed.

ii) Whether or not there were other tapes 'out there' was immaterial. The Defendants had to show reasonable grounds for believing that the Claimant had them in his control. The Defendants could not do so.

iii) Nowhere on the tapes that have been found does the Claimant admit to hitting Ms Heard.

iv) In addition, disclosure would only be ordered if it was necessary in the particular case (see for instance White Book 2019 paragraph 31.0.1). The overriding objective in CPR r.1.1 also requires the Court to consider the proportionate cost of any case management direction. Since the Defendants could get these tapes (if such exist) from their witness, Ms Heard, it is neither necessary nor proportionate to require the Claimant to disclose them.

v) In any case the draft order is far too wide since it seeks disclosure of all recordings which include the voice of Amber Heard (whether or not they also include the voice of the Claimant) and irrespective of the topic on which she is speaking.

25. I agree with Mr Wolanski that the Claimant should be required to make some further disclosure in relation to audio tapes.

i) I agree with him that it is relevant that the articles in *Mail Online* speak of 'tapes' in the plural as a 'series' of conversations, since that gives grounds to believe that what has so far been disclosed may not be the entirety of the relevant tapes which exist.

ii) Mr Sherborne is, of course, right that it is insufficient for the Defendants to show that there are grounds to believe that there are further tapes 'out there': they must show that there are grounds to believe that there are such tapes within the Claimant's control. However, in my view, Mr Wolanski has overcome that hurdle. After all, the recordings were in part apparently of conversations between the Claimant and Ms Heard. It was also Mr Waldman, the Claimant's American lawyer (or one of them), who came into possession of two of the tapes. I am also persuaded by Mr Wolanski's submissions that the evidence on the Claimant's behalf does not satisfactorily address the matter.

iii) I also agree with Mr Wolanski that it is nothing to the point that the Defendants may have (through Ms Heard) an alternative route to obtaining these tapes. She is not a party to this litigation and cannot be compelled to provide them. The Claimant is a party to the litigation and, in accordance with the order of Master McCloud, it is his duty to provide disclosure.

iv) As Mr Wolanski was inclined to agree in reply, the order as presently drafted is too wide. It cannot extend beyond tapes which are germane to the issues in the case. Mr Sherborne is right that the draft order would require the Claimant to disclose tapes whether or not that was the case, but this could be addressed by inserting into paragraph 1(a) of the draft order wording on the lines of 'so far as required by CPR r.31.6'.

v) I also do not see the justification for subparagraph b of the draft order ('stating when the recording came into existence and by what means they came into existence'), nor for subparagraph c ('stating when the Claimant first came into possession or control of the recordings').

vi) The duties on standard disclosure include the duty to disclose documents on which [the party making disclosure] relies – see CPR r.31.6(a) and so it is no complete answer that the tapes which Mr Waldman obtained assist the Claimant's case, rather than the Defendants'.

vii) Given the approaching trial, there is an urgency to this process, but the timings in the draft order for paragraph 1(a) and 2 were, presumably, based on a decision being given at the hearing. There will need to be some adjustment in view of the fact that this is a reserved judgment.

Text messages

26. This part of the draft order in summary would require the Claimant personally to make a witness statement describing the steps which he has taken to search for text messages in the period 1st January 2012 – 31st May 2016 whether to or from Ms Heard or third parties, stating whether any text messages have been deleted and whether all text messages found have been passed to Schillings. The draft order would then require Schillings to review the text messages which the Claimant provides and disclose to the Defendants those text messages which fall within r.31.6 and which have not so far been disclosed.

27. Mr Wolanski submitted that such an order was necessary and appropriate having regard to (i) what was said to be the Claimant's limited personal involvement with the disclosure process so far, (ii) that Brown Rudnick had failed to disclose relevant text messages and (iii) some text messages were referred to in the pleadings and which the Claimant had admitted existed but which had not been disclosed.

28. For the first proposition, Mr Wolanski referred me to the history of disclosure to date (see above).

29. For the second proposition, Mr Wolanski said that the Defendants had been able to compare what had been disclosed intentionally which was a spreadsheet of some 300-400 text messages with the inadvertent disclosure of some 70,000 further messages.

30. Among the latter had been the following:

    i) A text message from the Claimant to his friend Paul Bettany on 6th November 2013 saying, 'Let's burn Amber!!!'

    ii) Another text message from the Claimant to Mr Bettany on 6th November 2013, saying, 'Let's drown her before we burn her!!! I'll fuck her burnt corpse afterwards to make sure she's dead.'

    iii) Another text from the Claimant to Mr Bettany on 30th May 2014 saying, 'I'm gonna properly stop the booze thing, darling... Drank all night before I picked Amber up to fly to L.A. this past Sunday... Ugly, mate...No food for days ... Powders... Half a bottle of whiskey, a thousand red bull and vodkas, pills. 2 bottles of Champers on plane and what do you get.... ??? An angry aggro Injun in a fuckin' blackout, screaming obscenities and insulting any fuck who gets near... I'm done. I am admittedly too fucked in the head to spray my rage at the one I love.. For little reason as well I'm too old to be that guy But pills are fine!!!'

31. In his witness statement, Mr Charalambous says that on 11th October 2019 Brown Rudnick did agree that these texts (and others to which SMB had referred) should be included in the disclosure spreadsheet. He therefore assumes that the Claimant accepts that these messages came within r.31.6, but, he submits, they are indicative of the deficiency in the initial disclosure exercise in which these texts did not feature.

32. Mr Wolanski argued that the text to Mr Bettany on 30th May 2014 appeared to relate to the incident pleaded by the Defendants in paragraph 8.a.3 of the Re-Amended Defence which was substantively denied in the Re-Amended Reply paragraph 2.2C.

33. Mr Wolanski's third proposition was that the Claimant had not disclosed texts referred to in the pleadings. He gave the example of the Re-Amended Defence paragraph 8.a.2 in which the Defendants refer to an incident on 8th March 2013 during which the Claimant allegedly assaulted Ms Heard. The Defendants plead in this paragraph that,

> 'The Claimant subsequently sent Ms Heard a text message referring to that evening as a "disco bloodbath" and a "hideous moment"'.

In the Re-Amended Reply paragraph 2.2B this is said,

> 'As to the seventh sentence: it is admitted that the Claimant had an exchange of texts with Ms Heard on 12th March 2013 containing the words quoted therein. The words were used to placate Ms Heard; it is denied that the texts relate to any alleged physical abuse of Ms Heard (which is denied).'

34. When the Claimant was asked to produce the text the Defendants were told that the Claimant could not find it. The Claimant has now (on 29th January 2020) disclosed a screenshot of the 'disco bloodbath' text message, that screenshot having been previously disclosed by the Defendants.

35. Another example of a text message referred to in the pleadings which has not been produced is at paragraph 2.8.2 of the Re-Amended Reply. This is part of the Claimant's

response to paragraph 8d of the Re-Amended Defence in which it is alleged that the Claimant on 21st May 2016 arrived drunk at an apartment in South Broadway. It is alleged that the Claimant's arrival was at around 7.15pm. In his Re-Amended Reply the Claimant says,

> 'The Claimant texted Whitney Heard [Ms Heard's sister] on 21 May 2016 at 7.30pm in response to a text he received from her at 7.15pm suggesting his arrival may have been later than 7.15pm.'.

The Defendants comment that this exchange of texts has not been produced despite their request. They wish the Claimant to explain personally what steps have been taken to track down these missing texts.

36. Mr Sherborne responds that the Claimant and his legal team have done their best to investigate the missing texts. They have explained the inquiries which they have conducted and, Mr Sherborne asks rhetorically, what more could be done? Further searches would not be proportionate or reasonable.

37. In her witness statement Ms Afia and Mr Sherborne in his skeleton argument, also alleged that the Defendants' disclosure had been deficient. There is, though, no application for specific disclosure made by the Claimant against the Defendants and the merits of the Defendants' application have to be judged on its own terms.

38. My conclusions on the 'missing texts' part of the Defendants' disclosure application are as follows:

i) I respectfully echo and endorse what Blackburne J. said about the importance of the disclosure statement and the need for it to be signed and made by the litigant himself or herself (if an individual and if the qualification in the Practice Direction does not apply). Brown Rudnick were not entitled to amend and make the disclosure statement in the way that they did in September 2019. However, the Claimant has now provided a disclosure statement on 9th January 2020.

ii) Mr Sherborne did not seek to dispute that the three texts from the Claimant to Paul Bettany should have been disclosed or that the Defendants were wrong to infer that Brown Rudnick had accepted that they were disclosable. It is not therefore necessary for me to express a view, but I can well understand why the Claimant did not challenge Mr Wolanski on this issue.

iii) I was unimpressed with Mr Wolanski's reliance on the texts which had been mentioned in the pleadings but not produced on request.

a) CPR r.31.14(1)(a) provides that,

> 'A party may inspect a document mentioned in (a) a statement of case.'

b) But, as Gross LJ said in *National Crime Agency v Abacha* [2016] EWCA Civ 760 at [30], the test of 'proportionality' still applied and,

> 'In determining the issue of proportionality, a Court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action.'

c) The words used in the text mentioned in paragraph 8.a.2 of the Re-Amended Defence are admitted. The Claimant in his Re-Amended Reply alleges that they were used for a particular purpose. He can, no doubt give evidence about his purpose at the trial, but, since the wording of the text is admitted, the resolution of that issue is not going to be assisted by production of the text itself. In my view, therefore inspection of that text is not necessary for the fair disposal of the action and an order for its inspection would not therefore be proportionate.

d) That is independent of the Claimant's apparent inability to find the text.

e) The text in paragraph 2.8.2 of the Re-Amended Reply appears to concern the precise time of the Claimant's arrival at the apartment in South Broadway. That seems to me a relatively minor matter in this action. Thus, quite apart from the Claimant's apparent inability to find the text, I would have regarded it as disproportionate to order inspection of it.

f) I shall not, therefore order any further inspection or disclosure regarding the 'missing text messages'.

Papers from the Depp/Heard divorce proceedings (Depp v Heard (BD 641052))

39. Mr Wolanski submits that the US divorce proceedings also raised issues concerning the Claimant's alleged abuse of Ms Heard. The papers from those proceedings should therefore also have been reviewed to see whether they included any documents which should be listed as part of the disclosure process in this litigation.

40. On 13th January 2020 Brown Rudnick told SMB 'There was no discovery and production of documents in our client's divorce proceedings.' Mr Charalambous says that is incorrect. He has produced the 'Exhibit List' supplied by Ms Heard in those proceedings. The list is dated 15th and 16th August 2016. Mr Wolanski submits that it is to be inferred that the Claimant must likewise have provided a similar exhibit list and Mr Charalambous says that the Claimant filed his list on 8th August 2016. In any event, the Claimant would have received documents from Ms Heard.

> Mr Wolanski gives an example. In paragraph 8.a.5 of the draft Re-Amended Defence the Defendants rely on an incident in or around 17th August 2014 when it is said that the Claimant and Ms Heard travelled to the Bahamas to try to help him reduce his dependency on prescription painkillers and other drugs. The Defendants plead that during the trip, the Claimant had several manic episodes in the course of which he assaulted Ms Heard. The Claimant has responded in the draft Re-Amended Reply paragraph 2.2E. In summary he admits the trip took place for the purpose of curing his dependence on painkillers, not other drugs. He accepts the process was painful, but denies he assaulted Ms Heard. Further text messages between Ms Heard and Debbie were disclosed by the Claimant on 27th January 2020. These messages include a message from Ms Heard to Debbie,
>
> > 'He's manic. Full-on flipping out. Says he wants to quit. Give up. Not to call you guys. Etc. I just have him the rest of the meds. Just now.'

Mr Wolanski submits that these were disclosable by the Claimant since one of the issues in the case concerns the Claimant's mental state. In her witness statement, Ms Afia says that, since the Defendants now have these text messages from Ms Heard, it is neither reasonable nor proportionate to require the Claimant to produce them. It is also safe to assume that, if there are any other relevant documents from the divorce proceedings, Ms Heard will also provide them.

41. The Defendants also asked for disclosure of the exhibits in the divorce proceedings. Ms Afia said of this,

> 'I am instructed that the court reporter in the divorce proceedings maintains the record and exhibits in those proceedings. Brown Rudnick made requests from the reporting agency for the records requested by the Defendants. The reporter requested a signed authorisation from the Claimant, which I am instructed he gave. The reporter refused to provide the records on the basis that it is only the lawyers on record for the divorce proceedings who can obtain them.'

42. Mr Wolanski submits these documents must still be in the Claimant's control for the purposes of CPR r.31.8(2) (b) or (c) since the Claimant has or had a right to possession of them or has or had a right to inspect or take copies of them.

43. Mr Sherborne responds as follows:

i) Just because documents were listed in Ms Heard's Exhibit list, does not mean that the Claimant received them. Mr Sherborne asks me to note that the list has two columns, 'offered' and 'admitted'. Neither column was marked for any of the documents listed.

ii) He relies as well on Ms Afia's witness statement.

iii) He told me on instructions, though this was not in evidence, that the lawyers whom Mr Depp instructed for the purpose of the divorce proceedings no longer act for him and that was why they had not been asked.

iv) He again submits that Ms Heard is not in the position of a normal witness. Given her centrality to the Defendants' case, it was reasonable to make the assumption to which Ms Afia referred and, in those circumstances, it was not reasonable or proportionate to require the Claimant to make further disclosure.

44. As to this category, I conclude as follows:

i) I agree with Mr Wolanski that the documents from the US divorce proceedings which were exhibited in those proceedings are within the Claimant's 'control' since it appears that he has or had the right to possess them or to take copies of them. The explanation as to why the Claimant has not made a request of his American divorce lawyers is not in evidence, but in any case, it does not persuade me that the documents in question are no longer within his control for the purposes of the CPR.

ii) I also agree that these are likely to be relevant to the issues in the present proceedings given that Ms Heard's accusations of assaults appear to feature in both.

iii) For the reasons which I have given previously, it is proportionate and reasonable to make an order for further disclosure, notwithstanding that the documents (or some of them) may reach the Defendants by the alternative route of Ms Heard's voluntary co-operation.

iv) I agree that the structure of the draft order paragraph 6 is appropriate, although the timings will have to be adjusted.

Documents from the US defamation proceedings (Depp v Heard (CL-2019 0002911))

45. I have not seen the pleadings in the US libel claim which the Claimant has brought against Ms Heard, but I am told that it relates to an article in the *Washington Post* in which Ms Heard made similar allegations of assault by the Claimant.

46. It seems that a 'protective order' has been made in the USA by Chief Judge Bruce White of the Circuit Court of Fairfax County in Virginia. Mr Charalambous exhibits a copy of Judge White's order. The Claimant submits that the documents which the Defendants are seeking cannot be produced without infringing this order since they were produced by Ms Heard in the course of the US libel litigation and have been designated by her as confidential.

47. Mr Charalambous and Mr Wolanski draw attention to a qualification in paragraph 3 (m) of Judge White's order by which the restrictions will not apply regarding disclosure 'to any other person with the prior written consent of the producing party [here Ms Heard].' Thus, they argue on behalf of the Defendants, the restrictions would be lifted if the Claimant sought the permission of Ms Heard.

48. Mr Sherborne asks why the Claimant should be required to seek the consent of someone who will be a witness for the Defendants.

49. As to this category my conclusions are as follows:

i) Currently, I agree with Mr Sherborne that the documents subject to the protective order are not within the Claimant's control. They are not in his physical possession. No evidence has been given that he has a right to possess them or to inspect or take copies of them (at least not for the purposes of passing them on to the Defendants).

ii) I also agree with Mr Sherborne that, since Ms Heard is due to be a witness for the Defendants, it would not be reasonable or proportionate to require him to seek her consent to the disclosure to the Defendants. However, if the Defendants were to obtain an appropriate consent from Ms Heard the position would change. Then the protective order would be no obstacle to disclosure. Given the imminence of the trial, such a consent would have to be provided expeditiously or again it would not be reasonable or proportionate to require the Claimant to make this disclosure, but, if it is provided quickly, then I agree with Mr Wolanski that the Claimant should be required to make it.

iii) The Defendants have not persuaded me that there are other documents (that is, apart from those which the Claimant says are covered by the protective order) which are with r.31.6 but which the Claimant has failed to disclose.

Medical records

50. The Defendant's case in their Re-Amended Defence is that the Claimant's abuse of Ms Heard was related to his medical condition and, particularly, his dependency on alcohol and drugs. As I have said, the Re-Amended Reply denies that the Claimant assaulted Ms Heard, but it accepts (at least at times) that the Claimant had a dependency on painkillers (but not other drugs) – see paragraph 2.2E.

51. Mr Charalambous and Mr Wolanski argue that the Claimant's medical records relating to these issues are relevant and should have been disclosed but that the Claimant's disclosure has been incomplete.

52. One of the doctors who attended on the Claimant was a Dr Kipper. Mr Charalambous says that it is his understanding that Dr Kipper was solely treating the Claimant for his addiction problems and all of Dr Kipper's records should therefore have been disclosed. In her witness statement in reply, Ms Afia says that this understanding is incorrect: Dr Kipper treated the Claimant for other matters as well.

53. Mr Charalambous says that the notes from Dr Kipper which were supplied were originally heavily redacted. He says that they were then re-served in a less redacted form. He gives examples in paragraph 55 of his 3rd witness statement of some of the passages which were revealed on this second occasion. He submits that the newly disclosed passages were plainly relevant and there was no good reason to have redacted them in the first place. In consequence, the Defendants seek an order that the Claimant confirm that he has provided all his medical records to Schillings and then for Schillings to review those records to decide which ought to be disclosed to the Defendants. Similarly, the Defendants wish Schillings to be ordered to review all the redactions which have so far been made and maintained.

54. There are other doctors or medical professionals who have attended the Claimant. Initially, at least, it was Brown Rudnick's position that it was not proportionate for the Claimant to undertake a search of all of his medical records. When Mr Charalambous objected, Brown Rudnick advised SMB that the Claimant had also requested medical records from Dr Blaustein, and Dr Kulber and various other medical professionals but Brown Rudnick have not said whether the Claimant consulted them on relevant issues during his time with Ms Heard. None of their records have been disclosed. Ms Afia says in her witness statement that it would not be proportionate to require the Claimant to undertake searches of all of his medical records. She says that Dr Blaustein has not provided his records despite several requests and requiring him to make further effort or requests would not be reasonable or proportionate. There has been no further response from Dr Kulber. She understands that Ms Heard has served a subpoena for those records.

55. Ms Afia says that none of the other medical professionals who were provided with the necessary authorisation have provided any medical records. She says that Brown Rudnick (US), who are still instructed by the Claimant, are doing what they can to

pursue the matter, but it is not reasonable or proportionate for any further disclosure order to be made by this court.

56. Mr Wolanski drew my attention to CPR r.31.19 whereby the Court can review redactions made by a disclosing party. Mr Wolanski was not asking me to do that, but said that it was a default power which the Court possessed. He does, though, draw attention to r.31.19(3) which says,

> 'A person who wishes to claim that he has a right or duty to withhold inspection of a document or part of a document, must state in writing –
>
> (a) That he has such a right or duty; and
>
> (b) the grounds on which he claims the right or duty.'

Rule 31.19(4) then says that the statement referred to in paragraph (3) must be made in the list in which the document is disclosed or, if there is no list, to the person wishing to inspect the document.

Mr Charalambous drew attention to r.31.19(3) in his witness statement and SMB's letter of 17th January 2020 which had complained about the absence of an explanation for the redactions.

57. Mr Sherborne submitted that the onus lay on the Defendants to persuade the court that relevant documents had not been disclosed. He argued that Mr Wolanski had not been able to do that. Mr Sherborne also argues that the Court should be alert to confine disclosure of what would be personal and confidential documents to those which are relevant and necessary for the fair disposal of the action.

58. I conclude as follows so far as medical records are concerned:

i) I agree with Mr Sherborne that it is for the Defendants to show why it may be said that disclosure so far has been deficient. That will take account of the documents provided in the less redacted form from Dr Kipper. Thus, if initial efforts at disclosure were incomplete, but they have subsequently been made good, the Defendants will not have succeeded.

ii) However, I agree with Mr Wolanski that, on the face of it, the Claimant would have, at least, the right to call for copies of his medical records. In the circumstances of this case I consider that the Defendants are entitled to require the Claimant to provide more detail than he has as to what steps he has undertaken to obtain his medical records and to exhibit the correspondence concerned. His letters must include such consent as is required by any relevant US or State law for the medical professional concerned to provide the records concerned (including, if necessary, for the purpose of passing to the Defendants any which come within r.31.6). There is some reference in the witness statements to a 'HIPAA authorisation'. In my view this requirement would be reasonable and proportionate.

iii) Mr Wolanski is, of course, right to say that privacy or confidentiality (privilege aside) are not good reasons to refuse to disclose relevant documents in

accordance with r.31.6, but where medical records are concerned, the competing claims of privacy and confidentiality mean that particular care is needed to limit disclosure obligations to those which do meet the tests in r.31.6.

iv) In my view the circumstances are not such as to make it reasonable and proportionate to require Schillings to repeat the disclosure exercise so far as medical records are concerned. But, if further documents are produced by any of the medical professionals whom the Claimant has consulted about relevant matters, Schillings will no doubt advise their client as to which of them are disclosable.

v) In addition, so far as the Claimant maintains that redactions of the medical records are appropriate, he or Schillings must explain the grounds for the redactions as required by r.31.19(3)(b).

Computers

59. At paragraphs 42-45 of his witness statement Mr Charalambous rehearses the history of the disclosure process so far as the Claimant's computers were concerned.

60. The difficulty for the Defendants is that they must show that there is, at least, reason to believe that further relevant documents have not been disclosed given the totality of what has been disclosed so far.

61. In my view the Defendants have not done that in relation to the Claimant's computer.

Conclusion

62. The Defendants' application for specific disclosure succeeds in relation to some of the categories they seek, but not always in the terms that they seek. I shall ask the parties to agree an appropriate order or make submissions as to the same. Because the trial is imminent, it may be appropriate for some of the steps in the timetable to precede the formal hand down of this decision. Although the trial is imminent, I do not consider that it is appropriate to add any particular sanction if the order is not complied with (although, in the event of default, it will be open to the parties to make an appropriate further application). CPR r.31.21 will apply in any event.

63. The Defendants' application asks for an order that the Claimant provide a list of documents disclosed after the original disclosure on 13th September 2019. Whatever criticisms may be made of the format of the supplementary disclosures, we are now close to the trial date and I do not accept that it would be reasonable or proportionate to require the Claimant to engage in this exercise.

64. The Defendants also seek an order that the Claimant bear the costs of his repeated failures to make proper disclosure. I am not minded to make such an order at this stage. The costs of the proceedings will, as usual, be dealt with at the end of the trial and it is not reasonable or proportionate to depart from that usual practice. If the parties cannot agree an appropriate order for the costs of the disclosure application, they will need to make submissions as to this along with the other terms of the order.