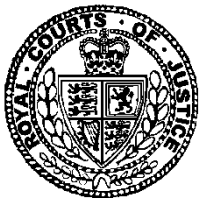

Neutral Citation Number: [2023] EWHC 1617 (Ch)

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

Nos. HC-2000-000003; BL-2019-001788

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday 13 June 2023

Before:

MR JUSTICE FANCOURT

BETWEEN:

THE DUKE OF SUSSEX	**Claimant/Applicant**
- and –	
MGN LIMITED	**Defendant**
- and -	
NEWS GROUP NEWSPAPERS LIMITED	**Respondent**

MR D SHERBORNE and MR J SANTOS (instructed by **Thomson Heath** and **Clintons LLP**) appeared on behalf of the **Claimant/Applicant**.

MR B SILVERSTONE (instructed by **Clifford Chance LLP**) appeared on behalf of the **Respondent**.

J U D G M E N T

[public version]

MR JUSTICE FANCOURT:

1 These are the reasons for my decision given on the morning of 9 June 2023, immediately after the hearing of the application, to permit the use in these proceedings of certain documents disclosed in other litigation. This is a public version of the judgment given in private on 13 June 2023. The delay in its publication is the result of time needed to order a transcript and for redactions to be considered.

2 The application I heard was made by the Duke of Sussex and was issued on 5 May 2023. It is for permission, pursuant to rule 31.22(1) of the Civil Procedure Rules, to use various documents that were disclosed by the respondent, News Group Newspapers Limited ("NGN") in the mobile telephone voicemail interception litigation ("MTVIL") for the purpose of the Duke's claim against MGN Limited ("MGN") that is currently being tried in the Mirror Newspapers Hacking Litigation, which I will refer to as "MNHL". The Duke also sought permission to disclose the documents in question to the other claimants in the MNHL.

3 The documents to which the application relates fall into the following three categories. First, about forty invoices from private investigators ("PIs") named as PIs by the claimants in the generic part of the case in the MNHL, which record payments made by The Sun for work done by those PIs on the instruction of a Mr Tom Worden, who was a journalist at The Sun from 2002 to 2004. Mr Worden then became a freelance journalist and was used as such by MGN from time to time. Second, a single email from 2007 from a Mr W, who is the news editor of agency X in California to a former journalist at The News of the World, relating to work commissioned by the journalist. Third, a single email from 2005 from a journalist at The Sun to Y at The Sun referring to one of the PIs named by the claimants in the MNHL.

4 Rule 31.22 provides, so far as material:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
> (b) the court gives permission; or
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> "(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

5 Any documents disclosed under compulsion in litigation are subject to a limitation on use. The person to whom they are disclosed may only make use of the documents and

their contents in and for the purposes of the litigation in which they were disclosed. However, the court has a discretion under the rule to permit a recipient to make other use of them, commonly referred to as "collateral use".

6 The test for giving permission for collateral use, put shortly, is whether the interests of justice favour permitting the documents to be so used. It is a broad discretion, but a number of decisions have established some principles. These are: that there must be a good reason given for granting permission; the grant of permission is exceptional, in the sense that it is not routinely given; and there must be cogent reasons for giving permission. The court must also be satisfied that there is no unwarranted prejudice to the disclosing party. That obviously means prejudice beyond the mere fact that documents only provided under compulsion are able to be used for collateral purposes, because otherwise the court would never grant permission.

7 Ultimately, it seems to me that the court is concerned to balance the legitimate interests of the party seeking permission against the legitimate interests of the disclosing party. The principles were summarised by Lord Oliver in *Crest Homes plc v Marks* [1987] AC 829 at 860, then in *Tchenguiz v Director of the SFO* [2014] EWHC 1315 at [18] by Knowles J, and on appeal from him by the Court of Appeal, at [2014] EWCA Civ 1409 at [66].

8 The Duke says that he wants to be able to make use of the identified documents in the MNHL trial for the purpose of rebutting the evidence of three witnesses called or intended to be called by MGN to the effect that they did not use PIs or were unaware that various PIs carried on unlawful activities; and, in seeking to prove his case, that these PIs were engaging in unlawful activities. One of the witnesses identified in the application, Mr Harwood, in fact concluded his evidence some time ago. The second, Mr Hanna, is now not to be called, and the third, Mr Worden, at the time I heard the application, was due to be called the following week.

9 The first category of documents is a series of invoices which record various searches that the PIs were instructed by Mr Worden to carry out. The most relevant point arising from them, it seems to me, would be that Mr Worden denies in his witness statement using any PI or agency, except one such PI, whom he says he used only for electoral roll searches. The first category of documents is apparently inconsistent with that statement.

10 The documents also show the kind of searches that the PIs in question did but, as NGN submitted, none of them necessarily leads without more to a conclusion that any of the searches commissioned by Mr Worden were illegal. Whether The Sun, at the time of the invoices, did anything illegal is not a matter for decision in this trial. It may fall to be considered in the MTVIL trial due in January 2024. But whether Mr Worden and a related company of which he was a director, TAG, were carrying on or commissioning unlawful activities on behalf of MGN is an important issue in the current trial.

11 The second document does not relate to any issue in the MNHL trial, except the question of whether X carried out activities that are unlawful. The email on its own does not prove that X was acting unlawfully, or rather would have been if it were

resident in England and Wales, and it does not prove anything about any of the relevant MGN witnesses' understanding of what X was doing.

12 The third document does not relate to any issue in the MNHL trial as far as I can see, except that it might be possible to interpret it as an admission by The Sun journalist that Taff Jones of Severnside did the same type of activities as a company called "TDI". However, what the journalist thought, and what Y thought, is itself of no relevance to the issues in the MNHL trial.

13 NGN opposed the application for permission to use these documents with vigour and deployed various legal arguments. Its first argument was that by taking the steps that the Duke had already taken, he, through his solicitors, was in breach of the primary duty imposed on him as a result of disclosure in the MTVIL because he had actively considered that disclosure to look for documents that could be helpful in the MNHL trial.

14 That argument seemed to me to be based on a rather forced and ultimately wrong reading of paragraph 15 of the witness statement of Mr Heath in support of the application, and a misunderstanding about the lawyers who were acting for the Duke in both the MTVIL litigation and in the MNHL trial. What NGN suggested was that, acting as the Duke's MNHL solicitors, Thomson Heath reviewed the MTVIL disclosure to find documents that might be helpful in the MNHL trial. They believed that Thomson Heath were not solicitors acting for the Duke in the MTVIL. If that were right, it would be in breach of the implied duty not to use disclosed documents for collateral purposes (see *Tchenguiz v Grant Thornton UK LLP* [2017] 1 WLR 2809 at [28] to [31]).

15 However, the evidence, as explained by the Duke's counsel, Mr Sherborne, was that this was not done. Both Thomson Heath and Clintons act for the Duke in both sets of proceedings, Clintons as his personal solicitors in both, and Thomson Heath as Clintons' agents in the MTVIL and as lead solicitors for all the claimants in the MNHL. As such, they and Mr Sherborne, counsel for the Duke in both claims, and his juniors, had knowledge of the content of NGN's disclosure and were aware of documents that were, they thought, relevant to the MNHL trial. Mr Sherborne explained that in the MTVIL searches had been conducted of claimant-specific disclosure, looking for documents containing Mr Worden and TAG's names, as a result of a specific disclosure application, and that schedules of documents relating to the case against TAG and Mr Couzens (the other director of TAG) and his other companies had been created. As a result, the lawyers personally involved had knowledge of those categories of documents relating to these PIs and their principals. To then retrieve and assemble those documents for the purpose of making this application is not a breach of the implied duty.

16 As for paragraph 15 of Mr Heath's witness statement, that reads as follows, under the heading, "**Timing**":

> "Finally, I should briefly address the timing of this application. The timing of this application is such that it has been made as soon as possible following the exchange of common/generic witness evidence on 10th March 2023, which placed these

> matters very much in issue. For the reasons given in Annex B, it is this apparently contradictory or inaccurate evidence that has necessitated this application for the reasons given. As a result of the huge volume of work that the parties have been dealing with since that time, with which the court will be aware (as set out and relied upon in various applications for relief from sanctions from both sides in the intervening period), it has not been possible to prepare this application sooner and, due to the Applicant/Claimants being unable to 'use' (within the meaning of CPR 31.22(1)) for the purposes of this litigation, the existence of the Documents in question and the important issues and findings to which they relate was not readily apparent to the Applicant, the Claimants and their legal team."

17 In those three sentences what Mr Heath was addressing is the argument that had been raised in correspondence, that the Duke had applied too late for the relief that he sought against NGN. NGN reads the final part of the last sentence as an admission that the lawyers were not aware of the existence of the documents now sought until they conducted an improper search. Although the language of the sentence is imperfect, I am satisfied that that is not what Mr Heath was trying to say, which was that, because of the pressure of work and the inability to search MTVIL disclosure for use in MNHL, Mr Heath and others had not focused on the existence of those disclosed documents until they came to consider how to deal with the evidence of Mr Worden. Mr Worden's witness statement was not exchanged until 10 March 2023, and he is the last but one of the generic witnesses to be called at the trial. When they did focus on it, they realised at that time that some of the NGN disclosure would be relevant.

18 I do not find it surprising that the lawyers, who have been immersed in the fine detail of the documents in both sets of litigation for years, were aware without conducting a review of the MTVIL disclosure that relevant documents existed. I am not persuaded that the Duke's solicitors have reviewed the schedules of documents to look for any relevant material in a way that is contrary to the restriction on use.

19 As for documents 2 and 3, although these are single emails that would probably not have been recalled as such, it is nevertheless credible that the Duke's lawyers would have recalled there were documents disclosed relating to each of X and Severnside, which are agencies or PIs that are as much in issue in the MNHL as they are in MTVIL.

20 I therefore reject the first ground of objection based on a prior breach of rule 31.22.

21 The next argument was that serious prejudice would be caused to NGN, such that use should not be permitted. This was said to arise because use of the documents in the file would be likely to result in a finding about whether the use of the PIs being made or considered by journalists then employed by NGN was unlawful, a finding on which NGN would not have the opportunity of being heard at the trial, which finding would be made in advance of a similar issue potentially arising in the MTVIL trial at a later date.

22 I consider that objection to be well-made as regards the second and third documents. The only purpose of using those documents in the trial is to seek to establish that X and Severnside were conducting unlawful activities, which would carry with it, by inference, a finding that NGN's journalists were aware of that when they used the same companies. The evidential value to the Duke only arises if one assumes that the documents prove unlawful activity involving NGN journalists. They are not being used to demonstrate, except in that way, that evidence given by a witness in the MNHL trial is wrong.

23 It is true that NGN would not be bound by any finding in the MNHL trial but, nevertheless, it would be prejudicial to its defence in the MTVIL claim for that issue to have been decided already by the same judge who will hear its claim. That is not, however, the case in relation to the first category of documents, where there is no necessary implication from the invoices that unlawful activity was carried out, and the relevance of the documents is principally in trying to demonstrate that Mr Worden was doing things that he denies having done, and that he was aware of various services that could be provided by the PIs in question and that he used them for that purpose.

24 If the documents also go towards establishing unlawful activity by MGN, they do not do so in isolation, but only by assisting to create a fuller picture of activities undertaken by those PIs. Even then, the issue in the trial is not simply what the PIs offered, but what MGN knew, when their employees instructing them.

25 The next objection raised was that the documents cannot be said to be relevant to the evidence already given by Mr Harwood and not to be given by Mr Hanna. I agree. This does not mean that the first category of documents is of no relevance to the evidence to be given by Mr Worden. On the contrary, it clearly is.

26 The next objection was that the application was made very late and so, by inference, the Duke cannot really believe that there is any significance in these documents. I do not agree. I do not consider that that is a legitimate point for a non-party to take in any event. Having seen and supervised the preparation of the parties for the MNHL trial, I can understand why an application of this kind was not first raised until some time after the exchange of evidence was completed. It is being heard late; it was not made too late.

27 I therefore conclude that the potential prejudice arising to NGN from the only likely use of the second and third documents does outweigh injustice to the Duke in not being able to make use of them. As Mr Sherborne accepted, these documents are not the only evidence that that Duke and the other claimants have in support of their claim of unlawful activity by Severnside and X.

28 In relation to the first category of documents, however, there would be real injustice to the Duke in not being able to challenge the evidence of Mr Worden on the basis of documents that are known to him or his legal advisors. That amounts, on the face of it, to a good reason for permitting use of the documents. There is, in my judgment, no serious prejudice – if any – to NGN because the documents will not lead to any determination of whether what Mr Worden was doing when employed by NGN was

unlawful. What matters is whether Mr Worden was doing things that were unlawful when he was self-employed and working on commissions for MGN. The truth of his evidence is, however, an important issue.

29 I therefore give permission for the Duke and the other three claimants whose cases are being tried to use the first category of documents during the trial, only for the purposes of the trial and not otherwise. I am not persuaded that it should follow that the documents should be shared with all other claimants in the MNHL whose claims are not currently being tried. Nor do I agree that that will be the automatic consequence of granting permission to the Duke, because the documents are not being disclosed to the Duke and his co-claimants in the MNHL; rather, permission is being granted to certain claimants to make collateral use of documents disclosed in the MTVIL.

30 If the documents have any relevance to my factual findings at the end of this trial, those conclusions will be a matter of record and will bind MGN on any future trial. If they turn out to be irrelevant then there is no obvious reason for them to be disclosed further to the claimants or, if there is, the other claimants can make any request at a later date, if necessary.

31 The first category of documents will therefore be released for use in the MNHL trial and will be disclosed by the Duke to MGN, but those documents will be subject to a restriction under CPR 31.22(2), that they may not be used for any other purpose, save, of course, in the MTVIL trial itself.

32 There will also be the same order in relation to the second and third documents as a precaution, given that I pre-read them and they were referred to in open court before I began to sit in private to hear argument about the documents.