Neutral Citation Number: [2024] EWHC 1730 (Ch)

Case No: **BL-2019-001788**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **27 June 2024**

Before :

Mr Justice Fancourt

- -

Between :

HRH The Duke of Sussex

Claimant

- and –

News Group Newspapers Limited

Defendant

- -
- -

Anthony Hudson KC and Ben Silverstone (instructed by **Clifford Chance LLP**) for **News Group Newspapers Limited**
David Sherborne and Ben Hamer (instructed by **Clintons**) for the **Group 3 Counsel**

Hearing dates: **27th June 2024**

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APPROVED JUDGMENT

Mr Justice Fancourt **Thursday, 27 June 2024**

Judgment by **MR JUSTICE FANCOURT**

1. This is an application issued on 4 April 2024 by the defendant ("NGN") for orders for specific disclosure against the claimant. The application concerns disclosure of documents relating to an issue of knowledge, or constructive knowledge, of the claimant of possible unlawful information gathering (other than voicemail interception) at any time prior to 27 September 2013.
2. In July 2023, I gave summary judgment for NGN on the claimant's claim for misuse of private information by voicemail interception, and accessory acts, on the grounds of limitation. I refused summary judgment on the remainder of the claim, on the basis that issues of knowledge or constructive knowledge relating to other kinds of unlawful information gathering alleged by the claimant had to go to trial, and could not be determined without a full evidential picture of the state of the claimant's knowledge of matters relating to unlawful information gathering at or before that date.
3. One of the most important issues at trial, on which the burden will lie on the claimant, will be whether he did not know, and could not by the use of reasonable diligence have found out, enough about the remaining allegations of unlawful information gathering to appreciate before September 2013 that he had a worthwhile claim against NGN. That is a paraphrase of the legal test in Section 32 of the Limitation Act 1980. I'll refer to it as the "Knowledge Issue", but it is not limited to questions of the claimant's actual knowledge.
4. The question of the adequacy of the claimant's disclosure relating to the Knowledge Issue has been debated back and forth in correspondence since July 2022, albeit rather sporadically. There were large gaps caused both by delays by the claimant's solicitors in responding and by the defendant not pursuing the matter, in part at least because of other applications, such as the strike out application and the amendment application, which overtook the question of disclosure, to some extent.

5. I am not really interested in the disagreement between the parties' lawyers about who is to blame for the slow progression of the issue. What I am concerned with is whether the trial of this issue will be fair to both parties, given the apparent paucity of disclosure by the claimant to date relating to the issue. The issue was, of course, cast into sharper focus after my ruling on the summary judgment application last summer.
6. Since that time, there have been the following letters written and steps taken.
7. First, a letter written on behalf of NGN on 28 November 2023, setting out claimed inadequacies in the claimant's disclosure and seeking disclosure in relation to the Knowledge Issue. Then on 23 February 2024, the claimant's solicitors replied to that letter. On 8 March 2024, NGN's solicitors wrote again, asking for confirmation about various matters to seek to clarify how the claimant's lawyers had gone about the exercise of claimant-specific standard disclosure, and requesting searches using a set of identified search terms. On 4 April 2024, without answering the letter of 8 March in any detail, the claimant's solicitors offered to carry out a search of one email account, which had been identified as a result of the questions that were being asked (the "SJPKP account"), and accepted that identified search terms would be used for that search.
8. On the same day, literally an hour after the letter was sent, NGN issued the application that is before me now. The claimant's solicitors did eventually respond to the March letter on 3 May 2024, but not in a way that was entirely satisfactory. As a result of further correspondence since then, different issues about further sources of documents have arisen.
9. For the first time on 11 June 2024, it emerged there was another large group of documents that had been provided by the Royal Household to the claimant in 2020, of which the claimant's solicitors were wholly unaware.
10. There has been some movement on both sides. The claimant's solicitors have not yet concluded the review of the positive hits obtained as a result of the search of the SJPKP account. Despite

Mr Sherborne's attempts, there is no evidence of what that unfinished exercise has produced: no documents have yet been disclosed.

11. The original order that NGN sought on this application has undergone some significant changes as a result of recent developments, including most recently a letter from Harbottle & Lewis, solicitors for the Royal Household, which was received only yesterday. At the same time as seeking to pursue a search or production of documents held by the Royal Household and by Harbottle & Lewis on behalf of the claimant, NGN has now issued non-party disclosure applications against representatives of the Royal Household and Harbottle & Lewis, which, indeed, was what the claimant's solicitors suggested in their evidence on this application NGN should have done. Harbottle & Lewis, on the other hand, have suggested that the application against the claimant personally should be pursued first. The non-party applications are not before me, but some of the relief sought overlaps with the relief sought in this application.
12. As with everything in this litigation, the evidence and arguments in support of and against the application have been produced at some length. The application was supported by 46 pages of evidence from Ms Mossman and there was then 21 pages of response from Mr Chisholm Batten. Ms Mossman then replied in a further 26 pages, and Mr Chisholm Batten took the opportunity to have a further say, justified in this case by very recent developments, in six more pages. I had over 50 pages of skeleton arguments to help me and I had time to read all the evidence, correspondence and the skeletons in detail. I had further helpful submission this morning from Mr Hudson KC, and Mr Sherborne.
13. The result, in overall terms, is this. I have real concerns that disclosure relevant to the Knowledge Issue is not being dealt with adequately by the claimant's solicitors. The majority of the search for and selection of documents to disclose has been dealt with by the claimant himself, in California. Mr Chisholm Batten suggests in his witness statement that the claimant is an old hand at dealing with disclosure, as a consequence of his Mirror Newspaper Hacking

Litigation claim. But the Knowledge Issue did not arise against the claimant in that case. The Knowledge Issue is a subtle one: it is a broad disclosure issue because the state of the claimant's actual knowledge about any form of unlawful information gathering, the conduct of the defendant's journalists and what any private investigators did is important, but it is not the end of the inquiry. Knowledge of matters other than the type of unlawful information gathering remaining in issue in this claim is potentially significant, as well as other types of unlawful information gathering that are not directly in issue.

14. Sometimes I have the impression in this claim that even the claimant's lawyers don't seem fully to grapple with the Knowledge Issue, at least the constructive knowledge aspect of it, despite its having been spelt out in NGN's correspondence and explained in my judgments. So it would not be at all surprising if the claimant himself did not fully understand or grapple with it. Perhaps the position instead is the claimant's solicitors do understand it, but they are reluctant to engage with it as an issue. In the letter replying to NGN's original letter about disclosure on 7 December 2022, the claimant's solicitors didn't even address the issue of disclosure relating to constructive knowledge of the claimant prior to September 2013.

15. In any event, it is not appropriate, in my judgment, in a case of this nature for searches of documents and assessment of relevance to be left to the claimant personally, which is what appears to have happened until very recently. The contention of Mr Chisholm Batten in his evidence that knowledge of voicemail interception is irrelevant because those claims have been struck out is indicative of the problem that can arise with this issue, even if solicitors are fully involved. If searches have been conducted to date on the basis that only documents that relate specifically to the types of unlawful information gathering that are in issue are relevant to the Knowledge Issue, then that is much too narrow, as is the suggestion previously made, but apparently now abandoned by the claimant, that documents postdating September 2013 cannot

be relevant. Yet that position was still being maintained by Mr Chisholm Batten in his email of 14 March 2024.

16. Apart from the articles about which the claimant originally complained in this claim and the documents that he chose to rely on in responding to the summary judgment application, the claimant has only disclosed five documents as being relevant to any of the issues for trial. Of these, only the documents previously relied on by him as evidence are relevant to the Knowledge Issue. That is rather remarkable and gives me cause for concern about the disclosure exercise.

17. From the correspondence, it appears that the claimant and his lawyers tend to look at the disclosure exercise through the prism of the allegations made in the claimant's claim and not regarding the nature of NGN's defence. That is, perhaps, why disclosure through the Practice Direction 57AC regime, which is otherwise appropriate in the Business and Property Courts, would be more satisfactory now than the old standard disclosure. But that's a matter for another day.

18. I've also seen troubling evidence to the effect that a large number of potentially relevant documents -- confidential messages between the claimant and his ghostwriter of Spare, as well as all the drafts of Spare --- were destroyed at some time between 2021 and 2023, well after this claim had been issued. The position is not wholly clear about what exactly happened and it needs to be made so by a witness statement from the claimant himself, explaining what happened to the Signal messages between him and his ghostwriter and the drafts, and whether any attempts have been made to seek t-o retrieve them.

19. It seems to me inherently likely that, in the course of discussing at length the material for the claimant's autobiography, matters would have been said that related to the parts of Spare in which unlawful information gathering in relation to newspapers is discussed. In short, it seems

to me that the requests for clarification of what had happened and for further searches and requests to be made, as set out in NGN's letter of 8 March 2024, were broadly justified.

20. Mr Sherborne argues that, since this is an application for specific disclosure, the court must be satisfied that the disclosure sought is necessary for the fair disposal of the claim, not just that it is potentially relevant. However, it seems to me, that correct standard disclosure has not been given by the claimant in this case, because of artificial restrictions placed on the searches that were carried out, in relation to the period for which the searches were carried out, the subject matter of the searches and the material on which searches were carried out. This is therefore probably not a case where I should apply strictly the criterion of necessity, although of course I do bear in mind questions of the likely materiality of what is sought, the likelihood of its existing, and the cost and expense of any further searches and disclosure exercise.
21. But in any event, where I do order further searches to be made in this judgment, or steps to be taken to identify documents, I do consider that it is necessary for the fairness of the trial of the Knowledge Issue. It is one where the claimant is uniquely possessed of the relevant knowledge and documents, and NGN depends on full and proper disclosure having been given.
22. I don't accept the suggestion that the fact that this application was not made before September 2023, or before the strike out application was made, shows that it is not necessary to order that disclosure now. The summary judgment application was made because the defendant already had sufficient evidence of actual knowledge of voicemail interception. Had it not become fairly obvious from about the end of July 2023, that it was unlikely that the claimant's claim would be ready for trial by January 2024, I consider that this application would probably have been made before that trial.
23. Following my request last week that the parties should meet to try to narrow the areas of dispute, NGN provided an amended version of the order that it seeks and then, following Harbottle &

Lewis's letter yesterday, a further amended version was circulated. That version seeks the following categories of relief.

24. First, that the claimant's solicitors must carry out searches of electronic documents located on any of the following sources used or owned by the claimant: email accounts, laptops or PCs, other electronic devices, mobile telephones, including text messages, WhatsApp messages and any other form of messaging, social media accounts, portable data storage devices, Cloud storage locations and backup tapes. This category of searches, as originally sought and still sought today, is much too wide. But in the light of what has emerged and the evidence that is now in place, Mr Hudson felt able to limit what he now seeks to four repositories of documents: the claimant's current (and only) laptop, any cloud storage of the claimant's texts and WhatsApp messages, the Signal platform, to see if anything remains of the admitted messaging between the claimant and the ghostwriter, and two hard drives provided by the Royal Household to the claimant in 2020, at his request.

25. The existing laptop has already been searched in relation to a few key words for the period up to 27 September 2013. It is now sought to be searched over an extended period from 2005 to date, applying 47 different key words,with disclosure of any relevant documents identified. The laptop should clearly have been searched in this broader way, or something approaching it, before. I accept the principle that, simply because documents are not brought into existence until after or even well after the September 2013 date, that does not mean that they are irrelevant to the Knowledge Issue. I think, however, the end date for any search can safely be January 2023, which was the date of publication of Spare.

26. Mr Chisholm Batten gave evidence that the claimant has confirmed that he did not discuss unlawful information gathering by text or WhatsApp with anyone else and that there were no chats with the ghostwriter, either on Signal or in person about unlawful information gathering. Exactly what Mr Chisholm Batten, or the claimant if he used the words, meant by, "unlawful

information gathering" is unclear. For example, does it relate to all kinds of unlawful information gathering or only those in respect of which the claimant still has a claim? The position is unclear. This is the problem, where evidence of such a fact-sensitive matter is given by a solicitor, not of exactly what the client told him, but of the effect of what was said, as he understood it.

27. Further, the suggestion that there was no discussion by texts is apparently contradicted by the ghostwriter in an article he wrote in the New Yorker, where he says:

> "We were texting around the clock."

It is possible that he used the word "texting" there as a synonym for messaging, either generally or Signal messaging specifically, but that's far from clear. Regardless of that narrow issue, I accept that it's appropriate in a case of this kind that turns on what the claimant knew or what he could have known at a particular time, for his text messages and WhatsApp to have been searched. It should have been done as part of standard disclosure, regardless of what the claimant might have thought he could remember about which media he used to discuss various matters. I will therefore direct a search of those repositories using the same search terms and over the same time period as for the laptop.

28. For what it's worth, I agree that an attempt should be made to retrieve the Signal messages that are believed to have been deleted and, as I have said, the claimant must make a witness statement explaining the circumstances in which the deletions of those messages and the destruction of the drafts or other documents took place after the commencement of these proceedings.

29. As for the hard drives, I do not accept there is sufficient likelihood of documents relating to the claimant's knowledge about relevant matters to be on documents on a shared drive used for business, rather than personal, purposes. The evidence of Mr Chisholm Batten and the screen shot of the menu of files and subfiles on the drive appear to show that it is business related and

emanates from his office. While it is not impossible that there might be something of relevance, the likelihood, it seems to me, is less, and searching those drives in addition to the personal email account, texts and WhatsApps would be disproportionate. If the hard drives do, as Harbottle & Lewis assert but the claimant denies, include cloud repositories, then the texts and WhatsApps are covered in any event by the specific order that I have made in relation to them.

30. Ultimately, Mr Hudson did not press for any other specific order under paragraph 1(a), and I decline to make any other order in the general terms sought.

31. The second category, paragraph 1(c) of the draft order in its latest formulation, seeks an order that the claimant's solicitors send letters to Harbottle & Lewis by a specified time after the order in which they (1) ask Harbottle & Lewis to provide Clintons within 21 days with hard copy and electronic documents held by Harbottle & Lewis in its client files for and/or in relation to its representation of the claimant; and (2) ask the Royal Household, Sir Clive Alderton and Sir Michael Stevens, to provide within 21 days hard copy and electronic documents held by the Royal Household, which record or contain communications which relate to allegations of voicemail interception and/or unlawful information gathering relating to the claimant.

32. In the light of recent correspondence, including Harbottle & Lewis's letter of yesterday, which is far from helpful to NGN in terms of willingness to assist, I initially formed the view that, for the claimant to be ordered to write a further letter in those or similar terms was pointless, as it would be met, inevitably, with the same robust response. Mr Sherborne says that I was right to form that view, pointing out that this would be not the first letter written to Harbottle & Lewis asking for that, but the third. The first letter, he said, was a letter dated 30 April 2024, which Mr Chisholm Batten describes as a request that Mr Tyrrell of that firm carry out searches as requested in NGN's original draft order of documents held by its firm in relation to its representation of the claimant and the Royal Family. However, privilege is claimed over that

letter and it has not been produced to the court. So in what context exactly that was asked for is uncertain.

33. The second letter Mr Sherborne identified was the letter of 24 June 2024. This asks for confirmation of whether the Royal Household has any hard copy or electronic documents recording or containing communications sent to or by, or on behalf of, the claimant. These two letters were therefore not requests by the claimant, as client or owner, for documents relating to his affairs, or his documents, to be provided to him. That seems to me to be a quite different kind of request in principle, to which it is difficult to see what a solicitor's objection could be, unless their fees remain unpaid.

34. I therefore agree with NGN that there is a purpose in writing such a letter, because it may result in any relevant documents held by Harbottle & Lewis being provided to the claimant's current solicitors, when they can be searched, identified for relevance and then any proper claim for privilege made. If that were done, there would apparently be no need for the non-party disclosure application against Harbottle & Lewis to continue. It is therefore proportionate for a short letter to be written to Harbottle & Lewis, which might well avoid the necessity for a further substantial hearing. I add only that the documents likely to be identified by such a request, if they are produced, will very likely relate to Harbottle & Lewis's representation of the claimant for his intended claim against the defendant from 2012 onwards, and therefore are plainly likely to be highly material to a fair trial of the Knowledge Issue. I will therefore make that order as sought.

35. As for the letter to the Royal Household, the terms in which that is now sought are much reduced from the original draft order, thereby dealing with the principal objection that Harbottle & Lewis made on behalf of the Royal Household, namely the breadth of the production that was being sought. No letter has previously been written to members of the Royal Household or Harbottle & Lewis on their behalf asking for the claimant's own documents to be given to him or his

solicitors. Again, I do not consider that such a letter would be pointless; it may bring clarity to the question of what documents exist, to whom they belong, and whether there is another proper reason for refusal to hand them over. Again, it may negate the necessity for a further hearing of the non-party disclosure application to be made, and I will therefore make that order, too.

36. It is not in dispute that if I make any of the substantive orders sought then the ancillary orders, which I think are paragraphs 1(d) and (e) and (iii) and (iv) of the draft, should also be made and I will make those too.