Neutral Citation Number: [2024] EWHC 1244 (Comm)

Case No: **CL-2021-000035**

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **25 April 2024**

Before :

Mrs Justice Cockerill DBE

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Between :

Eurasian Natural Resources Corporation Limited	**Claimant**
- and -	
(1) The Director of the Serious Fraud Office **(2) John Gibson** **(3) Anthony Puddick**	**Defendants**

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Anna Boase KC, Helen Morton and David Glen (instructed by Hogan Lovells International LLP) for the Claimant
Tom Richards and George Molyneaux (instructed by Eversheds Sutherland) for the First and Second Defendants

Hearing dates: **25 April 2024**

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APPROVED RULING

Mrs Justice Cockerill DBE **Thursday, 25 April 2024**
(**14:30** pm)

Ruling by **MRS JUSTICE COCKERILL DBE**

1. The hearing before me has involved a portfolio of different disclosure issues predominantly arising from a disclosure application by the claimant against the first and second defendants, the SFO and Mr Gibson, but also with a disclosure application against the third defendant and a disclosure application from the SFO against ENRC. Although the litigation in this place is plainly extremely hard fought, there has been ample evidence of a sensible and constructive approach to try to agree issues in the run-up to the hearing which resulted in a number of issues being resolved by agreement and ground narrowed. This has enabled the argument to be completed well within time. That argument has been skilful and courteous and can I also note that I was pleased to see that both junior counsel were able to do some meaningful advocacy, although Mr Glen unfortunately drew the short straw of things settling under his feet pretty much as he spoke.

2. Dealing first with the main application, *ENRC v the SFO and Gibson*, the legal background relates in large measure to the following paragraphs of PD 57AD, that is:

    a. Paragraph 12.1:

    > "Where a party who cannot produce particular documents whether because the document no longer exists the party no longer has it in its possession or for any other reason is required to describe each such document with reasonable precision and explain with reasonable precision the circumstances in which and the date when the document ceased to exist or left its possession or the other reason for non-production. If it is not possible to identify individual documents, the class of documents must be described with reasonable precision."

    b. Paragraph 17.1:

    > "Where the court concludes either that there has or may have been a failure adequately to comply with an order for extended disclosure, then the court should be satisfied that it is reasonable and proportionate to make an order to secure a party's compliance with the extended disclosure obligations and the court has a wide discretion to make such further orders as may be appropriate, including

> requiring a party to make a witness statement explaining any matter in relation to disclosure."

c. Also, paragraph 18.1:

> "Pursuant to which the court may vary an existing order for extended disclosure if it considers that any aspect of the relief sought falls outside the current disclosure obligations for which purpose the court has to be satisfied that it is reasonable and proportionate and necessary for the just disposal of the proceedings."

3. The first of the contentious issues before me, as I say a number of the issues having been resolved in whole or in part by agreement, is paragraph 1.1 of the draft order which relates to Ms Osofsky's mobile. The order sought is that the first defendant shall file themselves a witness statement signed by the appropriate officers addressing the following matters, having taken reasonable steps to make enquiries directly with Ms Osofsky whether Ms Osofsky has ever used her work mobile phone to communicate with intermediaries, journalists and/or other media outlets and/or to communicate with anyone in connection with ENRC and if so, providing full particulars of those communications to the best of Ms Osofsky's recollection.

4. Ms Osofsky is of course a category E custodian being one of a group of custodians comprising the SFO's most senior management. The reason that she is in focus is that disclosure confirms that during the course of her tenure as director, she played a leading role in the management of the SFO's PR activities, that she met journalists and that she took an active interest in how the ENRC investigation was portrayed in the media; and that period overlapped with the period where certain leaks were made.

5. ENRC says that it is likely that she would have used her SFO-issued mobile for relevant communications thereby creating disclosable documents for example under 5.1(a).

6. ENRC says that the way that this has been handled within the disclosure statement is inadequate. It is common ground that the test is if it is likely or there is a risk of relevant disclosable documents then paragraph 12.3 of the PD in engaged in terms of explanation for the disappearance; and the reason why we are talking about 12.3 is the fact is that somehow, the SFO managed to wipe Ms Osofsky's mobile phone. That is something which plainly should not have happened given that there were document preservation orders in play. But the net result is that any such documents which did exist on her work mobile have been destroyed.

7. Against this, of course, the point which is made by the SFO, is that the work mobile is hardly the main repository for relevant documents. Mr Whitfield explains that the SFO have conducted very extensive searches of Ms Osofsky's mailboxes etc. There is no suggestion of missing documents from the servers. The significance of the additional searches on the mobile really go to logs of calls and messages to other phones; the potential use of that work phone to communicate with journalists.

8. The SFO says that there is no reason to suppose that there was relevant information on the phone, whereas ENRC says that in the light of the role which she played and the centrality of her communications with the media, the matter falls the other side of the line.

9. It is fair to say that fitting this analysis in relation to a mobile device within the framework of the Practice Direction is not entirely straightforward. A device is not a document or a category of documents within the contemplation of the Practice Direction. Where one does not actually have the device, how does one say what documents are on it for the purposes of saying a disclosable document has been destroyed.

10. The SFO says that there are three main reasons why the order should not be granted, that it is not a 12.3 case; that 12.3 does not apply wherever documents have been destroyed. It applies where there are disclosable documents that cannot be produced. Those need not be individual documents but

there is a minimum trigger, a substantial reason to suppose that the device contains disclosable documents which they say is not activated here, where the active role which Ms Osofsky to have played was in relation to meetings mediated through the press office and any emails will have been produced. It is also said that if 12.3 is engaged it has been complied with, in that there has been an explanation precisely of circumstances and the description of the class of documents which they are unable to produce has been performed in simply saying that the device cannot be produced.

11. Overall, I do have some sympathy with the argument that the response given was in this respect too broad. The starting point is that as far as Ms Osofsky's phone goes, it is clear that it should not have been wiped. To what extent can one say that there is a likelihood or any risk that there are documents which would have been disclosable on her phone? I do not take the view at all that it could be said that it would be likely but there is some risk that there were documents on that phone and to that extent, it seems to me that the correct thing to do would have been to treat it as falling within 12.3. But if that is what should have been done, is what has been done non-compliant? I take the view that it was at least too broad.

12. The description is too broad. ENRC is entitled to expect the first defendant to provide a reasonably precise description of at least classes of documents which would be expected to be held on that device and which would otherwise have been disclosable in the proceedings. How it is to do that is a matter for it. It is likely that to do so it will have to ask Ms Osofsky, but there may be other ways of doing it.

13. However, having said that, that is as far as I would be prepared to go on this. It seems to me that what ENRC is entitled to get is the answer which it effectively should have got in the disclosure certificate. That is not a witness statement signed by the appropriate officer, having specifically

taken reasonable steps to make enquiries directly with Ms Osofsky covering the full range of things contemplated in 1.1 and providing full particulars with those communications.

14. The form of the order is therefore, in my judgment, inappropriate and over prescriptive. It would result in witness evidence. What ENRC are entitled to is, as I have said, effectively the answer which should have been given in relation to the categories of documents, looking closely at what is said in 12.3 would be expected. And it may be that there is no point in this but effectively that is what should have been given. It follows that that must now be given - by witness statement or by some other statement equivalent to the disclosure statement.

15. I turn then to 1.2. The second category is somewhat similar but panning out without the specific circumstance of the deletion and wiping of a specific person's phone. However, the SFO has admitted that it habitually wiped work issued mobile phones when an employee either left the organisation or had their old device replaced; in most respects, obviously a perfectly standard practice. The unfortunate thing is this appears again to have continued after data preservation steps should have been in place.

16. So what is being sought is details of each mobile telephone or other device that was issued by the first defendant to the first defendant's custodians, including those who have since left and then seeking a suite of information set out in the order.

17. The other reason why this is sought is that it is unclear whether any wiped data could have been retained and can be accessed and there is a possibility that such data is irrecoverable.

18. So as I have said, what is being sought is considerable details of those work mobiles' custodians' availability of data, whether searched. ENRC says this is to allow it to understand the ambit of the search the SFO has conducted or agreed to conduct with the documents contained on its custodians'

work issued mobile phones through clarifications about what remains available, what has been lost, what is still accessible, what has been searched.

19. Again, one might ask a question as to what the point of this is. Ms Boase says of course when it comes to trial much may be said about what is not there and without information of this nature, it will be difficult for a strong case which she says she is entitled to put in relation to adverse inferences being sought.

20. ENRC says it is seeking an explanation which should have been in the disclosure certificate and on that basis, it should be entitled to get the information and then seek to draw adverse inferences if information has not been retained.

21. It says that while smoking gun documents are most likely on private devices, contextual or other relevant documents may well be on work phones, pointing to certain examples of at least interesting correspondence on phones. Whether it is relevant or not is a matter for trial and some of that correspondence may have been on phones which were personal. Some of it may have been on work phones.

22. The SFO says that by seeking this, the ENRC is seeking a massive expansion of the data custodian schedule and points to the fact that the format in which this information is being sought specifically does involve massively expanding the already extensive data custodian schedule.

23. Overall, I have limited sympathy with this part of the application. If we started from a blank slate, I would say that the description which has been provided is lacking, as with Ms Osofsky and with C and E custodians, if phones had been destroyed, there would have to be a similar explanation. However, I do struggle with the proposition that we are in a similar position in terms of risk of

relevant material being on phones and that there should therefore have been a custodian by custodian explanation across all of these custodians.

24. In reality, it appears that there have already been manual searches of the C and E custodians. I'm not persuaded that for those outside that circle phones would fall into the category of repositories likely to contain documents or any real risk of containing documents which are relevant.

25. Even if those less central custodians did have phones and in this context, there is considerable evidence that work phones were by no means ubiquitous, one is looking in this regard in a number of places at people who it seems unimaginable would have relevant documents on their phone; for example, the library support officer or a paralegal.

26. So, in context, what is sought is, it seems to me, plainly overbroad. It is not feasible. I have no difficulty in believing it would be very difficult to do, even without the evidence which Mr Whitfield gave us in relation to the fact that there was no central record of work phones and so forth.

27. At this stage in the litigation, with witness statements impending, I would not be minded to grant this. What has been said by the SFO is that they have no difficulty with doing further searches which are reasonable and proportionate. As far as my consideration of this goes, I would again turn back to those C and E custodians because there is some clarity on those as to who had a phone and the position as to availability of data and whether it has been searched; and then if there is no data available, some explanation as to the circumstances in which it was destroyed akin to what would be expected on a paragraph 12.3 explanation.

28. That takes me to paragraph 1.4. This is about personal device disclosure. What is sought is further particulars of the first defendant's attempts to recover data stored on its custodians' personal devices and accounts pursuant to paragraphs 1 and 2 of my order of 17 March 2023. There is then a long

"including" broken down into now three sub-paragraphs. Sub-paragraph (a) dealing with category C or E custodians; category (b) dealing with the other custodians; and then category (c) dealing with grounds or reasons.

29. The starting point for this one is that I made an order. It set out what the first defendant had to do. It is common ground that the SFO has complied with the order. So, the question then arises as to why it is appropriate at this stage, given that we are on this analysis plainly looking at a paragraph 18 situation, why it is necessary, reasonable, proportionate to make this order.

30. ENRC says that it needs further and better information to assess whether the SFO has complied with its disclosure obligations more eventual. I do not see that as falling within the ambit of paragraph 18. It says that it needs further and better information to make the order of any utility. The issue was really joined on that question of utility with the SFO saying that the purpose of an order of the sort which I made is not to obtain information to enable the applicant to make further applications. The request is part of the defendant's disclosure obligation made with the aim of short-circuiting the need for further applications. It is done within parameters defined within the order and it has served its purpose when it has been completed.

31. ENRC says that *Phones 4U* really goes to whether the order should be made and it is not really relevant to follow-on applications and that it is really a situation where ENRC has no option but to pursue this, given the failure of the order which I made and that it therefore meets the paragraph 18.1 criteria.

32. I am afraid I simply do not accept that the order sought is necessary for the just disposal of the case or that it is reasonable and proportionate.

33. What is asked for is something which is not anything that was asked for in the original order. It could perfectly well have been asked for as a follow-up or as a corollary to the order originally sought and we could have then had a think about whether the order should be made at all, if that was the corollary.

34. It is something which requires a considerable amount of work to be done. It would impinge to at least some extent on privilege. There is also distinct oddity as part of a disclosure process to think of the reasons given by third parties who have been approached on a volunteer basis being given as part of that disclosure process.

35. The bottom line here is that it does not fall within paragraph 18. If ENRC had wanted more, it should have applied for further disclosure against the SFO. Having names would not materially advance the position as regards making any application if ENRC were minded to make an application. The truth is that nothing material has changed here since this was before me before, either as regards the end of the criminal investigation or the end of extended disclosure which would justify a more extensive order.

36. ENRC got their order, they do not have a result out of it. The next step is to think about whether, that having failed, the short circuit having failed, they can meet the criteria for applying a further disclosure order either against the SFO or individuals. They may well have done that. They have not done so.

37. The application indeed leaves a flavour that this is being done because there is no prospect of success in relation to disclosure applications against the SFO or individuals. In sum, ENRC has had what I decided it could have. It can have no more under this paragraph.

38. Paragraph 3, that relates to the surviving pool of data from the SFO mobile phones. This is all really about whether there should be forensic imaging or manual review, that being the offer. There has been a limited amount of information which has been recovered. Apparently, there are only 17 people within category C and E still employed. The SFO have looked at five in relation to that, there are therefore another 12, 20 other custodians outside category C and E, the pool has not been looked at.

39. ENRC says that insufficient parameters of review have been used: only searched with named journalist, not all, excluding many major names, no search with contact with individuals within the SFO who are not journalist, not searching for just WhatsApp or text message or whatever, but also phone numbers, screenshots, photos.

40. There is a compromise suggested at paragraph 39 of the SFO's skeleton. That compromise appears to me to be largely a sensible one. The objections which are made is it is the same manual search; adding a few named journalists is not enough. The objection to a forensic review, the objections have not been properly fleshed out.

41. However, against this, we are looking at devices which are secondary. Electronic review is often necessary when one is looking at emails but the emails in relation to these devices will already have been searched and anything will have been got out of it. So when you look at these devices to the extent they still exist, to the extent that anybody used them because some people do not use their work mobile phones, you are looking at other applications in which somebody either communicated with a journalist or had a communication with somebody else within the SFO about a journalist. That is a limited number of apps or data sources to interrogate.

42. So I am satisfied that the offer made is effectively sufficient to meet the need identified. It is a very small target and it is not sufficient to justify full forensic imaging. Having said that, I would like to

be clear that to the extent that there have been issues identified such as the range of journalists and intraoffice communications in relation to journalists, those devices which have been manually searched should be re-searched; and I understand it to be intended that at least the C and E custodians' devices, indeed all of the custodians' devices to the extent that the data survives will be searched.

43. That takes us to paragraph 6. This is in relation to the documents which may or may not have come out of the meetings which Ms Osofsky held with journalists, in particular the journalists who later published key articles. The point is made that there are no manuscript notes of those meetings have been disclosed. No, obviously, email notes of the meetings have been disclosed and ENRC say that they do not know who else attended.

44. The SFO via Mr Molyneux's clear and persuasive submissions says that just because there has been contact does not mean that you generate disclosable documents. It has to relate to ENRC or be otherwise within disclosable criteria. There is only speculation that there was anything improper about this at all in that these were on their face perfectly proper meetings with any reference to ENRC being in what might be called anodyne terms. There is limited chronological proximity and all in all, the materials deployed to say that there is something suspicious about these meetings is effectively speculation.

45. So as far as that is concerned, there is also material about who was there via the calendar invite and there is no failure -- this is a paragraph 18 situation -- there has been a reasonable search for relevant hard copy documents, this is not known adverse documents territory and nothing to give rise to an inference that an unlocated record would be adverse to the SFO.

46. On this, it seems to me that the course of the focused argument highlighted both the excessive breadth of the request as drafted and a possible route through. What the SFO had offered before

today was a rereview of the Osofsky hard copy notebooks. Ms Boase says that it is hardly likely that Ms Osofsky took her own notes of these meetings and I agree it is highly unlikely that she was the note-taker. So while doubtless it is kind of the SFO to do that, that is unlikely to be helpful.

47. The assumption that only G custodians attended, on which the SFO relies, may or may not be inadequate. Personally I can see no difficulty in envisaging a situation in which only the press office accompany and no hard copy documents survive. For example, if a press office person takes a manuscript note in a reporters' notebook just to check the accuracy of what comes out in the article and then destroys it, you might well end up in this situation.

48. But having said that, it did become apparent during the course of argument that the SFO may have taken an over-narrow approach as to whose knowledge counts for known adverse documents and that as a result there may have been a slightly over-narrow view as to who might be asked. So they have looked at the notebooks, they have looked at calendar invites and the notebooks of those whose details were generated via that.

49. The SFO has said that they are happy to look for the notebooks of Mr Drake. It seems to me that if there were other people in the private office that can be identified who were in post then there should be a look for their notebooks as well. Similarly, for Laura Temerlies who was specifically identified in one briefing note, there has been a search of her documents in another period but not in this period. I think that should probably be done.

50. As far as how that is done, I think that using reasonable efforts to locate those things is more than adequate. So far as confirming via witness statement, that seems to me to be well over the top. The enquiries in seeing if the hard copy documents can be found is sufficient.

51. Then we get to paragraph 11.3. Overall, I was not persuaded by this. This was ENRC saying effectively it needed to know the names in the list to ensure that they knew how it matched, effectively to be on a level playing field since it has provided its own list and that it was not clear who had been searched.

52. As Mr Richards said, what ENRC is entitled to is documents from relevant individuals in the sense that they have something to disclose. And if documents are disclosed, their names will be with and part of those documents. So, in addition, what is being sought was indeed open-ended and too wide. So, I am not going to grant paragraph 11.3. The documents will be disclosed if they are relevant and then the names will become apparent. It is not necessary to have a relevant individual's list.

53. Then we come to the yellow text issue, as it might be called, relating to paragraphs 1.3, 1.5, 1.6 correspondence versus witness statement. What Ms Boase says is that there are occasions when explanations have been confusing, and essentially a degree of faith in the accuracy of the correspondence process in relation to disclosure has been lost. A number of examples were given and that where witness statements are to be given -- or where explanations are to be given (and of course I have only to a limited extent granted that it should be by witness statement because it is more likely to be precise if a statement of truth is being signed) that would promote clarity and she says there is no need to treat it as a sanction.

54. Overall, I am not persuaded that it is necessary. Where I have required explanations for things to be in a witness statement ie. where something is equivalent to a paragraph 12.3 explanation, it should be a witness statement or the format you would use for a disclosure statement. But to the extent that I will order any other explanations, there is no need for it to be in a formal witness statement. The reason why one wants a witness statement is a reason which comes with a weapon. Ms Boase may

say very reasonably that there is a need to treat it as a sanction; but the problem is as soon as you have a witness statement, you have the potential for sanction. So no for that.

55. Date for compliance: because I am granting really not nearly as much as was asked for, I think that 31 May is a good idea; if it can be done before witness statements, it should be done.

56. The SFO application, that is I think if not agreed, it will either be complied with or agreed by the time an order comes in front of me.

57. That leaves only the question of costs. The Mr Puddick application, during the course of argument, thanks to Mr Glen dealing very well with a proffered change of wording on his feet, we seem to be in a position of agreement. That will doubtless have been brought close to being wrapped up over lunch.

58. I think that brings me to the end.