Neutral Citation Number: [2024] EWHC 557 (Comm)

Case No: **CL-2020-000748**

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

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

Date: **7 March 2024**

Before :

Mr Justice Andrew Baker

- -

Between :

Fiesta Hotels and Resorts SL & Ors	**Claimants**
- and -	
Deutsche Bank AG & Anor	**Defendants**

- -
- -

Tony Singla KC, Laurie Brock and Ian Simester (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Alexander Polley KC (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing date: **7 March 2024**

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RULINGS

(Approved Transcript)

Mr Justice Andrew Baker **Thursday, 7 March 2024**

Rulings by **MR JUSTICE ANDREW BAKER**

(**12:10**pm)

DB-Issued Devices

1. I am against the application so far as it concerns DB-issued devices. In my judgment, the evidence of a technical nature that has been provided for the application is clear, precise and comprehensive, even taking account of the criticisms, some of which have force, that it has come through piecemeal, and that some of it has come through late in the day and might better have come through at an earlier stage, either prior to or within the application. It is to the effect that the DB-issued devices were configured in such a way, and externally controlled by Deutsche Bank's systems in such a way, that as regards BlackBerry devices, the WhatsApp application could never, in the material period, even have been downloaded, and so far as Apple devices are concerned, in an earlier period the WhatsApp application could have been downloaded but in effect could not be used to send and receive messages and would result in the locking of the device, even if the app itself was downloaded but not used and present on the device for as little as an hour, and in a later period likewise the WhatsApp application could not even be downloaded.
2. I can see, picking over the last detail of every aspect of the matter on which the claimants rely, how Mr Singla KC seeks to read one part of one sentence of one paragraph of the SEC ruling as possibly capable of causing one to wonder whether there might have been a possibility of WhatsApp on DB-issued devices. In my judgment, that possible interpretation of one part of one sentence of one paragraph of the SEC order is an insignificant piece of evidence against the clear and detailed technical explanations that the court has been given.
3. I therefore conclude that there is no substantial basis for thinking that there is likely to be any WhatsApp communication at all, let alone WhatsApp communications of possible disclosable relevance to these proceedings, on the DB-issued devices.

4. I am not going to prevent Deutsche Bank, if they choose to do so, continuing, if they are happy to do so at minimal cost, to explore the possibility of looking on those devices, but I am not going to order them to do anything in relation to them. That includes a decision that it is not appropriate for the court to order even that they proceed with an attempt to unlock devices using a default password to check for the presence of WhatsApp, or WhatsApp messages, if the claimants still would like Deutsche Bank to try that, or at least to try it in particular with Mr Ferri-Ricchi's device or devices. As I say, I am not going to stop Deutsche Bank doing so if they wish to do so on some agreed basis that on the claimants' side acknowledges the potential risk of data loss involved in making the attempt. But there is going to be no order on that part of the application.
5. I felt it appropriate to indicate straight away that I was not persuaded by that part of the application, without needing to trouble Mr Polley KC on it, allowing him to focus on the other parts of the application, rather than taking up further time with submissions on the DB-issued devices. But I thank him for his very clear skeleton on the point, and I should make clear that in reaching the conclusion I have reached I have not placed any particular weight on the arguments over the proportionality or disproportionality of the possible costs that might be involved in the attempt to crack the devices, if that were necessary. As a result, the correction that Mr Polley quite properly made to, as he put it, an error or misunderstanding of some evidence that he may have perpetuated in his skeleton has not affected the outcome.

(**2:43**pm)

Personal Devices

1. It seems to me that the handbook provisions very recently disclosed effectively put beyond any real doubt that as an express matter of contract as between Deutsche Bank and the ex-employees, other than Mr Frontini, to whom those terms may not have applied, Deutsche Bank would have a contractual right to require the ex-employees to allow the bank to take a full forensic image of their

personal devices, on which they had or may have conducted work-related correspondence via WhatsApp, were that reasonably necessary for the bank's purposes in responding to these claims or in order to complete a satisfactory investigation by the bank into the use by the ex-employees of WhatsApp on their personal devices for Deutsche Bank business purposes, that being contrary to obligations they owed as part of their obligations of confidence to the bank.

2. It may be true, as Mr Polley KC, as it seemed to me, effectively accepted, that a qualified obligation of that kind was in any event a necessary consequence of the acceptance the bank had previously indicated of its control over work-related communication data, if it existed, on those personal devices. That is because, on the evidence for the application, the court is confronted with the relatively stark fact that as regards documents in the form of electronic data stored on devices that would evidence, or evidence traces of, what had originally been WhatsApp communications, but which are not still today held in the form of stored WhatsApp communications, only the taking of a full forensic imaging of the device to enable an external consultant such as FTI who have been engaged by Deutsche Bank would hold out a prospect of retrieving the data.
3. As regards WhatsApp messaging still extant in that format on the devices, irrespective of any disputes or differences between the parties over the basis upon which Deutsche Bank might have been able to extract those, the practical position today is that those have all been, or, in the case of Mr Gomez-Alarcon, will shortly be, extracted using the 'Export Chat' function and a protocol in relation to cooperation between the ex-employees and FTI that Herbert Smith have put in place on behalf of Deutsche Bank.
4. The conclusion, therefore, that the bank, as it seems to me, would have a contractual right to demand delivery up at least sufficient to enable the full forensic imaging to take place of the ex-employees relevant personal devices -- sorry, the importance of that conclusion -- is that it would provide a basis for the court to order that the bank demand such delivery up as a right, if the court

concluded that it was reasonably necessary to go through a process of that kind to hunt for traces of WhatsApp activity and/or deleted WhatsApp messaging.

5. That means, as it seems to me, although in the way of a hard fought, heavy interlocutory application in this court, a range of other points have either been debated between the solicitors in correspondence and it may be have fallen away or been overtaken by events, or have remained seemingly live so as to have been the subject of submissions before the court, the application in fact boils down to two aspects.

6. Firstly, is there value, in the interests of justice, in spelling out that disclosure is to be given, and specifying a deadline for that disclosure, of what at this stage I will describe loosely as the output from the Export Chat process that has been undertaken? In my judgment, there is. In that regard, as it seems to me, in the context of this heavy commercial trial, hard fought on both sides, and where the private interests and rights of the ex-employees are a factor to be borne in mind, there is a value in Deutsche Bank being able to point to the existence of the court's conclusion that that disclosure was required, although it has to be extracted from the ex-employees' own personal devices, and for the parties and the court engaged in further case management in the case there is value in being clear as to the deadline by which that current process is to be completed. I shall come back at the end of this short *ex tempore* judgment to state the precise terms in which I propose to make that order.

7. Secondly, then, is there some real reason as distinct from, on the evidence, merely a speculative possibility that cannot be completely ruled out, that there might be found traces or evidence of WhatsApp activity no longer held by those personal devices in the form of stored WhatsApp communications that would be of some sufficient significance in the litigation as reasonably to justify calling for that additional degree of intrusion into the personal affairs of the individual ex-employees?

8. As regards three of the ex-employees, but for two slightly different reasons, that is to say, Mr Hernandes, Mr Madar and Mr Frontini, in my judgment the position unarguably is that there is no

such real reason and there is only a speculative such possibility. The two slightly different reasons for that conclusion are that in the case of Mr Hernandes, the evidence from him through the witness statements of Ms Deas is that he no longer has any species of access to any of what may have been his WhatsApp activity whilst employed by Deutsche Bank, as a result of no longer having the personal devices that were in his use at that time. In the case of Mr Madar and Mr Frontini, the relevant evidence comes in the form of their evidence, again conveyed to the court through Ms Deas's witness statements, specifically confirming that all of their WhatsApp activity is retained in that form and therefore will have been extracted by the Export Chat process.

9. In the case of Messrs Gomez-Alarcon and Ferri-Ricchi, it can be said that the court does not have in quite those specific, unequivocal terms, a confirmation of exactly that type as has been given by Messrs Madar and Frontini. However, in my judgment, the fair reading of the correspondence that has been disclosed between Herbert Smith on behalf of Deutsche Bank and those ex-employees or their representatives, the clear tenor of what they are saying, is that their WhatsApp messaging is still there, and the debate is as to the method by which that is to be provided to or extracted on behalf of Deutsche Bank. In the case of Mr Ferri-Ricchi, including a specific confirmation that nothing will be deleted.

10. I acknowledge the aspect prayed in aid by Mr Singla KC of Deutsche Bank being in a better position than are the claimants to identify if there is some real reason to think that there might be other material there that could be extracted and that might be relevant. I bear in mind also that the process has indeed been, as Mr Polley KC has said, an iterative one, and that that is not necessarily as entirely satisfactory in all the circumstances as Mr Polley invited me to say that it had been. That is to say, there is room for criticism, as it seems to me, of Deutsche Bank of the way in which explanations have been provided piecemeal, have not all turned out to be accurate, and have had to be qualified, supplemented or changed.

11. But bearing all of that in mind as potential contra-indicators, my conclusion overall is that the proposition that the additional intrusion into the ex-employees' personal devices that would be involved in the taking of a full forensic image is not reasonably necessary for there to have been a fair and just search for, and investigation of the possibility of, relevant WhatsApp communications sent or received by them that ought, other things being equal, to find their way into the disclosure in the case.

12. For those reasons, I propose to make an order upon the application, but only in the following relatively limited terms:

    a. I propose to define the 'FTI Export Chat Process' as being the process set out in Ms Deas's email, 16 February 17.14 hours, that appears at her exhibit EASD2 page 34. That is one of the emails in the exchanges with the ex-employees or their representatives in which the intended process for the supervised use of the Export Chat function involving the ex-employee and FTI is set out.

    b. I propose to define a 'Relevant WhatsApp' as being a message sent or received using WhatsApp, for this purpose including attachments, that is likely to support the claimants' case or adversely affect Deutsche Bank's case in relation to one or more of the issues for disclosure in the litigation. That avoids the granting of an order that simply refers to relevant WhatsApps and stores up a debate as to precisely what test of relevance the court had in mind should be applied.

    c. With those definitions built in, which can be in recitals in the order that can be drawn up, the order will then simply be that Deutsche Bank shall, by 4 pm on Friday, 12 April, give disclosure by further list, with simultaneous production of copies or notification of any claim by Deutsche Bank to privilege, of Relevant WhatsApps -- so that will be the defined term -- sent or received by -- the ex-employees can then be set out in the way that they are in the draft order proposed by Mr Singla KC -- during the period from 1 October 2012 to the

earlier of 31 March 2020, or the date on which the respective ex-employees ceased his employment with DB, copies of which have been obtained using the FTI Export Chat Process from the hand-held personal mobile devices of any of the ex-employees other than Mr Hernandes.

d. I except Mr Hernandes only on the basis, as will be apparent from the earlier part of this short judgment, that the evidence in his case is that there is nothing to disclose, rather than that, for some other reason, he stands in a different position to the other four ex-employees. If the process had not already been undertaken with Mr Hernandes so as to identify, as it has in the event been identified to the court's satisfaction for the purposes of the application, that there is nothing to see here in his case, I would have included him in the order, but because of that particular factor affecting him, his personal devices are not included. Of course, he is still included as a relevant sender or receiver of WhatsApps as might be found on the other individuals' personal devices.

13. I am not persuaded that, for that purpose, I would be granting or minded to grant different or wider relief on the application if the position relating to the nature or extent of Deutsche Bank's contractual entitlements to examine the ex-employees' personal devices were not definitively established along the lines of the handbook provisions that I mentioned at the start of this judgment. The degree of uncertainty such as it is that exists in relation to Mr Frontini as to whether whatever precise terms might apply to him go quite as far as those handbook entries therefore has not had any bearing on the order that I am prepared to grant.

14. For that reason, I see no need for or justification at this stage for an order along the lines of the proposed order in paragraph 5 of Mr Singla KC's revised draft order concerning yet further disclosure in relation to contractual terms.

15. Subject to counsel on either side identifying that logically, by reference to the judgment I have now delivered, I should be saying anything more in the order, I apprehend that what I have therefore

identified is the only substantive order that will be made, and effectively takes the place of paragraphs 1(a), 2 and 4, as proposed by Mr Singla KC's draft, and paragraphs 1(b) and 3 of his draft, related to the DB-issued devices, fall away given the very short ruling earlier in the hearing, having concluded that I did not need to hear from Mr Polley KC in relation to that part of the application.

(**3:24**pm)

Costs

1. As it seems to me, the appropriate way to assess costs in relation to this application is that the claimants overall should be regarded as having reasonably issued and successfully pursued an important application but for which there is very real doubt in my mind that Deutsche Bank would ever have confronted properly the likelihood of WhatsApp communications having been used such that they should have been identified from the outset as a potentially important disclosure source and such as might ultimately generate at least some material disclosure.
2. I agree with the particular submission advanced by Mr Singla KC that for these purposes it is not appropriate to judge success and failure, or relative success and failure, on this application, and hence the fair and just order as to costs, by reference to some attempt to predict in advance how many disclosable WhatsApps will ultimately be generated and how important they might or might not be.
3. It seems to me in particular that in a number of respects Deutsche Bank through the correspondence prior to and to at least some significant extent still during the course of the application successively took stances that proved to be unjustified or inaccurately founded as a matter of fact, and in other important regards have demonstrated that at least as regards this aspect of their disclosure in this litigation it was *de facto* necessary for the claimants to have the

application issued and then later pursued, and to have this hearing hang over Deutsche Bank, in order to get to the far more satisfactory end result that they have ultimately achieved.

4. For reasons described by Mr Singla KC, that far more satisfactory end result than the *status quo* at the time the application was issued goes a lot further than the rather specific and narrow order that I have ultimately granted on the back, amongst others, of a conclusion I have been able to reach as to the nature and extent of Deutsche Bank's relevant control.
5. All that said, I take the view that there is substantial force in the submission that the claimants have allowed to an excessive degree what I have sometimes referred to as the "bunker mentality" to set in. The length, tone and content of a lot of their solicitors' correspondence was not as it should be. Their solicitors' witness statements for the application were almost entirely argumentative whilst simultaneously claiming not to be argumentative and claiming to recognise, although the witness statement demonstrated that the deponent does not understand, the difference between witness evidence of fact and argument.
6. I have no doubt that the aggressive and in certain respects excessive manner of pursuit of the application will significantly have aggravated the costs on both sides.
7. In my judgment, stepping back and looking at the fair result overall bearing those factors in mind, the just order as to costs is that Deutsche Bank will bear their own and will pay 50% of the claimants' costs of and occasioned by the application in any event. Those costs to be assessed on the standard basis if not agreed, but only at the end of the case.