Neutral Citation Number: [2020] EWHC 1734 (QB)

Case No: QB-2018-006323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2020

Before :

MR JUSTICE NICOL

- -

Between :

John Christopher Depp II	**Claimant**
- and -	
(1) News Group Newspapers Ltd.	**Defendants**
(2) Dan Wootton	
-and-	
Amber Heard	
	Third Party Respondent

- -
- -

David Sherborne and Kate Wilson (instructed by **Schillings**) for the **Claimant**
Adam Wolanski QC and Clara Hamer (instructed by **Simons Muirhead and Burton**) for the **Defendants**
David Price QC (solicitor) for the **Third Party Respondent**

Hearing dates: 29th June 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.

.....

MR JUSTICE NICOL

Mr Justice Nicol :

1. I have set out the background to this libel action in my previous judgments.

2. On Thursday 25th June I heard an application by the Defendants for a declaration that the claim was struck out because of the Claimant's alleged failure to comply with my earlier 'unless' order for disclosure. I reserved judgment.

3. A draft of my judgment was distributed to the parties on Friday 26th June 2020. In that draft I said that I agreed with the Defendants that the Claimant had not completely satisfied the obligation in paragraph 3(c) of my 'disclosure order' of 6th March 2020 which, by paragraph (10) of my order of 10th March 2020 I had made an 'unless' order. At the hearing on 25th June, Mr Sherborne, who represented the Claimant had indicated that, if I did find that there had been a breach, the Claimant would wish to apply for relief from sanctions. The trial is currently listed to start on 7th July 2020 and it was agreed by both parties that any such application would need to be made very expeditiously. Mr Sherborne proposed and Mr Wolanski QC for the Defendants agreed that it would be reasonable to require that the draft of any such application notice (together with the evidence in support) should be served within 36 hours of my draft of the judgment reserved on 25th June being distributed to the parties. The Claimant did so serve a draft application notice and the supporting evidence. My draft judgment was formally handed down on the morning of 29th June 2020 which was also the date when I heard the Claimant's application for relief from sanctions.

4. In my draft judgment from the hearing on 25th June, I indicated that it would not be appropriate to make the declaration that the claim was struck out until I had heard and determined any application for relief from sanctions.

5. This application was the first disputed matter which I considered on 29th June 2020. I reserved my decision which I am now handing down. I had made clear that I wished to resolve any other pre-trial issues on the same day. Of course, if the Claimant was refused relief from sanctions, the claim would be struck out and there would be no trial. Nonetheless, because it was desirable to resolve as far as possible any other pre-trial matters, the parties agreed to proceed on the assumed basis that the trial would proceed. It was on this basis that I heard the second disputed matter, namely whether I should make the order sought by the Claimant that Ms Heard, as a Third Party, should be required to make disclosure of certain categories of documents.

6. As I have explained in my previous judgments the articles which the Claimant alleges libelled him concerned his relationship with Ms Heard who is his former wife. In those articles, it is said, the Defendants accused the Claimant of multiple acts of physical violence against Ms Heard, some of which, it is alleged the articles said, put Ms Heard in fear of her life.

7. The Defendants substantially rely on the defence of truth in Defamation Act 2013, s.2. In doing so they have served a number of witness statements from Ms Heard (among others) and Mr Wolanski has indicated that they will rely on her evidence in support of that plea.

Should the Claimant be allowed relief from sanctions?

8. This application is under CPR r.3.9 which says,

> '(1) On an application for relief from any sanction for failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application including the need –
>
> (a) For litigation to be conducted efficiently and at proportionate cost; and
>
> (b) To enforce compliance with rules, practice directions and orders....'

9. As is well known, the Court's approach to such an application has been analysed in *Denton v T.H. White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3296. The Court has to ask itself three questions: (1) Was the breach serious or significant? (2) Why did the breach occur? (3) Is it just to allow relief from sanctions having regard to all the circumstances, particularly the matters referred to in r.3.9(1)(a) and (b)? These are commonly referred to as the three *Denton* stages.

Denton Stage 1: Was the breach serious or significant?

10. Mr Sherborne did not seriously contest that the breach was serious or significant. In my view, he was right to take that course. I had ordered disclosure of certain categories of documents on 6th March 2020. The Claimant has brought libel proceedings in the US state of Virginia arising out of an article that Ms Heard had written in the *Washington Post*. One of the categories of documents which I required the Claimant to disclose concerned documents which had been produced on discovery in those Virginia proceedings. I set a tight timetable for compliance since, at the date of my order, the trial was due to start on 23rd March 2020. Shortly thereafter the Claimant asked for a little more time since there had been a relatively recent change in his solicitors from Brown Rudnick to Schillings and the amount of work required was considerable. On 10th March 2020 I agreed to extend time (see paragraph (5) of my order of 10th March extending time for compliance with paragraph 3 of the order of 6th March 2020) but, I added that, if the Claimant failed to comply with that or various other orders his claim would be struck out.

11. Thus, the order which the Claimant breached was an 'unless' order and breach of such an order will almost invariably be serious or significant.

12. In my judgment handed down on 29th June 2020 I found that the Claimant had not completely complied with paragraph 3(c) of my order of 6th March 2020. That sub-paragraph required the Claimant to disclose any documents produced on discovery in the Virginia libel proceedings which came within CPR r.31.6 and which had not already been disclosed. In my judgment of 29th June 2020 I agreed with the Defendants that certain texts exchanged between the Claimant and his assistant, Nathan Holmes, and which were referred to as 'the Australian drug texts' did come within that description.

Denton Stage 2: why the breach occurred.

13. Ms Afia of Schillings gives her account of how the breach occurred in her 7th witness statement (dated 27th June 2020).

14. Ms Afia apologised for the breach of my order which she acknowledged (in light of my judgment) had occurred. Her apology was on behalf of her firm and the Claimant. She explained that my disclosure order had required a very large number of documents to be reviewed. Even with the extended deadline which my order of 10th March 2020 had given the Claimant, this was still a very taxing task. Schillings had been obliged to consider a very large number of documents as a result of my disclosure order. Their team had been working virtually round the clock. As a result of my disclosure order some 142 documents from the Virginia proceedings had been disclosed to the Defendants. The Australian drug texts had been considered but the view was taken that they did not fall within r.31.6 and they did not therefore have to be disclosed.

15. Ms Afia accepted, in the light of my judgment, that the Claimant had taken too narrow an approach to the requirements of r.31.6, but, she said, the error had been made in good faith and not with the intention of deliberately concealing documents adverse to the Claimant's case. Schillings had obtained a full download of iCloud messages, SMS messages and MMS messages for the period of 15th February 2015 – 9th March 2015 and had reviewed these to see if any others came within r.31.6. One further message from Mr Holmes sent on 3rd March 2015 had been identified and that would be disclosed. The Defendants have alleged 14 incidents where it is said that the Claimant was violent to Ms Heard. On 3 more of those occasions the Defendants have pleaded that the Claimant was affected by alcohol and/or drugs. The Claimant has agreed that Schillings would review his messages for the immediate period before each of those three incidents to see if any further documents should be disclosed.

16. As to the *Denton* second stage, Mr Wolanski submitted:

    i) I could not accept that the breach was solely the responsibility of Schillings. He commented that there was no witness statement from the Claimant himself in regard to how the default had occurred.

    ii) Mr Wolanski also submitted that the Claimant had previously misled me at the pre-trial review hearing on 26th February 2020 regarding his possession of a certain recording of a conversation between him and Ms Heard.

    iii) He also commented that the Claimant's US lawyers had recently threatened Ms Heard with sanctions for providing documents to the Defendants in the present proceedings (including the Australian drugs texts).

    iv) In any event, as the White Book commented, a good reason for the default which required relief from sanctions was ordinarily something which was outside the control of the party in default. A mistake by the party's lawyers was not of that kind. Mr Wolanski submitted that, even if Ms Afia's explanation was correct, it was not a good reason.

17. While there is no witness statement from the Claimant himself, Ms Afia's witness statement gives a full account of how the breach occurred. It is plain from her witness statement that the Australian drug texts were included in the documentation which the Claimant supplied to Schillings in compliance with paragraph 3(a) of my order of 6th

March 2020. Schillings were then obliged to review the documentation which the Claimant supplied to them. I have no reason to doubt that they did so.

18. I accept Ms Afia's explanation of why the Australian drug texts were not thereafter disclosed to the Defendants.

19. I shall return to Mr Wolanski's second and third points when I come to consider the *Denton* 3rd stage.

20. As for Mr Wolanski's fourth point (that a good reason would ordinarily be something outside the control of the parties), this has to be seen in conjunction with the next paragraph in the notes to the White Book at 3.9.5, namely that, 'If some good reason is shown for the failure to comply with a rule, practice direction or order, the court will usually grant relief from any sanction imposed because of it.' In other words, if a reason outside the control of the defaulting party is shown, it is not usually necessary to go on to consider the 3rd *Denton* stage. I agree with Mr Wolanski to this extent. The explanation given by Ms Afia for how the default occurred does not mean that the Claimant avoids examination of all the circumstances of the case: he does have to engage with *Denton* stage 3 as Ms Afia effectively acknowledges in her witness statement.

The 3rd Denton stage

21. Mr Wolanski submitted that there were 7 factors for me to take into account at the third *Denton* stage any one of which, he submitted, would be sufficient to deny the Claimant relief from sanctions, but which in combination provided an 'overwhelming' case against granting the Claimant relief.

    i) *There was no reason to revisit the reasons why, on 10th March an 'unless order had been made. It was only in a rare case that the sanction previously stipulated would be departed from. In this case there had been multiple breaches of the 'unless' order.*

    Mr Wolanski referred me to *Global Torch Ltd v Apex Global Management Ltd (No2)* [2014] UKSC 64, [2014] 1 WLR 4495 where Lord Neuberger said at [23]

    > 'Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have.'

    That is also in line with one of the particular factors to which the Court must have particular regard- see r.3.9(1)(b) and *Michael Wilson and Partners Ltd v Sinclair* [2015] EWCA Civ 774, [2015] 4 Costs LR 707 at [26(iii)]. Likewise in *Sinclair v Dorsey and Whitney (Europe) LLP* [2015] EWHC 38888, [2016] 1 Costs LR 19 at [43] Popplewell J. spoke of it being a 'rare' case where the decision to impose an 'unless' order with its consequence of striking out in default should be revisited.

    ii) *Had the trial proceeded on 23rd March, the Defendants would not have had the Australian drugs texts. The Defendant had only found out about them recently when Ms Heard had alerted the Defendants to their existence. Because they*

were unaware of them, the Defendants would have been unable to challenge the Claimant's evidence regarding those matters.

iii) *It was now clear, Mr Wolanski submitted, that the Claimant had misled the Court at the pre-trial review hearing on 26th February 2020* (This was Mr Wolanski's second point at the *Denton* stage 2)

One of the issues raised at the Pre-Trial review concerned recordings of conversations which included Ms Heard. In turn that led to a debate as to whether the Claimant had any such recordings. Schillings had said he did not. Recently it has transpired that he did. This recording was referred to at the present hearing as 'Argument 2'. In an earlier witness statement (dated 21st February 2020) prepared for the hearing on 26th February, Ms Afia had said,

'The Claimant does not hold and has never held any of these recordings.' Mr Wolanski commented that the point was repeated by Mr Sherborne in the course of his oral submissions, at a time when Mr Depp was present, as was one of his US lawyers, a Mr Adam Waldman. Since 12th June 2020 Ms Heard provided to the Defendants a document referred to as 'the extraction report'. That showed that the Claimant had had possession of the 'Argument 2 tape'. On 13th March 2020 the Claimant had disclosed as part of his response to my orders of 6th March and 10th March parts of the Extraction Report, but not the parts which showed that he had been in possession of a recording of 'Argument 2' and had had it since at least 18th February (the latest date by when it had been disclosed to Ms Heard in the Virginia proceedings).

In her witness statement of 27th June Ms Afia accepted that the recording of 'Argument 2' was disclosable, but, she said, it had just been missed. She commented that 'our instructions were that the recordings were not held by the Claimant.'

Ms Afia has made an 8th witness statement (dated 28th June 2020) in which she says, 'there was no intention to mislead the Defendants or the Court'. Mr Wolanski comments that the statement is ambiguous as to whose intention Ms Afia is referring and he repeats his observation that there is no witness statement on the matter of relief from sanctions from the Claimant himself. He submits that I should infer that the Claimant *did* intend to mislead the Court.

In her 8th witness statement, Ms Afia also explains how certain texts were overlooked. She says that the Claimant's team used an electronic key word search, but these did not include the words 'fight', 'hit' or 'control'. Mr Wolanski submits that that is remarkable, given the nature of the disputes between the parties which leads to his comment that there can be no confidence that other relevant messages may also have been overlooked.

iv) *The Claimant had threatened Ms Heard with repercussions in the Virginia proceedings for supplying the Australian drugs texts to the Defendants in these proceedings. The intimidation of Ms Heard has continued in the days leading up to the present hearing and only days before the expected start of the trial on 7th July 2020* (This was Mr Wolanski's third point at *Denton* stage 2).

Mr Wolanski submits that the Defendants have only known about the deficiencies in the Claimant's disclosure because of the assistance they have received from Ms Heard. The discovery procedure in Virginia allowed either party to designate a document as 'confidential' in which case its use outside those proceedings was restricted. After the hearing on 25th June Ben Chew, who is one of the Claimant's US lawyers wrote to Ms Heard's US lawyers,

> 'We understand that in London today counsel for the *Sun* tabloid represented to the Court there that Ms. Heard's American lawyers provided certain texts that Mr. Depp produced and marked CONFIDENTIAL pursuant to the Protective Order in the Fairfax case. We believe that such disclosure is an egregious violation of the Protective Order and we plan to seek appropriate relief from the Court in Fairfax.'

Mr Wolanski submits that a letter in those terms sits uneasily with what Ms Afia said in her 8th witness statement, namely.

> 'There has been no attempt to prevent the Defendants obtaining documents by Ms Heard, even if the provision of these documents is apparently in breach of US procedural law.'

Mr Wolanski argues that the letter of Mr Chew was only the latest in a number of similar threats to Ms Heard by the Claimant's US lawyers.

v) *The Defendants cannot now have a fair trial. Ms Afia's 7th and 8th witness statement show that the Claimant's legal team have been incompetent in applying the r.31.6 test. Important documents may have similarly been overlooked. The Claimant has admitted that a further message should have been disclosed. Unless the whole disclosure exercise was re-done, the Defendants could not have a fair trial, but there is simply insufficient time to do that before 7th July.*

vi) *The Claimant will have the opportunity to vindicate his reputation through the Virginia libel proceedings.* That trial is due to start in January 2021. In that claim Mr Depp is the claimant and Ms Heard is the defendant. There will not therefore be in those proceedings the asymmetry of which the Claimant has complained in the English proceedings. Mr Wolanski told me that a Judge in Virginia has already ruled that Ms Heard's article in the *Washington Post* did refer to Mr Depp. The factual issues will be determined by a jury in Virginia, but that feature did not dissuade the Claimant from suing Ms Heard in Virginia. While jury trials were more common in defamation cases in England, it was never suggested that they provided an inadequate means of vindication.

vii) *If the present trial goes ahead it will absorb vast resources.* The Court Service has agreed to make 5 court-rooms available (because of the need to observe social distancing). The burden on the public purse and the displacement of resources which could otherwise be used for other cases is, therefore, particularly acute.

22. In response, Mr Sherborne argues that the *Global Torch* and similar cases were addressing a different type of situation, namely a litigant who has recalcitrantly refused to obey an order of the court, despite being given every opportunity to do so. He argues that the present situation was different. The disclosure order was converted into an 'unless' order on 10th March 2020, not because the Claimant had been recalcitrant, but

because the trial date was fast approaching and Schillings had sought an extra few days in which to meet the challenge of reviewing a very large number of documents.

23. Striking out, Mr Sherborne submitted, was a draconian step which should be reserved for cases where it was clear what the litigant had to do and had not done it. This was not a case of a litigant refusing to do something which he clearly was required to do, but a mis-judgment of what the Rule 3.6 required. The Claimant now accepted that the Australian drugs texts were disclosable but the decision to the contrary which the Claimant had taken prior to my judgment was made in good faith, as Ms Afia had said. She had apologised on behalf of both her firm and the Claimant for that error.

24. The Defendants had chosen to allege that the disclosure order had been breached only by reference to the Australian drugs texts. It would be unfair to the Claimant to allow Mr Wolanski to widen his complaints as he had sought to do.

25. Mr Sherborne emphasised that the Australian drug texts had not in themselves shown that the Claimant had been violent to Ms Heard. That was important in my decision whether striking out the claim for failure to disclose them was a proportionate measure.

26. There was, he submitted, an air of unreality regarding the complaints of threats against Ms Heard. She had undoubtedly assisted the Defendants, notwithstanding anything said by the Claimant's US lawyers. As for the future, Mr Sherborne offered on the Claimant's behalf an undertaking that he would not seek to take any measures against her regarding alleged breaches of the protective order by passing any documents to the Defendants which had been marked confidential.

27. It was also unrealistic, Mr Sherborne submitted, to suggest that Mr Depp had deliberately withheld the 'Argument 2' recording. First, Mr Sherborne submitted that this recording assisted the Claimant, since Ms Heard can be heard to admit that she had sometimes started fights and that, on occasion, she had hit the Claimant. This, therefore supported his case that it was Ms Heard who was the aggressor. Second, 'Argument 2' had been disclosed in the US proceedings which was how it had reached the Defendants. Mr Sherborne reminded me that early on in these proceedings, Nicklin J. had refused to stay the present proceedings despite the Defendants' argument that they could not fairly defend the action because of restrictions placed on Ms Heard by the Virginia proceedings (see the transcript of his judgment of 27th February 2019).

28. Mr Sherborne submitted that, whatever redress could be obtained by the Claimant in the Virginia proceedings, would not compensate for the loss of the opportunity to litigate in the UK. As Mr Wolanski had observed, the Virginia proceedings would be decided by a jury which would not give a reasoned decision. By contrast, at the conclusion of the trial, I would give a reasoned judgment which would be more satisfactory for the Claimant and a more effective form of vindication for either him or Ms Heard. The opportunity to seek that vindication in the jurisdiction where the Defendants' articles had been circulated to a very large number of readers and where the Defendants had exacerbated the injury to the Claimant's reputation by the conduct of their defence was very important to the Claimant. This is not the type of situation where a claim against the party's legal representatives (assuming that there would be a claim for professional negligence) would be an adequate alternative.

29. Finally, Mr Sherborne submitted that the resources which would be needed to try the case were a result of the COVID-19 pandemic: it had nothing to do with the nature of the breach by the Claimant.

30. In my judgment, I should grant relief against sanctions. I have taken into account all that Mr Wolanski and Mr Sherborne have said, but in my view it would not be just to strike out the claim. My reasons are as follows,

    i) The claim is far advanced and the trial is imminent. Despite the breach which I have found and despite Mr Wolanski's submissions, I am not persuaded that the trial of the claim would be unfair.

    ii) Ms Heard has provided assistance to the Defendants and has done so despite whatever may have been said by the Claimant's US lawyers. I agree that it is important that she is not subjected to sanctions in another jurisdiction for having done so. In the course of the hearing, Mr Sherborne offered an undertaking to that effect and it will be a necessary part of my decision that that is formalised in an undertaking to this Court.

    iii) I agree that the 'unless' order which I made on 10th March was not because the Claimant had been recalcitrant but because of the imminence of the trial which was then due to start in only a few days' time. I cannot find that the breach which I have found was deliberate. Rather it was because of an erroneous view of the nature of the disclosure obligations in r.31.6. In all of those circumstances, I agree that the position which I face is not quite the same as in *Global Torch* and the other decisions relied on by Mr Wolanski and in those circumstances, while the breach was serious, there is scope for other considerations to play a more significant role in the assessment of what justice requires.

    iv) I see some force in Mr Sherborne's objection that the Defendants' resistance to the present application has expanded beyond the breach which I have found. Of course r.3.9 requires the court to take into account all the circumstances of the case, but fairness to the Claimant requires him to have a proper opportunity (a) to answer the allegation of breach and (b) to have the Court determine whether that breach has been proved (if not admitted). Thus, I agree with Mr Sherborne that I should focus for the purposes of the present application on the breach which I have found proved (together with the additional text which the Claimant has agreed ought also to have been disclosed).

    v) I also see force in Mr Sherborne's points that a reasoned decision (which I shall have to give after the trial) will be a vindication for whichever party is successful of a different order than a bald verdict of a jury. Of course, I mean no disrespect to the procedure adopted in Virginia. As Mr Wolanski commented, in the past juries commonly decided factual issues in libel trials in England. However, Parliament considered that the system should change and now it is usual for defamation actions to be tried by judge alone. The Claimant's choice to sue Ms Heard in Virginia as well as the Defendants in this jurisdiction does not demonstrate his indifference to the advantage which the present English system will give him (or the Defendants if they are the successful party at trial). This is not the type of case where the Claimant should be left to such recourse as he may have against his lawyers (assuming that he would have such a remedy).

vi) This trial will be unusually resource intensive. As Mr Sherborne submitted, this is a consequence of COVID-19. As it happens, the same pandemic has led the courts to favour where possible the use of technology to conduct hearings remotely. Somewhat ironically, there is not therefore quite the same competition for court resources that there would be in normal times and therefore the continuation of this trial will not necessarily be at the expense of other litigants and cases. Mr Sherborne argued that the demand on the court was independent of the Claimant's breach. Of course, the COVID-19 pandemic is not the result of the breach, though the breach has led to two quite extensive hearings and two reserved judgments.

vii) Finally, I have to decide this application in the present circumstances. The trial did not proceed on 23rd March and I am not persuaded that it is helpful for me to consider the counter-factual position if it had.

Should Ms Heard be ordered to make Third Party disclosure

31. The Claimant relies on Senior Courts Act 1981 s.34 and CPR r.31.17 which, so far as material says,

> '(3) The Court may make an order under this rule only where –
>
> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs'

32. Thus, there are two preconditions which must be satisfied if an order is to be made, but, even if they are, the Court has a discretion as to whether to make the order. The pre-condition in r.31.17(3)(a) is satisfied if the documents in question may well support the case of the applicant (or adversely affect the case of another party). It is not necessary for the applicant to go further and establish that the documents are more probable than not to have this effect - see *Three Rivers DC v Bank of England (No.4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210.

33. In support of this application, the Claimant relies on the 6th witness statement of Ms Afia made on 23rd June 2020. Mr Sherborne observed that there is no witness statement from Ms Heard in response to the application.

34. It is convenient to consider the application category by category and do so by reference to the Claimant's draft order.

35. Category 1(a) *The raw file that is the original and complete recording made by the Third Party Respondent on 22 July 2016 when she and the Claimant met in or near San Francisco or, if that is not available, the most proximate copy thereof.*

36. On 16th June 2020 the Defendants' solicitors sent a letter to Schillings disclosing an audio file of a conversation between the Claimant and Ms Heard which was said to have

taken place in San Francisco on 22nd July 2016. The letter also included a transcript of that recording which, Ms Afia says, is not agreed.

37. Ms Afia comments that at the time the Claimant was subject to a Temporary Restraining Order which had been obtained by Ms Heard. The Claimant accepts that he met Ms Heard on or about that date. The Defendants have not answered a request from Schillings as to the provenance of the recording, but Ms Afia invites me to infer that it must have been made by Ms Heard. The only voices heard on the recording are those of Ms Heard and the Claimant. It seems that the recording has not been disclosed in the Virginia proceedings. Towards the end of the recording, the Claimant asks her 'Are you recording this?' Ms Heard responds, 'Now I am. Go.' Mr Sherborne submits that this is a lie because it is apparent that the recording had begun some time before this question.

38. Ms Afia comments that parts of the recording are of poor quality and substantial parts are inaudible. As I have said, the transcript which Simons Muirhead and Burton (the Defendants' solicitors) have supplied is not agreed. It appears from the Defendants' solicitors' letter that the Defendants propose to rely on the recording. This has led the Claimant to seek category 1(a). One example of a disagreement is given by Mr Sherborne in his skeleton argument.

> '[The Defendant's transcript includes Ms Heard saying "*You can throw a punch but yet screaming's okay.*" Mr Depp considers that Ms Heard said: "*You can**'t** throw a punch but yet screaming's okay.*" That puts a different light on the exchange, and is more consistent with the context in which there is a contrast of two matters, namely punching and screaming. If that is what Ms Heard said, then it is consistent with the Claimant's case that Ms Heard was violent to him and he did not punch her.'

39. Mr Sherborne submits that the exchange is relevant, Ms Heard possesses the recording, its production to the Claimant is necessary to dispose fairly of the action.

40. Ms Afia comments that at one point in the recording, Ms Heard begs the Claimant to hug her. Mr Sherborne submits that this is inconsistent with Ms Heard's account (adopted by the Defendants) that he had subjected to her repeated and serious violence. Ms Afia also comments that the recording is also inconsistent with Ms Heard's allegation of one particular incident of alleged violence by the Claimant on the night of Ms Heard's birthday party on 21st April 2016. The Claimant's pleaded case is that he was the victim, not the perpetrator of domestic violence. Ms Afia says that in the recording, the Claimant alleges that it was Ms Heard who hit him. Ms Afia says that on the recording Ms Heard does not deny this version of events on 21st April 2016.

41. Mr Price QC who represented Ms Heard on this application, argues that this category does not satisfy either of the necessary pre-conditions in r.31.17(3).

42. I agree with Mr Price that the Claimant has not shown that r.31.17(3)(b) is satisfied. In my judgment, the evidence from the Claimant does not establish that Ms Heard is likely to have a better copy than the one which has been produced. It is only if she did that it could even arguably be said to be necessary for the fair disposal of the case to order her to produce it. Mr Depp can, of course, give his own evidence about what is said on the

recording and, if the quality of the recording is poor in places as Ms Afia says, its value in rebutting his version will be diminished.

43. I refuse to order Ms Heard to disclose category 1(a). Mr Price said that Ms Heard has offered to investigate whether she does have a better recording and to produce it to the parties if she does. That may be helpful, but it does not alter my view that the Claimant is not entitled to an order that she do so.

44. Category 1(b) is not pursued by the Claimant.

45. Category 1(c) *The raw file that is the original and complete recording made by the Third Party Respondent, or if that is not available, the most proximate copy thereof of the conversations between the Third Party Respondent and the Claimant which took place in or near Toronto in or around September 2015 and which are referred to on pages 4 and 5 of the transcript identified in paragraph 1(b)(i).*

46. Ms Afia explains that the Defendants have disclosed 2 other recordings: one was of a conversation on 15th June 2015, the other was on an unknown date in 2016. She says that these recordings are of only part of the conversation in question. Further, in one or both there is reference to another conversation between Ms Heard and the Claimant which occurred in Toronto. At various stages, Ms Heard offered to send the Claimant the 'Toronto tapes' but she has never done so. The Claimant originally sought the most original version of all three recordings.

47. The application in relation to first two recordings was in Category 1(b) and is not now pursued. The Claimant does persist in relation to the 'Toronto tapes'. I accept that the Claimant has shown that the 'Toronto tapes' have at least existed in the past. I agree with Mr Sherborne that he is assisted in this regard by the absence of any evidence in reply from Ms Heard.

48. However, I do not accept that he has shown that the condition in r.31.17(3)(a) is satisfied. As Mr Price submitted, it is a pre-condition of third-party disclosure that the document in question is likely to assist the case of the applicant or adversely affect the case of another party. It is not sufficient for Mr Sherborne to comment that the Toronto tape was of a conversation at a critical time in the relationship of Ms Heard and the Claimant and that the relationship between the two of them is central to this litigation. The Claimant is not assisted by drawing attention (as Mr Sherborne did) to paragraph 8.a of the Re-Amended Defence which pleads that 'Throughout their relationship the Claimant was controlling and verbally and physically abusive.' This does not assist the Claimant to show that the 'Toronto tapes' are likely to support his case or adversely affect the Defendants' case.

49. I refuse to order Ms Heard to disclose category 1(c).

50. Category 1(d) *All photographs howsoever taken or created by the Third Party Respondent purporting to show damage caused by the Claimant during or in connection with an act of domestic violence against the Third Party Respondent between 1 January 2013 and 21 May 2016.*

51. Ms Afia draws attention to passages in Ms Heard's witness statements in which she says that she took photographs of various items which had been damaged by the

Claimant in the course of his violent attacks. Ms Afia says that some photographs of damaged property have been produced, but the Claimant seeks an order that she produce all such photographs.

52. In my judgment the Claimant cannot satisfy r.31.17(3)(a) in relation to this category. He has not shown that any such photographs are likely to support his case or adversely affect the case of the Defendants. If he wishes to comment on the limited number of photographs which have been produced, he may do that on the current state of the evidence. Thus, I am also not satisfied that category 1(d) meets the pre-condition in r.31.17(3)(b).

53. I refuse to order Ms Heard to produce category 1(d).

54. Category 1(e) *All communications between the Third Party Respondent and the man who visited her at the Eastern Columbia Building at approximately 11pm on 22 May 2016 sent or received between 21 April 2016 and 31 May 2016, whether sent by text, email, or otherwise howsoever, which refer to or relate to their meeting*

55. Ms Afia notes that in her witness statement Ms Heard says that the Claimant was irrationally jealous of her supposedly having affairs with other men during the course of her relationship with the Claimant. That, too, is pleaded in effect in paragraph 1 of the Confidential Schedule to the Re-Amended Defence paragraph. In his Re-Amended Reply, the Claimant has denied that allegation – see paragraph 1 of the Confidential Schedule. Thus, Mr Sherborne argues, there is an issue on the pleadings as to whether the Claimant's concern that Ms Heard was having affairs with other men was well-founded or irrational jealousy. This underlies category 1(e) and also category 1(f).

56. I do not accept this submission. Because they are in confidential schedules, it is not appropriate for me to quote them in this public judgment. However, if it was the Claimant's case that his concern about Ms Heard's infidelity was justified, that should have been more clearly pleaded. It is not and the bare denial of the allegation in paragraph 1 of the Confidential Schedule to the Re-Amended Defence is not in my view sufficient.

57. Accordingly, I do not accept that the pre-condition in r.31.17(3)(a) is fulfilled in regard to either category 1(e) or category 1(f). Further, I am not persuaded that the pre-condition in 31.17(3)(b) is fulfilled either. The central issue for the defence of truth is whether Mr Depp assaulted Ms Heard. Even if she had been unfaithful to him, that would be irrelevant on that central issue. I am not therefore persuaded that these categories of documents are necessary for the fair disposal of the litigation.

58. Category 1(f) *All communications between the Third Party Respondent and Elon Musk, whether sent by text, email, or otherwise howsoever, sent or received between 1 March 2015 and 21 May 2016 which refer to or relate to them meeting at the Eastern Columbia Building when the Claimant was not present on 22 May 2016 or arrangements for it.*

59. For the same reasons as I have given in relation to Category 1(e) I refuse this part of the application.

60. In his submissions, Mr Price also argued that, even if the pre-conditions were satisfied, I should refuse disclosure in my discretion. He particularly relied on what he said was

the lateness of the application. Mr Sherborne submitted that there were good reasons why the application was only made now. For his part, Mr Sherborne argued that there were good reasons to exercise discretion in the Claimant's favour. He relied on the imbalance between the Claimant (who was obliged to make extensive disclosure) and the Defendants (who, for the most part, could only pass on what Ms Heard had chosen to give them).

61. Since I have found that the pre-conditions are not fulfilled, the issue of discretion does not arise.

Overall conclusions

62. Subject to the Claimant giving the undertaking regarding not seeking sanctions against Ms Heard for any breach of the Virginia protective order because of such assistance as she has already or may in the course of this litigation give to the Defendants, I will grant the Claimant relief against sanctions.

63. I refuse the Claimant's application for a third-party disclosure order against Ms Heard.

64. This judgment has necessarily had to be provided expeditiously for reasons which will be readily understood.