Case No's: HC-2000-000003/
Various (listed in Register of Claims)

Neutral Citation Number: [2022] EWHC 1441 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
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Fetter Lane, London
EC4A 1NL
Date: 3 February 2022

Before:
MR JUSTICE FANCOURT

IN THE MATTER OF THE MIRROR NEWSPAPERS HACKING LITIGATION
4th Wave

Between :

VARIOUS CLAIMANTS

Claimant

-v-

MGN LIMITED

Defendant

MR DAVID SHERBORNE and MR JULIAN SANTOS (Instructed by Thomson Heath & Associates) appeared on behalf of the Claimant
MR RICHARD SPEARMAN QC and MR RICHARD MUNDEN (Instructed by RPC) appeared on behalf of the Defendant

Hearing dates: 3 and 4 February 2022

RULING

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MR JUSTICE FANCOURT:

1. This is now at least the 22nd -- and the claimants say the 23rd -- case management conference in the Mirror Newspapers Hacking Litigation. The matter comes back before me following the settlement of all the eligible claims for the fifth trial, which was due to take place in January 2022.

2. In this fourth wave of claims, being managed together, there are currently 85 live claims. Some of those have been in existence for up to two years, some of them have only relatively recently been issued as claims. It is now clear -- and I have directed -- that these 85 claims will be tried at a trial starting in June 2023. In one sense it is regrettable that it has not been possible to find a seven-week window before then. On the other hand, the fact that there is not going to be a trial for some 16 months does allow greater opportunity to case manage all the claims in this litigation so that they are either settled or tried by the end of July next year.

3. The procedure for these claims that has been long established in the course of the litigation and various orders made by the previous Managing Judge is roughly as follows: there is a pre-action letter sent by a claimant to the defendant and then a 42-day moratorium before any claim form can be issued, designed to allow the parties to see whether the claim can be settled without a claim form.

4. If the claim is not settled there is then an early disclosure letter which is served by the claimant with their claim form and the defendant provides early disclosure according to a pre-agreed formula, within a period of 28 days, to enable the claimant to understand the scope of the claim that they are able to bring.

5. Particulars of claim are then due within a further 42 days and a defence is due 42 days after that. There is then a one-month stay of the claim to enable a further opportunity for the parties to negotiate on a more informed basis.

6. Following the stay, the defendant is required by existing orders in this case to serve proposed keywords for searches and custodians for searches within a period of 28 days after the stay is lifted. Following default by the defendant previously, the Managing Judge ordered at the 16th case management conference in 2019 that on default by the defendant the claimant instead was entitled to serve its proposed keywords and custodians, to which the defendant would then have to respond within 14 days. There was then a further 14-day period in which to agree, failing which the matter would have to be resolved by the court. Disclosure in each individual claim would then take place either four or six weeks after the searches and custodians had been agreed or determined.

7. All of that sequence of events takes up a considerable amount of time before one even reaches the stage of preparing witness statements for the trial. The net effect is that it takes something over a year as a minimum period, even assuming that there are no prolonged disputes or other delays in the timetable, for a claim to be brought to trial and sometimes significantly longer than that.

8. As things stand in the 85 claims, there are some 14 where particulars of claim have not yet even been served and there are ten claims in which early disclosure is still to be given. That is due within the next week or so. There will then be the 42-day period for particulars of claim in those claims to be served.

9. There are about another 14 cases in which a defence is currently outstanding and is due relatively shortly. However, in 13 of those claims and in 11 other cases in which a defence has been served, the defendant has very recently applied for summary judgment on Limitation Act grounds, so the 13 further defences will not be due under the rules of court until after those applications have been disposed of.

10. Picking up concerns expressed by me in a short judgment last November about the progress of this current wave of claims and the failure to provide more than ten eligible claimants for the January 2022 trial, the claimants have sought by their draft order for this case management conference a varied procedure and timetable by making suggestions to change various matters that have previously been ordered by the court. These include the removal of periods for stays, and shortening the period of time for early disclosure to be given and for the provision by the defendant of keyword search terms and custodians.

11. There is also a proposal to revoke a previous order allowing for de-clustering of service of defences and creating a default provision where the defendant is in further breach of the court's order to provide its search terms and custodians, such that in case of default the claimant itself will be entitled to nominate its own custodians and search terms and those will be taken to be the terms and custodians without any opportunity for the defendant to challenge them.

12. At the time when the claimants made their proposal it was not known that the earliest trial date would be June 2023 and the parties had hoped for an October to December 2022 trial window. Such a trial window would have put much more pressure on the timetable. As it is, with a June 2023 timetable there is a relatively -- I emphasise relatively -- comfortable time in which to prepare in an orderly way for the trial of the 85 claims.

13. The issues raised by the claimants do of course have some significance not just for the 85 claims but also for future claims that may be brought -- and I am told that there are some in the pipeline -- and it would be unrealistic to assume that no more will emerge during the course of the next 16-month period.

14. However, the trial of any such future claims will be unlikely to be before early 2024 at the earliest and so there is currently no real problem with the operation of the timetable in relation to any such claims. The real problem with the operation of the timetable was identified in November in relation to the way in which the provisions for disclosure were supposed to operate but had, effectively, broken down.

15. Working back from a trial date of June 2023, one can see that a pre-trial review will have to take place by about the middle of April 2023 to afford the parties sufficient opportunity to prepare any eligible claims for trial. That means that witness statements

should be exchanged by no later than about the middle of February 2023 and in order for that to happen disclosure will need to have been completed by the end of the Michaelmas term 2022. Allowing the maximum six weeks for that disclosure process, that means that the keywords and custodians will need to have been resolved by 10 November 2022 at the latest.

16. Allowing a significant, but not excessive, period of time to resolve any disputes about keywords and custodians, I consider that the process of seeking to agree keywords and custodians will need to start in early August 2022 at the latest and if there is to be the one-month stay after the exchange of defences, that means that the latest of the defences to be served in response to these 85 claims will have to be served by the end of June 2022.

17. Looking at a timetable of that kind, the question I have to decide is to what extent any or all of the changes that the claimants propose should be made, not just with a view to the orderly trial of these 85 claims but for future claims too.

18. I do not consider that a sufficient case has been made out to remove prospectively (it obviously does not apply to the current 85 claims) the moratorium at the start of the process after a pre-action letter has been written. As Mr Sherborne acknowledges, the stipulated 42-day moratorium overlaps in any event with a regular 28-day period for the parties to exchange information under a pre-action protocol before a claim form should be issued. In reality, therefore, his suggestion was only that the moratorium should be reduced by 14 days.

19. I do not consider that that will be likely to have a significant benefit in terms of progressing future claims. In principle, delays in order to enable negotiations to take place are beneficial and are approved by the court. In the absence of any obvious gain resulting from removal of that moratorium I am not inclined to order it.

20. Similarly, it seems to me that a stay of a month after the close of pleadings is a sensible and beneficial provision, if time permits. It has certainly proved beneficial in the previous waves of this litigation, although I accept to a lesser extent in the fourth wave, so far as it has progressed. Nevertheless, again, the removal of that period of a month will not, in my opinion, be more conducive to the case management of future claims for settlement or for trial or, indeed, be more conducive to the settlement of any of the 85 claims where defences have yet to be served.

21. Nor am I persuaded that a period of 28 days for early disclosure to be given after issue of the claim form is the problem. It may well be that there is much less in the way of documentation that the defendant has to find and give disclosure of, since the extent of generic disclosure has progressed as far as it has and as the defendant admits, in 73 per cent of cases they give at least some voluntary pre-action disclosure at an earlier stage. But, again, this does not seem to be the cause of any problem with the operation of the timetable in these proceedings and I am not persuaded reducing it to 14 days will make a significant difference.

22. In view of the times that are limited for the service of defences and the resolution of disputes about search terms and custodians, it is, however, in my judgment necessary to make some adjustments to the way that the de-clustering provision, so-called, and the need for agreement or determination of keywords for searches and custodians operate; that is certainly the case in relation to the 85 current claims and I consider that it would also benefit the conduct of future claims.

23. Dealing first with the de-clustering of defences, I accept in principle that there is justification for a provision that gives the defendant a little leeway, to the extent of three working days, where more than one defence is otherwise due at the same time. I accept that although a substantial part of each defence is a generic response and relatively formulaic in response to a relatively formulaic claim, nevertheless there are detailed responses that have to be made sometimes in relation to 50 or 100 articles or more and it is a significant piece of work.

24. It is unfair, in other words, to require the defendant to have to serve numerous defences all at the same time.

25. However, the tail of being fairer to the defendant in this regard cannot be allowed to wag the dog of compliance with the overall requirements of an effective timetable for the trial of these claims.

26. The problem has been shown to be one caused by the operation of the stays that are from time to time ordered in these proceedings or take effect under the rules, as they now will in relation to the summary judgment applications.

27. The stay pending the trial of other claims in the same wave has the potential to duplicate the de-clustering effect, one happening before the stay takes place and the other happening afterwards. There will be effectively a stay under the Civil Procedure Rules in relation to the 13 defences from today going forwards until possibly mid May in order to enable the summary judgment applications to be dealt with.

28. There is some provision needed, in my judgment, to supplement the effect of the de-clustering provisions and the alternatives for me are to say that the de-clustering provisions will be left in place and the matter can be addressed at a later stage, or I will make an order that in any event all the defences that are outstanding have to be served by 30 June 2022.

29. I have considered carefully whether it is better to leave the matter to be reviewed on handing down judgment on the summary judgment applications, but it seems to me it will be harder for the court to work out itself at that time what is the right thing to be done and it is better if the onus is placed on the defendant at that time to apply, if justified, to vary the order that I will make today. It is the defendant who will know best exactly what steps need to be taken in relation to each of the defences which are outstanding and to what extent those will otherwise be able to be dealt with before 30 June.

30. I will, therefore, make an order which does not interfere with the de-clustering provisions as such but which adds an additional requirement for the service of defences in these 85 claims that they must be served by the defendant at the latest on 30 June 2022.

31. Mr Sherborne expressed concern that such an order could have the unfortunate effect resulting in a large number of defences being served at roughly at the same time, causing a knock-on problem with the resolution of keywords and custodians and disclosure and in due course witness statements, all having to be dealt with at the same time, but that, in my view, is not the consequence of the order that I am proposing to make. It would be exactly the same if the court took the course that Mr Sherborne urged, which is to remove the de-clustering provision entirely because in those circumstances, following the determination of the summary judgment applications, a substantial number of defences would all become due, assuming the application is unsuccessful, of course.

32. If it is successful then there will be no defences in those claims, but a large number of defences would, in those circumstances, become due at roughly the same time.

33. Secondly, the procedure for dealing with search terms and custodians. The starting point is that the defendant has been persistently in default in complying with court orders to serve proposed search terms and custodians within a specified period after the end of the stay following the service of a defence. Mr Spearman sought to persuade me that it was only in 10 or 12 cases that had been relied upon by the claimants but those 10 or 12 were about the only cases in this wave other than the eligible claims for the January 2022 trial which have reached a stage of having to resolve the identity of keywords and custodians.

34. Going further back, the historic reasons for the order made by Mann J at the 16th case management conference was that there had been prior default by the defendant in complying with the order in relation to keywords and custodians.

35. I am therefore not prepared to accept, as Mr Spearman suggests, that this is now an opportunity for the defendant to make a fresh start and that there are unlikely to be continuing problems in this regard in the future.

36. The claimants' proposal is that there should be an automatic default if the defendant does not supply its proposed terms and custodians within a period of 14 days following the end of the stay after the service of defence. That would allow the claimants to serve their own list of any search terms and custodians and the defendant would not be able to do anything about it. I do not agree that such a sanction or approach is proportionate.

37. I do agree -- and it is not disputed -- that there should still be a 14-day period for the defendant to propose its search terms and custodians. Then there should be a right for the claimants in default by the defendant to do so within a further period of 14 days.

38. If the claimants do so within the 14-day period and the defendant then fails to respond within a further 14-day period in substance to those proposals, either agreeing with them, disagreeing with them or making counter proposals to each proposal, then in those circumstances the claimants' terms and custodians are the terms and custodians for searches by default subject to any application by the defendant for relief against sanctions.

39. But if the defendant does respond in substance to the claimants' proposals within the period of 14 days, there will then be an opportunity within a further 14-day period for the claimants to respond and seek to reach agreement. The same applies if the defendants do comply with the court's order and serve their own search terms and custodians.

40. Failing agreement within that period of 14 days, the claimants must then apply without delay to the court to resolve any issue.

41. Given the time after the expiry of the stay following the service of all defences, which will be 1 August 2022, and the need to resolve any issues relating to search terms or custodians by no later than 10 November 2022, it is not, in my judgment, sufficient to leave the procedural scheme where it has been and give the defendant another chance to seek to comply with it. It is for the reasons that I have given that it is proportionate to introduce the revised scheme. That puts the defendant at risk of a sanction but only in circumstances of a double default by the defendant, not, as the claimants would have it, in circumstance where there has been a single default in supplying search terms and custodians.

42. Any matter in dispute can and should also be raised at an accounting hearing, on notice, once it is clear that there is likely to be a dispute that the court may need to resolve.

43. So far as accounting hearings are concerned, everyone agrees that these should be resumed and I will facilitate them. The remaining issue is whether or not, as the claimants suggest, the cost of up to four lawyers attending at such a hearing should be allowed in place of the current allowance for two lawyers to attend.

44. The reason given by Mr Sherborne is that it is sometimes appropriate on the claimants' side for a lawyer representing only some of the claimants, where those particular claims are in issue at the accounting hearing, to attend where it is not a matter that the lead solicitor on behalf of all the claimants can deal with.

45. I am not persuaded that it is appropriate to direct that up to four lawyers may attend potentially at the defendants' ultimate cost on each occasion. It seems to me that a better approach is that if and when there is such a hearing where it is justified for a third or even a fourth lawyer to attend on behalf of the claimants, they can and should do so and at the conclusion of the hearing they should ask me to certify that the cost of their attendance should be treated as the costs of the action.

46. In the sort of example given by Mr Sherborne where there is a particular issue which relates to only one or more of the claimants which can't properly be dealt with by the lead solicitor, I will be likely to grant the certificate for further lawyers, up to two more lawyers' attendance. If I consider that the matter, albeit relating to a particular claimant was one that could sensibly have been dealt with by the lead solicitor and counsel, then I will not grant such a certificate.

47. **Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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