VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

John C. Depp, II, Plaintiff, v. Amber Laura Heard, Defendant.	Case No. CL2019-02911

NOTICE OF JUDICIAL NOTIFICATION OF
<u>UK COURT RULINGS IMPACTING THIS MATTER</u>

THE CLERK OF COURT WILL PLEASE TAKE NOTICE of the following rulings of the High Court of Justice – Queen's Bench Division in the related matter of *John Christopher Depp II v. News Group Newspapers Ltd., et al.*, QB-2018-006323, which impact this matter:

1. Approved Judgment, Dated June 25, 2020 (Att. A): The High Court of Justice held that Mr. Depp "failed to comply fully with the obligation in paragraph 3(c) of my order of 6th March 2020." Att. A ¶ 52. Specifically, Mr. Depp failed to disclose in the High Court of Justice proceedings "a series of texts between Nathan Holmes and [Mr. Depp] … called 'the Australian drug texts'." *Id.* ¶ 12. These text messages

    a. "tended to show that [Mr. Depp] was seeking a supply of ecstasy shortly before the journey to Australia and, very likely, had obtained that drug."

    b. "tended to show that [Mr. Depp] was seeking a supply of cocaine ('whitey') at about the same time and felt he was in urgent need of it."

    c. "tended to show [Mr. Depp's] exasperation when challenged about his use of drugs which supported Ms Heard's account in paragraph 8.a.8 of the Re-Amended Defence."

    d. "The timing of the texts was significant. They all took place a few days before the pleaded assaults in Australia, whether the incident in which the Claimant cut his finger was as the Claimant said on 8th March or a little earlier."

Id. ¶ 46; *see also id.* ¶¶ 30-45. The High Court of Justice held that "[t]he Australian drug texts were adverse to the Claimant's pleaded case and/or were supportive of the Defendants' pleaded case." *Id.* ¶ 50. Based on Mr. Depp's violation, "Defendants have sought a declaration that the case is therefore struck out." *Id.* ¶ 53. The High Court of Justice allowed Mr. Depp to "apply for relief against sanctions." *Id.* ¶ 54.

2. Approved Judgment, Dated June 29, 2020 (Att. B): The High Court of Justice reiterated that Mr. Depp violated Court orders:

> 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.

Att. A ¶ 12. Mr. Depp sought relief from sanctions. He also "threatened Ms. Heard with repercussions in the Virginia proceedings for supplying the Australian drugs texts to the Defendants in [the UK] proceedings." *Id.* ¶ 22(iv). The High Court of Justice granted Mr. Depp relief against sanctions, "[s]ubject 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." *Id.* ¶ 62.

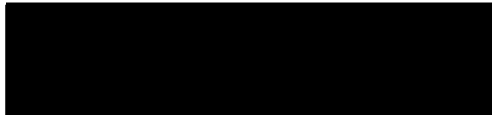
3. Order, Dated July 2, 2020 (Att. C): The High Court of Justice "granted relief from sanctions in respect of the breach [by Mr. Depp] of the unless order of 10 March 2020" "UPON the Claimant undertaking to the court by his counsel on the Claimant's behalf that he will take no step to seek any relief or sanction in any court, whether in the US or otherwise,

against Ms. Heard in respect of the provision by Ms. Heard of documents to the Defendants for the purpose of their defence of these proceedings."

Dated this 9th day of July 2020

Respectfully submitted,

Amber L. Heard



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I certify that on this 9th day of July 2020, a copy of the foregoing was served upon counsel for Plaintiff by email, as agreed upon by the parties, addressed as follows:

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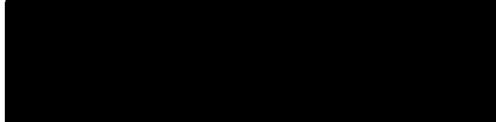

Elaine Charlson Bredehoft

Neutral Citation Number: [2020] EWHC 1689 (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: 29/06/2020

Before :

MR JUSTICE NICOL

- -

Between :

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

- -
- -

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**

Hearing dates: 25th 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. The application presently before me is by the Defendants for a declaration that the claim stands struck out because of the Claimant's alleged failure to comply with my earlier 'unless' order for disclosure.

3. On 26th February I heard a pre-trial review. At that stage the trial was due to commence on Monday 23rd March 2020. Most of the hearing that day was occupied with an application by the Defendants for disclosure. In my judgment, handed down on 6th March 2020 I agreed that the application succeeded to some extent. The same day I made what I described as the 'disclosure order'.

4. Part of the Defendants' application concerned a libel action which Mr Depp had brought against his ex-wife Amber Heard in the state of Virginia, USA. As I have previously explained, the articles which give rise to the present libel action concerned their marriage and what was alleged to be physical violence by Mr Depp against Ms Heard. The Defendants have alleged that their article was true, and they rely substantially on a number of witness statements from Ms Heard in support of that plea. The Virginia libel action arises out of an article which Ms Heard wrote for the *Washington Post* and which Mr Depp alleges contained similar imputations of physical violence by him against her.

5. In respect of the Virginia libel action, a complication was said to have arisen in that some of the documents were protected by an order of the Virginia Court in favour of Ms Heard. My order of 6th March 2020 had to take account of this. The Claimant's solicitors had previously been Brown Rudnick, but on 11th February 2020 the Claimant instructed Schillings in their place.

6. My order of 6th March 2020 included the following at paragraph 3:

> 'In respect of all documents which have been disclosed by either party, or by any non-party, in the US Proceedings Depp v Heard (CL - 2019 0002911) ("the US libel claim documents"), in the event that the Defendants do provide to the Claimant's solicitors written notification from Amber Heard personally or through her lawyers that Amber Heard has provided her consent to disclosure of such documents pursuant to the Protective Order of Chief Judge Bruce D. White of the Circuit Court of Fairfax County in Virginia, USA dated 25 September 2019:
>
> a. Within 48 hours of such notification the Claimant do provide a witness statement verified with a statement of truth from him personally confirming that he has provided all the US libel claim documents to Schillings;
>
> b. Within 72 hours from the step in paragraph 3(a) above, Schillings do confirm in a witness statement verified by a statement of truth that they have conducted a review of the US libel claim documents which have not yet been disclosed to the Defendants and ascertained which of those documents fall within the scope of CPR 31.6; and
>
> c. In so far as the Claimant has not hitherto disclosed to the Defendants any of the US libel claim documents which fall within the scope of CPR 31.6, the

Claimant, through his solicitors, Schillings, do disclose all such documents by list, and provide copies of all such documents, within 72 hours of the step in paragraph 3(a) above.'

7. Ms Heard gave her consent (on which paragraph 3 of the Disclosure Order was dependent) on 8th March 2020.

8. On 10th March 2020 the Claimant applied for an extension of time within which to comply with various parts of the Disclosure Order. On 10th March 2020 I varied the Disclosure Order as follows.

   i) The time for compliance with paragraph 3 was extended to 13th March 2020 (see paragraph (5) of the order of 10th March 2020).

   ii) By paragraph (10) of the order of 10th March I said,

      'Unless the Claimant complies with ... (5) ... above the claim is struck out.'

9. On the present application, the Defendants accept that the Claimant made the witness statement required by paragraph 3(a) of the Disclosure Order and that Schillings made the witness statement required by paragraph 3(b) of that order, but, they submit, the disclosure which was made as a result of paragraph 3(c) of the Disclosure Order was incomplete.

10. The Defendants rely on the evidence of Jeffrey Smele, a partner in Simons Muirhead and Burton, the Defendants' solicitors. Mr Smele explains that he has been in contact with Charlson Bredehoft Cohen and Brown ('Charlson Bredehoft') who are the US attorneys instructed by Ms Heard for the purpose of the Virginia libel proceedings.

11. Charlson Bredehoft have informed Mr Smele that, no later than 18th February 2020 in the Virginia libel proceedings Mr Depp disclosed what is called 'an extraction report' which sets out, among other things, information regarding texts sent to and from the Claimant's mobile phone.

12. Some of the entries from the extraction report were included in the disclosure made by the Claimant in response to paragraph 3(c) of my disclosure order, but not a series of texts between Nathan Holmes and the Claimant which Mr Smele has called 'the Australian drug texts'. It is convenient for me to use that label, but I do so without, at this stage drawing any conclusion as to the significance of these text messages.

13. It is the Defendants' contention that these text messages fell within CPR r.31.6 because they were documents adverse to the Claimant's case and, to some extent, supported the Defendants' case and, in consequence the Australian drug texts came within r.31.6(b)(i) and (ii). The extraction report had, as I have said, been produced in the Virginia libel proceedings sometime before 18th February. Mr Wolanski QC for the Defendants submitted, without contradiction by Mr Sherborne for the Claimant, that they must have been in the Claimant's possession, custody or control.

14. Consequently, the Defendants contend that the Claimant failed to make proper disclosure of the Virginia libel trial documents and, as a result of paragraph (10) of my order of 10th March 2020, the claim is struck out.

15. Mr Sherborne's contention in summary is that the Australian drugs texts were not disclosable under r.31.6, there has been no failure to comply with the 10th March order and, therefore, the Defendants' application should be refused.

16. That was the shape of the argument which I heard at the hearing on 25th June 2020. However, Mr Sherborne intimated that, if I was against him and found that the Claimant was in breach of the order of 10th March, the Claimant would expeditiously apply for relief from sanctions. The adjourned trial is due to start on 7th July 2020. Plainly, any such application would need to be made very fast. Mr Sherborne would need to know whether his argument today had succeeded before the Claimant made such an application. I asked him what would be a reasonable time for the application notice to be served (at least in draft) together with any evidence in support. Mr Sherborne suggested 36 hours after the draft of this (reserved) judgment was distributed. Mr Wolanski did not object to that time scale which I also agree would be reasonable.

17. Rule 31.6 states,

'Standard disclosure requires a party to disclose only –

(a) The documents on which he relies; and

(b) The documents which

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.'

18. Mr Sherborne relied on *Shah v HSBC Private Bank Ltd* [2011] EWCA Civ 1154 in which the Claimant was claiming compensation from the bank for its delay in executing certain transactions. The Bank's position was that the delay was required by the Proceeds of Crime Act 2002 because it suspected money-laundering. The Claimant wanted to know the identity of the bank officials who had suspected money-laundering. The bank had disclosed the nature of the information but had redacted the names of the officials. At first instance Coulson J, held that the names of the officials were disclosable but public interest immunity allowed the bank to conceal their names. The Court of Appeal concluded that the names were not disclosable under r.31.6 and the issue of public interest immunity did not therefore arise.

19. Importantly, the case is a reminder that the test for standard disclosure under the CPR is narrower than the rules relating to discovery under the Rules of the Supreme Court.

20. The Court quoted from Lord Woolf's report which led to the CPR (at [32]) and which now appears in the commentary in the White Book at 31.6.3 (though, as the Court observed somewhat laconically, 'without attributing its source'). Coulson J. had asked himself whether the names of the Bank employees were 'relevant'. The Court of Appeal observed that the word 'relevant' does not feature in r.31.6. Since the CPR constituted a deliberate move away from earlier authorities (such as *Companie Financiere et*

Commerciale v Peruvian Guano Co (1882) 11 QBD 55) it was dangerous to rely on authorities which pre-dated the CPR - see for instance [23]. Mr Sherborne submitted that the effect of *Shah* was that it was insufficient that a document *may* assist the opposing litigant: it must do so [28]-[29].

21. Mr Sherborne also argued that a party's 'case' was to be derived from the pleadings rather than the witness statements. The essential issue in this case, he submitted, was whether Mr Depp had subjected Ms Heard to physical violence. The defence of truth on which the Defendants rely will turn on that question.

22. I did not understand Mr Wolanski to dispute these propositions of law, although he did comment that it was not necessary that the document in question conclusively proved the case of the party receiving disclosure. In this regard, I agree with Mr Wolanski. I note that the report of Lord Woolf described the second category of documents covered by the RSC (and which Lord Woolf intended should still be covered by the CPR) as,

> '*Adverse documents*: these are documents which *to a material extent* adversely affect a party's own case or support another party's case. [my emphasis].'

23. The Re-Amended Defence pleads, as I have said, that the words complained of were true in the meaning that,

> 'the Claimant beat his wife Amber Heard causing her to suffer significant injury and, on occasion leading to fearing for her life.' (Re-Amended Defence paragraph 8).

24. The third sentence of paragraph 8.a of the Re-Amended Defence pleads,

> 'Throughout the relationship the Claimant was controlling and verbally and physically abusive to Ms Heard particularly when he was under the influence of drink and/or drugs.'

25. Particulars are then given of 14 incidents. These include alleged assaults of Ms Heard by the Claimant while they were in Australia in March 2015 – see Re-Amended Defence paragraphs 8.a.8-8.a.11 together with further details in the Confidential Schedule to the Re-Amended Defence. The Defendants allege that these incidents began on or around 3rd March 2015. At 8.a.8 it is pleaded,

> 'The Claimant subjected Ms Heard to a 3-day ordeal of physical assault which left her with injuries including a broken lip, swollen nose and cuts all over her body. On the first day there was an argument about the Claimant's drug use after the Claimant took out a bag of MDMA (ecstasy) and Ms Heard confronted him about his drug-taking. The Claimant argued that MDMA was not on his "not allowed" list which Ms Heard disputed.'

26. In his Re-Amended Reply the Claimant denies that he ever subjected Ms Heard to physical violence. He has never done more than grab her arms to restrain her from hitting him which, the Claimant says, she often did. He denies the third sentence of paragraph 8.a of the Re-Amended Defence (which I have quoted above) – see Re-Amended Reply paragraph 2.2.

27. The Claimant responds specifically to the allegations that he assaulted Ms Heard in Australia. He admits that they travelled together to Australia in March 2015, but the allegations in paragraphs 8.a.8-8.a.11 are otherwise denied – see Re-Amended Reply paragraph 2.2H. In connection with drugs, the Claimant pleads at paragraph 2.2H4,

> 'For the avoidance of doubt, it is expressly denied that the Claimant took MDMA, that Ms Heard found a bag of MDMA or that there was any conversation about MDMA.'

28. The Claimant pleads (see Re-Amended Reply paragraph 2.2H1) that the incident in which his finger was injured took place on 8th March 2015 and was preceded by an argument with Ms Heard concerning his wish to enter into a post-nuptial agreement with her. The pleading says, 'This caused Ms Heard to go into a prolonged and extreme rage.'

29. Although both Mr Wolanski and Mr Sherborne referred me to various passages in the witness statements of the Claimant and Ms Heard, I note that the White Book says at 31.6.3,

> 'Whether a document falls within [the first two categories of Lord Woolf's summary and of which disclosure was still intended to be required under the CPR] is to be judged against the statements of case and not by reference to matters raised elsewhere, including in witness statements *Paddick v Associated Newspapers Ltd* [2003] EWHC 299 (QB).'

I respectfully agree with that observation. When this judgment was circulated in draft, Mr Wolanski commented that he had only been able to read *Paddick* after the hearing (it had not been cited in advance of the hearing and was not available at the hearing itself) and he did not accept that it correctly stated the law. However, he recognised that this did not affect my judgment. I, therefore, simply note his reservation.

30. I turn to the Australian drug texts. These were all between the Claimant and a Nathan Holmes, whom Mr Smele describes as the Claimant's assistant. The texts on which the Defendants rely were exchanged between Mr Holmes and the Claimant between 25th February and 7th March 2015.

31. Mr Smele exhibits to his witness statement the extraction report which shows, as well as the content of the texts, the date and time on which they were sent (and whether by Mr Holmes or by the Claimant), and the date and time on which they were read.

32. Mr Wolanski took me through the texts on which he relied for the proposition that these were either adverse to the Claimant's case or supportive of the Defendants' case. It is not possible to go through each of the texts individually, particularly as it is important for the draft of this judgment to be distributed as soon as possible in view of the imminence of the trial as well as the other outstanding matters which need to be addressed before then, if indeed the trial is to proceed..

33. Instead, it is sufficient for me to identify the reasons why Mr Wolanski submits that the texts ought to have been disclosed and selectively illustrate the points he seeks to make. I shall, of course, turn later to what Mr Sherborne had to say about them.

34. It was Mr Wolanski's case that the texts show the Claimant asking Mr Holmes to provide him with MDMA pills. He gives the example of text 30 sent by the Claimant on 27th February 2015 saying,

> 'Disappearer!!! We should have more happy pills!!!?? Can you???'

35. Mr Holmes quickly replies (text 31),

> 'Yes we can !! I'm giving them to Stephen to give you. Yay xx'

36. On 2nd March 2015 the Claimant texts Mr Holmes asking,

> 'Where is the other one?'

37. Mr Holmes replied immediately (text 44),

> 'There was two G in that jar. Are you out? The guy only carried 2 a day and more tomorrow. He said it's because if he's caught with more than 2 it's 20 years in prison .... I can try another guy and get one more for when you pick Malcolm up.'

38. This was immediately followed by text 45 in which Mr Holmes said, 'I'm going to meet the man now you will have it when you get here.' And text 46, in which Mr Holmes said, 'Then I'm getting more in the morning'. One second later the Claimant texted 'Go'.

39. However shortly after that in a series of texts (48-52) Mr Wolanski submitted, the Claimant appeared to be exasperated and impatient with Mr Holmes. In text 52 he said,

> 'Fucking give me the goddam numbers. I'll take care of this shit!!! Don't bother.'

40. As part of what appears to be Mr Holmes' attempt to placate the Claimant, he says at text 54,

> 'Where are you now? If they don't have it, I can't get it. It's someone that works on the film not a professional dealer. I will bring it to you.'

41. Mr Holmes tries to apologise at text 72 and says he is sorry. The Claimant responds at text 73,

> 'No you're not. Why?? That is not a part of the job description. And I'm telling you now. Any ONE of ANY of you guys start to lecture me. (and text 74 continues) I just do not want to hear it [Claimant's emphasis.'

42. The Claimant appears to continue this theme at text 77 saying,

> 'I'm a grown man and I will NOT BE JUDGED [Claimant's emphasis].'

43. And in a series of texts (79-82) the Claimant says,

> 'AND I WILL NEVER EVER LIVE IN THIS WORLD CAGE ANY LONGER. [Claimant's emphasis]'.

44. On 7th March 2015 the Claimant texted Mr Holmes,

'Also ... May I be ecstatic again??? Helps ... color me deceased.'

45. A little later and still on 7th March the Claimant texted Mr Holmes (text 105),

> 'Need more whitey stuff ASAP brotherman ... and the e-business!!! Please I'm in a bad bad shape. Say NOTHING to NOBODY!!!!'

46. Mr Wolanski submitted that these texts were adverse to the Claimant's case on the pleadings and supportive of the Defendants' case because:

    i) They tended to show that the Claimant was seeking a supply of ecstasy shortly before the journey to Australia and, very likely, had obtained that drug.

    ii) They also tended to show that the Claimant was seeking a supply of cocaine ('whitey') at about the same time and felt he was in urgent need of it.

    iii) They tended to show the Claimant's exasperation when challenged about his use of drugs which supported Ms Heard's account in paragraph 8.a.8 of the Re-Amended Defence.

    iv) The timing of the texts was significant. They all took place a few days before the pleaded assaults in Australia, whether the incident in which the Claimant cut his finger was as the Claimant said on 8th March or a little earlier.

47. Mr Sherborne submitted that none of the texts contradicted the Claimant's pleaded case or, in terms, supported the case of the Defendants. Furthermore, if the disclosure obligation was as wide as the Defendants submitted, it would be disproportionate, given that the central issue in relation to the truth defence was whether the Claimant had beaten Ms Heard and none of the Australian drugs texts were directly concerned with that issue. Further, so far as the texts spoke of the Claimant trying to acquire cocaine, this was irrelevant since the Claimant's alleged use of cocaine was no part of the Defendant's pleaded case.

48. Mr Sherborne submitted the Claimant has not denied that he took drugs and that he did so and drank during their relationship. He refers me to the following in the Claimant's 2nd witness statement (his trial witness statement) which includes,

> '20. It has been well-reported and I have been open about my challenges with alcoholism and addiction throughout my life....
>
> 21. My addiction over the years has been to Roxicodone pills. ...
>
> 22. I have taken other drugs in my life and I did take other drugs during the course of our relationship but I never suffered addiction with those drugs...
>
> 25. After this, for the most part of our relationship with very occasional lapses I would use marijuana and drink wine... At times we took drugs together: MDMA mushrooms and cocaine. However these were not common occurrences....'

49. Mr Sherborne submitted that it could not be said that anything to do with drugs was disclosable under r.31.6. He also emphasised that the overriding objective meant that the obligation to make disclosure had to be considered through the prism of

proportionality. The *Shah* case had emphasised that the obligation of disclosure was narrower under the CPR than it had been previously. He submitted that the texts between Mr Holmes and the Claimant did not bear on any of the issues on the pleadings. The texts may have shown that the Claimant was trying to acquire MDMA, but they did not show that he had succeeded. Still less did they show (as the Defendants allege) that he had a bag of MDMA pills with him and that this was the cause of the argument between the Claimant and Ms Heard. Given the Claimant's past problems with drugs, it was not surprising that he was making inquiries about possible sources of drugs.

50. In my judgment the Defendants are right. The Australian drug texts were adverse to the Claimant's pleaded case and / or were supportive of the Defendants' pleaded case.

i) I agree that the timing is significant. The exchanges with Mr Holmes began shortly before the alleged incidents in Australia. Even if the Claimant is correct about the date when he suffered injury to his finger, they continued up until 7th March, i.e. the day before the date on which the Claimant says his finger was injured.

ii) As I have said, it is not necessary that the documents in issue demonstrate the falsity of the disclosing party's case or the truth of the receiving party's case. It is sufficient, as Lord Woolf said in his report, if the documents 'to a material extent' adversely affect the disclosing party's case or support the case of the receiving party. I agree with Mr Wolanski that the Australian drug texts do this. They do so in the ways that Mr Wolanski has submitted.

iii) I have applied the test in r.31.6 and not the earlier authorities.

iv) I do not accept that it would disproportionately extend the duty of disclosure to treat it as extending to the Australian drug texts. Substantial resources have been devoted by both parties to this litigation which they both, understandably, regard as important. In my judgment which led to the Disclosure Order, I specifically recognised that the US litigation between the Claimant and Ms Heard might have yielded documents which were disclosable in the present proceedings. I do *not* say that the texts were disclosable in these proceedings because they had been disclosed in the Virginia libel action. I had no evidence about the tests which would be applied by the courts of Virginia to determine a party's obligation to disclose or discover documents, but the overlap of subject matter of the two sets of proceedings meant that suitable checks needed to be made and paragraph 3 of my order of 6th March 2020 provided what I considered to be an appropriate system for doing that.

v) I do not agree with Mr Sherborne that the texts regarding cocaine are immaterial to the pleaded cases. References to cocaine (or 'whitey') are not infrequent. In any event, the third sentence of paragraph 8.a alleges more generally that the incidents of violence sometimes followed the Claimant's consumption of drugs (or alcohol). That allegation is not limited to MDMA. The Claimant has denied that sentence in paragraph 2.2 of his Re-Amended Reply.

vi) I also agree with Mr Wolanski that the Claimant's response to what he saw as Mr Holmes lecturing him is supportive of what the Defendants say was his

reaction to Ms Heard confronting him about his possession of a bag of MDMA pills.

vii) I have decided this application, as I am required to do, by reference to the parties' pleaded cases. I make it clear that, if and so far as the witness statements are relevant to the present exercise, my decision would have been the same.

51. In reaching this decision, it has not been necessary for me to make any finding regarding the Defendants' allegations as to the Claimant's earlier non-compliance with his disclosure obligations. They were denied by the Claimant.

Conclusion

52. For all of these reasons I agree with the Defendants that the Claimant failed to comply fully with the obligation in paragraph 3(c) of my order of 6th March 2020.

53. The Defendants have sought a declaration that the case is therefore struck out because of the provisions of paragraph 10 of my order of 10th March 2020.

54. I am not going to make such a declaration at this stage since, as I have said, Mr Sherborne intimated that, if I was against the Claimant on the issue of whether there had been a breach of the disclosure obligation, the Claimant would wish to apply for relief against sanctions. The parties agreed that in circumstances where the trial was imminent it would be reasonable to require any such application to be served in draft, together with any evidence in support, no later than 36 hours after this judgment is distributed in advance. In the event that no such application is made within that time scale, I make it clear that the Defendants have permission to restore their application notice.

55. If the Claimant does apply for relief from sanctions, I will hear that application on Monday 29th June 2020. If necessary, time will be abridged for me to do so. On Monday I shall also wish to deal with any other outstanding pre-trial matters.

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**

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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.

Claim No QB-2018-006323

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

BEFORE THE HONOURABLE MR JUSTICE NICOL

02 July 2020

B E T W E E N:-

JOHN CHRISTOPHER DEPP II

Claimant

-and-

(1) NEWS GROUP NEWSPAPERS LIMITED
(2) DAN WOOTTON

Defendants

ORDER

UPON the Defendants applying by Application Notice dated 24 June 2020 for a declaration that the claim stood struck out because of a breach of paragraph 5 and 10 of the Order of 13 March 2020 and the obligation in paragraph 3 of the Order of 6 March 2020

AND UPON the Court finding that the Claimant was in breach of paragraph 3(c) of the order of 6 March 2020

AND UPON the Claimant immediately, upon the handing down of the Court's judgment, applying pursuant to CPR r.3.9 for relief from sanction

AND UPON the Claimant undertaking to the court by his counsel on the Claimant's behalf that that he will take no step to seek any relief or sanction in any court, whether in the US or otherwise, against Ms Heard in respect of the provision by Ms Heard of documents to the Defendants for the purpose of their defence of these proceedings

AND UPON the Claimant, by his counsel on the Claimant's behalf agreeing to disclose to the Defendants within 24 hours all documents within his control which demonstrate, or may demonstrate, that he obtained, attempted to obtain or took MDMA, cocaine or any other narcotic drugs in the following periods:

a. 1 March to 8 March 2013.
b. 25 February 2015 to 12 March 2015.
c. 15 April to 21 April 2016.
d. 14 May to 21 May 2016.

AND UPON the Claimant, by his counsel on the Claimant's behalf agreeing to disclose to the Defendants by 9:00am on 2 July 2020 the text messages referred to in paragraph 7 of the Seventh witness statement of Jenny Afia dated 27 June 2020

AND UPON the Claimant applying by Application Notice dated 24 June 2020 to rely upon the evidence in Kevin Murphy's second witness statement at trial

AND UPON the Defendants applying by Application Notice dated 26 June 2020 to rely upon at trial the evidence in Amber Heard's Fifth witness statement and in Raquel Pennington's witness statement

IT IS ORDERED THAT

1. The Claimant be granted relief from sanctions in respect of the breach of the unless order of 10 March 2020.

2. The Defendants do have permission (a) to rely at trial upon the evidence in the Fifth Witness Statement of Amber Heard dated 26 June 2020 and (b) to rely at trial upon the evidence in the Witness Statement of Raquel Rose Pennington dated 16 June 2020.

3. The Claimant does have permission to rely at trial upon the Second Witness Statement of Kevin Murphy dated 24 June 2020.

4. The costs of the Defendants' application for a declaration dated 24 June 2020 be reserved.

5. The costs of the Claimant's application for relief from sanctions dated 29 June 2020 be reserved.