Case No: HC12A04146

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Neutral Citation Number: 2014 EWHC 3655 (CH)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 28/10/2014

Before :

THE HON.MR JUSTICE MANN

- -

Between :

VARIOUS	**Claimant**
- and -	
MGN LIMITED	**Defendant**

- -

MR D SHERBORNE and MR J REED (instructed by **Taylor Hampton**) for the **Claimants**

MR M NICKLIN QC (instructed by **RPC**) for the **Defendants**

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.

1. MR JUSTICE MANN: These are my reasons behind an indication that I gave this morning after argument to the effect that what is called in these proceedings generic disclosure should be given by MGN.
2. The matter arises in the following circumstances. These proceedings, as by now will be well known, are proceedings in which a number of individuals sue MGN Limited, as proprietor of several newspapers in the Mirror Group stable, in respect of phone hacking and allied wrongs said to have been committed by the newspapers. There are a significant number of such claimants and the litigation is managed in order to keep it manageable and within bounds.
3. The current state of affairs is that eight cases, or perhaps nine cases, are to be taken to trial in February as test cases. A number of cases have now settled. The pleadings in each of the cases take a similar form, though they are of course adjusted to their own particular circumstances.
4. At the heart of the claims made by the claimants is an allegation that Mirror Group engaged in phone hacking or data blagging as a result of which their privacy was infringed when voicemail messages were listened to and other confidential information was obtained, and in some cases sensationalist articles were written about the individuals in question.
5. Not all of the victims of phone hacking or alleged phone hacking have had articles written about them. For example Mr Alan Yentob, who is one of the claimants, has not had an article written about him, at least no article based on any confidential information or any private information obtained from phone hacking. Nonetheless, in his particular case Mr Nicklin QC, who appears for MGN, said on his feet this morning that although it is not recorded in any document, it was accepted that he was a substantial victim of phone hacking.
6. The pleadings in each case contain two principal elements. The first is a pleading of such

facts demonstrating hacking carried out in relation to that individual, as the claimant can provide on the basis of information available to him or her before the proceedings started. That is claimant-specific information. Some of that information will have come from the Metropolitan Police who, when they come across evidence in the course of their investigations that an individual was hacked, inform that individual so that the individual can take whatever steps he or she sees fit. A number of them have sued on the basis of that.

7. If through that and through any other means the claimant was aware of hacking having taken place, then the information available to that claimant is pleaded. It is of the nature of the activities of the newspaper that they were not publicised, and indeed they were kept secret within the newspaper, or such is the allegation. The phone hacking did not come to light until recently and in the early stages of this litigation MGN made no admissions that it took place at all.

8. The other category of factual material set out in the claimants' pleadings in this case is what is described in the parlance of this case as “generic”. The nature of that information is that it is generalised information which has come into the public domain as to the existence of phone hacking in general terms. It has come into the public domain in a variety of ways. There is a pleading of certain expressed statements by individuals, and in particular there is reliance upon the evidence given by a journalist, Dan Evans, as to practices at the Mirror Group when he was there in the early 2000s. That is a very important source of information for the claimants. None of that generic information goes to any particular specific incident of hacking against any individual. Nonetheless, it is relied on amongst other things as supporting the factual case that the individuals were hacked because until recently there was no admission by MGN that any such incidents had taken place.

9. Originally, eight sample cases were to be taken forward as test cases to judgment. In the late

summer, however, events took a slightly dramatic turn. Four of those cases settled. In respect of the other four MGN has, as it put it, admitted liability, but no settlement was reached with the claimants in those four other cases. There was a degree of equivocation as to actually what an admission of liability meant and in a judgment in the autumn I ordered that the defendant should particularise the scope of the admissions. In an order dated 26 September, I ordered that:

"The defendant shall, by 4pm on 8 October 2014, file and serve amended defences in the Original Representative Claims. Those amendments shall give full particulars of the admissions that the defendant wishes to make."

10. Pursuant to that order, which was resisted by the defendants at the time, the defendant put in an amended pleading. It differed very markedly from the original form of pleading.

11. I can take as an example the amended Defence as it was filed in relation to the claim of Lucy Jane Taggart. The original defence started by setting out a limitation defence and pleaded the defendant's contention:

"... that the claimants' case based as it is solely upon inference is misconceived not least because it has the effect of reversing the burden of proof." There are then a number of paragraphs which make very limited admissions, including an admission that Mr Evans gave the evidence that he gave but not its truth or accuracy and admitting certain publications but essentially making admissions as to the existence of any phone hacking or other improper activity. The Defence pleads to the Particulars of Claim paragraph by paragraph.

12. The Defence is to that extent in a traditional form. The amended Defence, however, is in a rather different form. It does not seek to meet the claimants' case paragraph by paragraph. It starts in paragraph 1 by setting out the admission of liability which was contained in a letter dated 24 September 2014, the form of which can be seen in my judgment of 26 September.

It then goes on to admit that the defendant was responsible for the acts of certain employees in relation to unlawful interception of voice messages and blagging of her call data. It goes on to say:

> "This admission is not limited to specific matters complained of in the particulars of claim but extends to any Activities carried out by the defendant's employees from June 2000 to April 2007 to which the claimant was subject (see paragraphs 5(3) and 5(4) below)."

13. It then accepts that the articles of which the claimant complains:

> "... are likely to have been the product, at least in part, of the Activities against the claimant."

14. Paragraph 4 indicates that the defendant does not know and cannot establish the precise scope of the activities in the absence of admissions by those who carried them out, which admissions do not exist save in the case of Mr Evans. It reads thus:

> " 5(4) Unless those who carried out the activities make admissions as to what they did, it will not be possible to demonstrate these matters. For example, Dan Evans has claimed that he used untraceable pay-as-you-go mobile telephones to carry out voicemail interception. If that is correct (and the defendant is prepared to accept for the purposes of these proceedings that it is) then the defendant has no way of establishing the extent of voicemail interception that was carried out using this method."

15. Paragraph 5 then goes on to provide:

> "The best information that the defendant can provide in relation to the extent of the activities concerning the claimant ..." and it lists four matters. The second is as follows:

"(2) Dan Evans has made admissions that the claimant was a target of phone hacking whilst he was employed by the defendant."

And (4) reads as follows:

"(4) In the period 10 February 2003 to 27 April 2007, calls were made to the claimant's mobile telephone from the defendant's telephone system. The defendant cannot now ascertain the nature or purpose of those calls. The defendant nonetheless admits that the pattern of at least some of those calls may well be consistent with interception or attempted interception of the claimant's mobile telephone messages."

16. Paragraph 7 contains some concessions about remedies but does not plead any particular facts.

17. One would have thought that a Defence filed in those circumstances would have made some attempt to meet the particulars of claim paragraph by paragraph. However, it does not do so. Paragraph 6 indicates that MGN disdains to plead further to the claim. It reads as follows:

"In the light of the admissions above, the defendant does not plead further to the particulars of claim."

18. There has been no argument before me as to whether such a form of pleading is compliant with the rules. There has been a certain amount of debate as to equivocation which results from that form of pleading and I have to say for my part I regard it as unsatisfactory. The parties and the court were entitled to expect an amended form of pleading which dealt with the paragraphs as they needed to be dealt with rather than the slightly lofty form adopted by the present form of Defence. Be that as it may, that is the present form of Defence and there has been no attempt to strike it out. We will live with it at least for the time being.

19. What emerges from the new pleading is, therefore, that there is no longer a general denial of relevant phone hacking activities on the part of MGN. It is accepted that there was phone

hacking as regards the individual claimants.

20. I should observe that the four defences in the various actions are similar. What is not admitted, however, is any particular extent of phone hacking beyond specific pleaded incidents and the Defence accepts perhaps understandably that that full extent cannot be known. However, there is no clear acknowledgment by the defendant as to the extent of the phone hacking even in generalised terms beyond the particular incidents of which the claimant complains.

21. Mr Nicklin QC, for the defendant, sought to say that the pleading contains an admission of all the facts which Mr Evans has admitted as going on in the Mirror Group while he was employed by the sole newspaper in the group that employed him. He says that was the intention behind paragraph 5(2) which I have set out above. I have to say I find that a very surprising suggestion. This is obviously a very carefully drafted document which has been couched in its precise terms, no doubt for tactical reasons. The particulars of claim set out what it was in general terms that Mr Evans was alleging and it was quite clear from the particulars of claim that the claimants were going to rely on the truth and accuracy of Mr Evans' admissions in his evidence elsewhere. If it really were the case that MGN were intending all that Mr Evans has said to be treated as being true and accurate for the purposes of proceedings, I would have expected a very different form of words. That is the trouble with going about pleading in this particular way. I rather suspect that if MGN had gone about pleading in a more conventional way the point would have been flushed out more clearly. However, for present purposes I find merely that there is no recorded clear acknowledgement on the pleadings by Mirror Group as to the accuracy of what Mr Evans has said, much less any other more generalised statement about the extent of phone hacking. It remains an issue in the case.

22. So far as disclosure is concerned, MGN has given what it says is proper standard disclosure in relation to phone hacking activities specifically directed against any of the claimants. It has done word searches in its documentation which were intended to bring that about. Disclosure was supposed to have taken place under an earlier order of mine of 8 July on 30 September 2014. It did not take place on that day but what has been described as claimant specific disclosure has now been provided. That claimant specific disclosure is that disclosure which tends to demonstrate or disprove the activities targeted at the individual claimants.

23. What has not been given is any form of generic disclosure, that is to say disclosure going to the general level and nature of phone hacking in the defendant or the rest of the defendant's group.

24. As I have indicated it was part of the claimants' pleaded case that there was extensive phone hacking, and that was principally relied on in the pleadings in support of the averment that it did indeed actually occur in relation to the claimants. Apart from the particular pleaded points, the sort of evidence germane to this question has to be imagined, but it might for example include evidence of hacking in relation to other individuals who are not the subject of any of the present actions, and might include more generalised e-mails passing between journalists and/or executives of the defendant relating to its journalistic practices. The exercise of a little more imagination could come up with some more suggested disclosure, but what I have just said is sufficient to demonstrate the sort of disclosure which would be relevant to any relevant issue of generic phone hacking.

25. The defendant not having given any generic disclosure, the claimants apply at this CMC for such disclosure. The defendants decided for themselves that such generic disclosure was not to be given because it was not relevant, or not sufficiently relevant, or not sufficiently

probative, and/or was disproportionate in relation to such issues as arise.

26. The question for me at this stage of the proceedings is whether as a matter of principle generic disclosure is capable of being relevant to any outstanding issues. I approach this at this stage of the hearing as a matter of principle. If I decide the point in favour of the claimant, it still remains to be seen what, if any, generic disclosure should be given because there will undoubtedly be questions of proportionality (and often practical points) which will arise in relation to this issue.

27. I turn, therefore, to the question of whether as a matter of principle generic disclosure should be given. Disclosure is always related to issues in the case. The case of Mr Reed, who has argued the point on behalf of the claimant, was that it went to various matters.

28. First, it went to support an inference that there was phone hacking against his clients.

29. Second, it went to support the case that hacking went on beyond the incidents claimed of in the Particulars of Claim and took place on a number of other occasions apart from those which apparently resulted in articles made about his clients. In other words, it goes to the actual extent of phone hacking.

30. Third, so far as it went to the actual extent of phone hacking, it would be capable of going to the damages recoverable in this case. It will said at the trial that each act of phone hacking was a wrongful invasion of privacy which gives rise to a separate claim for damages and that damages will be bigger the more phone hacking went on, whether or not it resulted in articles.

31. Fourth, Mr Reed submitted that the hacking demonstrated the *modus operandi* of Mirror Group.

32. Fifth he said it was capable of going to the calculation of what he called user principle damages; that is to say, damages calculated on the footing of a price that would be paid for

an article that was written or information leading to an article that was written as opposed to straight compensation for the act of hacking.

33. He instanced the sort of material (generic material) that would be useful and potentially relevant on these issues. It included the sort of information that I have referred to, that is to say specific information about other victims of hacking. He also relied on the existence of expenses claims by journalists said to be recorded in claim documents, which will have included or may have included the cost of calls made from pay-as-you-go mobile phones which were used on a short-term basis for making phone calls which were part of the hacking activity.

34. Mr Nicklin resisted Mr Reed's submissions. He pointed out that the primary purpose of the generic case advanced against his client was to bolster the specific case in terms of the hacking that is specifically said to have occurred. He says that is no longer necessary in the light of his admissions. He submitted that the court would not be assisted in any relevant issue in this case by getting more information than it has; that is to say, the disclosure that has been given and the admissions that the defendant has made and, he interjected at this point, what Mr Evans has admitted. I have already indicated what emerged in argument about what he said about what Mr Evans admitted and its status in this case.

35. He went on to submit that any disclosure would be disproportionate. It could involve enormous activities and in terms of improving the claimants' respective cases, it would not do very much, if indeed anything at all, bearing in mind again the concessions that he says his client has made. The precise scope of phone hacking is said to be almost by definition impossible to gauge because it was carried out covertly and unrecorded, so the general picture that would or might emerge of phone hacking would not be of any great assistance.

36. He went on to point out that this case is different from the NGN litigation where he said

there was little or no primary evidence from the newspaper. The claimants already have a significant amount of primary evidence from the newspaper in relation to their individual cases and they should not have more generic material. I observe at this point that whether it is true to say that there is more information in this case than there was in the NGN case was hotly disputed by the claimant. That is not an issue I propose to resolve.

37. Lastly, he pointed to a judgment of Mr Justice Vos in the NGN litigation entitled "Various claimants v Newsgroup Newspapers Limited, [2012] EWHC 2692", a judgment delivered on 5 October 2012. In that judgment, Mr Justice Vos declined to give some further generic disclosure being sought in that case on the grounds that it would not in the circumstances further the claimants' case and would be disproportionate.

38. As I have already foreshadowed it is necessary to resolve the disclosure point by reference to the pleaded cases and the issues that arise. If it were the case that the defendants had made wide-ranging and extensive and clear admissions as to the extent of phone hacking, in such a manner as would make any disclosure of the generic case merely repetitive of the admissions, then it would not be appropriate, or it may well in those circumstances, not be appropriate to order generic disclosure. However, in my view, the admissions that have been made in this case are nothing like enough to achieve that. They are limited and carefully crafted admissions and make no real admissions about the generic case. The generic case is relevant to two or perhaps three but not all of Mr Reed's issues to which he said they went.

39. I accept that the generic case is relevant to the issue of the likely extent of phone hacking beyond the specific incidents of which specific complaint is made in the individual cases. I accept that the generic disclosure is capable of demonstrating that which has not yet been demonstrated or conceded, that is to say that there may have been more and potentially much more hacking of each claimant's phones than the incidents they currently know about and are

able to plead, and that is capable of going both to the existence of a cause of action and as to the damages recoverable in this case. A claimant who has been hacked on, say, five occasions is likely to have a smaller claim than a claimant who has been hacked on 105 occasions. I accept that it is highly unlikely that it will be possible to demonstrate the precise number of occasions on which a claimant has been hacked, but it may be possible as a result of generic evidence to demonstrate that the claimant has been hacked on a very significant number of occasions other than those as specifically pleaded, and that that is capable of operating in the claimants' favour in the manner to which I have referred.

40. Furthermore, there remains at least one hole in the defendant's admissions as to which generic disclosure may go. I have read paragraph 5(4) of the pleading and I note that there is an acceptance of the existence of some of the calls which "may well be consistent" with interception. That isn't even an admission of phone hacking on those occasions. There is, therefore, even in the admissions of liability which the defendant seeks to have made, a degree of equivocation in relation to the specific cases and the specific instances. That is another point to which generic disclosure is capable of going.

41. I do not think that establishing the full *modus operandi* of the defendant is an issue which justifies generic disclosure, if indeed it is a real issue at all. Nor do I see that generic disclosure goes to user principle damages. I therefore put those on one side. However, some generic disclosure is capable of going to aggravated damages so far as internal knowledge and concealment is concerned.

42. So far as Mr Nicklin's reliance on Mr Justice Vos's judgment is concerned, it seems to me that on a fuller reading of that judgment, which I was able to conduct assisted by Mr Reed, Mr Nicklin's reliance on it is completely misplaced. It is quite clear from a proper study of that judgment that there had already been significant generic disclosure in that case. The full

extent of it, or the basis of it, is not clear from that particular judgment but it is certainly clear from various paragraphs in that judgment which I will not trouble to read into this judgment. It is specifically referred to and on more than one occasion Mr Justice Vos refers to "further" generic disclosure, thereby acknowledging that some had already taken place. The essence of the decision is not that generic disclosure as such was refused because it was disproportionate or not necessary. The essence of it is that the claimant had had enough disclosure and that any further disclosure would not advance the case and would be disproportionate. In the words of Mr Justice Vos himself, "enough is enough".

43. The case is therefore not in any sense a true parallel with the present case and I gain no assistance from it at all save that I suppose Mr Reed might be entitled to invoke it as being a similar sort of case in which generic disclosure was at one stage thought to be helpful to the case.

44. In those circumstances, I decide as a matter of principle that generic disclosure is capable of going to extant issues in his case and it is not immediately obvious that any generic disclosure will be pointless and/or disproportionate or should be disallowed *in limine* for any other reason.

45. In those circumstances, I had to move on to consider how generic disclosure could best be achieved in a proportionate fashion. I record that once I had announced my decision in principle, the next step was readily agreed between or accepted between the parties, and that is that at least in the first instance, and without prejudice to the claimant's right to apply for more generic disclosure, the obligation would for the time being be complied with by giving disclosure of certain documents which have already been disclosed to the Metropolitan Police in connection with the police's own investigations. I record that the correspondence demonstrates that the police have no objection to that disclosure.

46. Further questions as to the extent, if any, to which generic disclosure should take place will have to await an application which is formulated in order to have that issue determined. The extent to which it is appropriate may depend on what emerges from the disclosure of the particular material just referred to.