Neutral Citation Number: [2022] EWHC 3370 (KB)

Case No: QB-2019-002482

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/12/2022

Before :

MRS JUSTICE HILL DBE

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Between :

WALTER SORIANO	**Claimant**
- and –	
(1) SOCIETE D'EXPLOITATION DE L'HEBDOMADAIRE LE POINT (SEBDO) **(2) MARC LEPLONGEON**	**Defendants**

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David Sherborne and **Ben Hamer** (instructed by Rechtschaffen Law) for the **Claimant**
Jonathan Price (Ince Gordon Dadds LLP) for the **Defendants**

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23/12/2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. By two applications dated 14 January 2022 and 26 October 2022 the Claimant seeks specific disclosure from the Defendants.

2. The Claimant is a British-Israeli businessman, domiciled in England.

3. The First Defendant is the publisher of *Le Point*, a weekly French-language political and news magazine. *Le Point* is published in print and online. The Second Defendant was a journalist employed by the First Defendant.

4. On 21 June 2019 the First Defendant published an article on the *Le Point* website about the Claimant which had been written by the Second Defendant, entitled '*United States: Israeli agent targeted by Russian interference investigation*' ("the article").

5. On 17 July 2019 the Claimant issued this claim for libel arising out of the publication of the article.

6. The application dated 14 January 2022 seeks an order requiring the Defendants to conduct further searches for documents by reference to specific terms and to conduct various other specific searches. It was supported by a witness statement from the Claimant's solicitor, Shlomo Rechtschaffen ("Rechtschaffen 2"). This was responded to by a witness statement from the Defendant's solicitor, Gareth Jones ("Jones 3"), to which Mr Rechtschaffen replied with a further statement ("Rechtschaffen 4").

7. The application dated 26 October 2022 seeks information about those of the First Defendant's subscribers who have accessed the article within England and Wales. This was supported by a bundle of relevant correspondence between the parties.

The procedural history

8. On 20 November 2020, after a preliminary issue trial Nicol J determined the natural and ordinary meaning of the words complained of in the article, insofar as it relates to the Claimant, as follows:

> "The Claimant is a spy or a spook and there are grounds to investigate whether he has directly or indirectly used surveillance, military methods or data interception technology in his work; whether he was involved in the surveillance of police officers investigating President Netanyahu; and

> whether he was involved in Russia's attempt to interfere in the 2016 election in the USA" (see [2020] EWHC 3121 (QB) at [30]).

9. On 22 January 2021 the Defendants filed their Defence.

10. On 24 March 2021 the Claimant filed a Reply.

11. On 14 October 2021 a Case Management Conference was held at which standard disclosure was ordered. The Defendants have since made standard disclosure.

12. On 8 July 2022 Collins Rice J dismissed the Defendants' application dated 23 February 2022 for strike out and/or summary judgment. She held that the Claimant's pleaded claim of serious harm was defective in that it was inconsistent with Nicol J's meaning judgment. She permitted the Claimant to amend his Particulars of Claim in respect of the issue of serious harm (see [2022] EWHC 1763 (QB)).

13. On 27 July 2022, 30 August 2022 and 28 September 2022 the parties filed and served, respectively, Amended Particulars of Claim ("APOC"), an Amended Defence and an Amended Reply.

14. It is relevant for the purposes of these applications that the Defendants have raised the public interest defence under s.4 of the Defamation Act 2013 ("the 2013 Act") and denied that publication of the article has caused the Claimant serious harm. The public interest defence is heavily contested, as the Amended Reply at [17] onwards makes clear. Accordingly, the public interest defence and the serious harm element of the Claimant's claim are likely to be the central issues at trial.

The law

15. Applications for specific disclosure are governed by CPR 31.12, which provides that:

> "(1) The court may make an order for specific disclosure or specific inspection.
>
> (2) An order for specific disclosure is an order that a party must do one or more of the following things –
>
> (a) disclose documents or classes of documents specified in the order;
>
> (b) carry out a search to the extent stated in the order;
>
> (c) disclose any documents located as a result of that search

16. Under Practice Direction 31A, paragraph 5.4:

> "In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the party concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents

or otherwise) the court will usually make such order as is necessary to ensure that those obligations are complied with.

17. The White Book 2022, paragraph 31.12.2 makes clear that in deciding whether to exercise its discretion to make an order for specific disclosure, the court should have regard to:

    (i) whether the party seeking the disclosure has made a *prima facie* case that the documents sought are relevant to a pleaded issue between the parties (i.e. whether they are likely to support the applicant's case or adversely affect the respondent's case); and

    (ii) whether an order is in accordance with the overriding objective and is, in all the circumstances, proportionate.

18. Under CPR 31.4, the disclosure obligation extends to electronic documents, including emails and other electronic communications and databases pursuant to CPR 31.4.

19. The public interest defence under s.4 of the 2013 Act was recently considered by the Supreme Court in *Serafin v Malkiewicz* [2020] 1 WLR 2455 at [52]-[78]. Further, in *Hijazi v Yaxley-Lennon* [2020] EWHC 3058 at [41], Nicklin J observed that the focus is on the Court coming to "findings of fact about the investigations prior to publication" and on that basis whether the belief in the public interest of the publication "was objectively reasonable".

20. In respect of serious harm, Sharp J (as she was then) noted in *King v Grundon* [2012] EWHC 2719 (QB) at [40] that "*one well-directed arrow* [may] *hit the bull's eye of reputation*" and cause more damage than indiscriminate firing.

The application dated 14 January 2022

21. The application sought an order covering several items of specific disclosure.

Paragraph 1(a): search terms

22. Under this paragraph of the draft order the Claimant sought an order requiring that searches be conducted by reference to a series of specified search terms.

23. Mr Sherborne for the Claimant relied on the Defendants' disclosure statement indicating that they conducted searches for the purposes of standard disclosure using only the keyword 'Soriano'. He submitted that unsurprisingly this resulted in very limited disclosure. Mr Price for the Defendants argued that his clients had been advised of their disclosure obligations under the CPR and had searched more widely than for material captured by the keyword 'Soriano'. Mr Sherborne noted that the Defendants has not placed any evidence before the court, for example in Jones 3, about the nature of the searches conducted. He invited me to disregard submissions made about the search process in the absence of any evidence.

24. All the further search terms in the Claimant's draft order are said to be relevant to the public interest defence, which is one of the two key issues in the case: see [14] above.

25. Mr Sherborne submitted that the public interest defence is a subtle one, which is intrinsically fact-sensitive. It focusses on what was known by a Defendant prior to publication. Here, it will necessarily focus on the investigation undertaken by the Second Defendant in his role as a journalist at the First Defendant. Evidence obtained in his investigation is likely to be directly relevant to the objective reasonableness of the subjective belief of the Defendants under s.4(1)(b) of the 2013 Act. Proper disclosure of the material held and considered by the Second Defendant up to the point of publication is therefore essential for a fair determination of the s.4 issue.

26. He alighted on Mr Price's submission to the effect that the Second Defendant had already made disclosure of material that underpinned his belief for the purposes of the public interest defence. Mr Sherborne highlighted that the Claimant is entitled to disclosure which goes to the objective element of the belief test too, and which might show that the subjective belief was not reasonably held.

27. Mr Price for the Defendants relied on the three elements of the public interest defence as being that (i) the article was on a matter of public interest; (ii) the Second Defendant believed that publishing it was in the public interest; and (iii) the Second Defendant's belief was reasonable in all the circumstances, having regard to such steps as it was reasonable for him to take to verify the allegations. He submitted that it was only the third element to which the disclosure application could sensibly go. It became clear that this was common ground: see [25] above. Mr Price submitted that it remained unclear how it was said that compliance with the order sought would be likely to produce documents which are relevant to that issue. He also opposed the draft order on various practical grounds, as noted below.

28. The Defendants advanced a general objection to the application on the basis that only the Second Defendant is likely to have relevant documents as the disclosure sought relates to his investigation. Further, it was pointed out that although the draft order was sought against both Defendants, the Defence at [19]-[20] makes clear that they both rely only upon the reasonableness of the belief of the Second Defendant, such that it was not clear how any documents other than those to which the Second Defendant had access could be relevant.

29. In light of these points having been taken, the Claimant made clear prior to the hearing that he would be content to limit this application to the Second Defendant if the Defendants confirmed that the Second Defendant has not lost or is no longer in control of any documents he used in the investigation. Mr Price was unable to give that assurance.

30. Accordingly during the hearing Mr Sherborne and his team revised the draft order, so that the First Defendant would only have to carry out searches under paragraph 1(a) in relation to material to which the Second Defendant had had access at the material time, and only insofar as he no longer has such access. In my judgment this was a sensible and pragmatic compromise.

31. The draft order proposes that searches be conducted for relevant material in a specific period of time, namely 1 November 2018 to 21 June 2019. 1 November 2018 has been selected as the start date because the Defendants' pleaded case is that this was the date on which they first became interested in the Claimant. The timeframe ends with the

date of publication of the article. In my judgment this is a proportionate and sensible period.

32. The Claimant proposed 20 new search terms, each relating to an individual or organisation. The relevance of each of these was explained in Rechtschaffen 2 and Rechtschaffen 4. Jones 2 took issue with the need for several of the searches.

33. I have grouped the proposed search terms together as follows.

34. 'Rybolovlev', 'Bouvier', 'Ron Wahid', 'Arcanum', 'Squarcini' and 'Jude'. As to the relevance of these names:

    (i) The Amended Defence at [30]-[32] asserts that (a) in around November 2018 the Second Defendant became interested in the Claimant whilst investigating a legal dispute between Dimitri Rybolovlev and Yves Bouvier; (b) the Second Defendant was made aware that the Claimant had been employed by Mr Rybolovlev; (c) he obtained documents which demonstrated the Claimant's involvement in that case; and (d) he was informed by two sources that the Claimant's company USG Security had been paid by Mr Rybolovlev to find compromising information about Mr Bouvier.

    (ii) The Defence at [31] asserts that during the course of his investigation, the Second Defendant became aware that both Mr Rybolovlev and Mr Bouvier had employed the services of private intelligence operatives, two of whom were Ron Wahid and Bernard Squarcini.

    (iii) While Olivier Jude is not cited in the Amended Defence, he is the police officer conducting the investigation into the Rybolovlev/Bouvier dispute and has been mentioned briefly in the Defendants' disclosure.

35. Jones 3 argued that there had already been disclosure about several of these individuals. However, many of these were documents that had come into existence after publication of the article, and several were in the public domain. Mr Sherborne was therefore right to contend that they were of limited relevance to the public interest defence. This point applies to several of the other proposed search terms detailed below.

36. Initially, the Claimant had proposed the use of 'Wahid' as a search term. Jones 3 raised the concern that this would return unmanageable results (albeit not providing any evidence of this). Accordingly, Rechtschaffen 4 proposed substituting 'Wahid' with 'Ron Wahid' and 'Arcanum' (Mr Wahid's company) to narrow the likely results.

37. 'Ocampos' and 'Karlsen'. These names relate to those described in the Amended Defence at [32(b)] as "AS Monaco footballer Lucas Ocampos, and former director of AS Monaco, Tor Kristian Karlsen". That paragraph of the Amended Defence asserts that the Claimant was paid to find out information about both of these individuals.

38. Although Jones 3 indicated the documents that had already been provided about these individuals, Rechtschaffen 4 pointed out that there was limited disclosure from the timeframe relevant to the public interest defence.

39. 'Netanyahu + Walter'. Mr Price suggested that searching under Mr Netanyahu's name was a "fishing expedition". However Mr Netanyahu is referred to as part of the natural

and ordinary meaning of the article (see [8] above); and Rechtschaffen 4 highlighted that all the material disclosed so far in relation to him bar one email is material already in the public domain. Accordingly, I agree with Mr Sherborne that there is a basis for considering that further searches might generate more relevant material.

40. Initially the Claimant had proposed the use of 'Netanyahu' as a search term. Jones 3 again raised the concern that this would return unmanageable results, without providing direct evidence of this. While noting that if the searches were limited to the Second Defendant's devices, the results might not be unmanageable, Mr Sherborne proposed that the search in Mr Netanyahu's name be combined with 'Walter' as the Claimant's first name, in the hope of making the results more focussed.

41. 'Drucker', 'Seventh Eye', 'Septieme oeil', '7th Eye' and '7e oeil'. Raviv Drucker features in the article and in the Defendants' disclosure to date. Seventh Eye is an Israeli news publication linked to Mr Drucker. Mr Drucker is not relied on in the Amended Defence and Mr Price submitted that there was no suggestion that the Second Defendant had relied on anything published by Seventh Eye before the article about the Claimant was published. However Mr Drucker is suspected by the Claimant to be behind a number of other Israeli reports which are relevant to the nature of the Second Defendant's investigation. I accept Mr Sherborne's contention that searches in these names may well produce material relevant to the objective element of the public interest defence, even if the Second Defendant did not explicitly rely on this material.

42. 'Politico', 'Forensic News' and 'Stedman'. Politico and Forensic News (owned by Scott Stedman) are both said to have conducted parallel investigations into a Senate Intelligence Committee letter referred to in the article and published relevant stories on the issue. The Second Defendant had read the Politico article prior to publication, as pleaded in the Amended Defence at [38]. Mr Price submitted that there was no suggestion that the Second Defendant had relied on anything published by Forensic News before he published the article about the Claimant. However again I accept Mr Sherborne's submission that searches to capture that publication as well as Politico may well produce material relevant to the objective basis of the Second Defendant's belief; and that even a 'nil return' from such searches could have relevance.

43. 'Rouget'. This refers to an individual who the Claimant asserts appears to have been used by the Defendants to gather information about the Rybolovlev/Bouvier dispute. Mr Sherborne submitted that the evidence currently available generates an inference of information sharing between the Defendants and Mr Rouget which the Defendants have not sought to rebut in Jones 3 or otherwise.

44. 'Circles Bulgaria' and 'Circles + Walter': The Amended Defence at [29(e)] asserts that by the time of publication of the article, the Second Defendant had established that the Claimant may have contracted with Circles Bulgaria, company which used mobile data interception technology. The company is referred to in various other parts of the Amended Defence. Mr Sherborne submitted that it remains unclear how the Second Defendant came by this information. He initially proposed 'Circles' as a search term but he accepted during the hearing that this may return unmanageable results, hence these modified search terms and combinations (Walter being the Claimant's first name).

45. Taking into account all these factors, I am satisfied that the order sought by the Claimant under paragraph 1(a) of the draft should be made for the following reasons:

    (i) The Claimant has made out a *prima facie* case that the documents sought are relevant to the public interest defence which is a fact-sensitive and heavily disputed issue between the parties.

    (ii) The material sought is likely to support or adversely affect the parties' respective cases on this issue.

    (iii) A specific disclosure order in respect of this material is therefore necessary to ensure that the Defendants' disclosure obligations under the CPR are fully complied with.

    (iv) The Claimant has taken various steps to ensure that the order sought is, in all the circumstances, proportionate. As detailed above, these steps comprise ensuring that the documents sought relate to a relatively narrow and justifiable time-period, modifying the obligations on the First Defendant and revising the search terms so as to reduce the likely number of results returned.

    (v) The combined effect of these steps should mean that the results from the Second Defendant's searches will be focussed and yield relevant documents.

    (vi) All the circumstances of the case and, in particular, the overriding objective, militate in favour of the order being granted.

Paragraph 1(b): specific emails

46. Under this paragraph of the draft order the Claimant sought an order for the disclosure of emails to and from certain individuals. The individuals are those who sent or received the emails that featured in the Defendants' disclosure at SOR.00029, SOR.00045, SOR.00033, SOR.00027, SOR.00028, SOR.00021, SOR.00022, SOR.00035, SOR.00037, SOR.00036, SOR.00024 and SOR.00046.

47. Mr Sherborne contended that the emails in this sequence are likely from just two separate individuals. The senders of these emails have conducted research relating to the article. The Defendants' disclosure to date has the appearance of "cherry picking" as it is unlikely that there were no further emails about the research provided. He relied on the fact that the Defendants had not asserted that the further emails did not exist.

48. The proposed search in relation to these senders and recipients is limited to the same timeframe as was used for paragraph 1(a) of the draft order.

49. Mr Price argued that the Claimant cannot prove that there are further emails in existence. However as Mr Sherborne highlighted, he is not required to do so at this stage, but simply to illustrate that it appears that there might be.

50. Mr Price also submitted that the Second Defendant could not be required to disclose his sources. Mr Sherborne responded that any concerns about this could be met by the fact

that the Defendants could apply redaction to particular names and email addresses as they had done in the standard disclosure process.

51. I agree with Mr Sherborne that this further specific disclosure order is appropriate. The Claimant has made out a *prima facie* case that the full content of these emails chains is relevant to the public interest defence. An order in respect of this material is therefore necessary to ensure that the Defendants' disclosure obligations under the CPR are fully complied with. The requests made are narrowly defined as is the timeframe; and there is no basis for considering that the order sought is disproportionate, especially if the Claimant's suspicions that there are only two individuals involved in all the emails prove justified. Again, all the circumstances of the case and the overriding objective support this order being made.

Paragraph 3 of the draft order

52. This proposed that the Second Defendant be required to search his mobile devices for documents responsive the search term 'Soriano'. This is appropriate given that the Defendants' disclosure statement makes clear that his mobile devices have not yet been searched. They may well contain relevant material.

53. Paragraph 3 of the draft order also made explicit that the Second Defendant should search his mobile devices for material under paragraphs 1(a) and (b) of the draft. Again this is appropriate for the reasons given at [45] and [51] above.

The application dated 26 October 2022

54. The Amended Defence at [6] and Jones 2 confirmed that at the date of the pleading, 94 subscribers based in England and Wales have accessed the article on the website since it was published. It does not feature in the print version of *Le Point*.

55. By this application the Claimant sought a list of the identities (and company names if applicable) and addresses of these subscribers and a document containing this information or identifying any other subscribers who viewed the article meeting the test in CPR 31.16.

56. Mr Sherborne submitted that a key question in determining serious harm is the identity of the publishees. The "*one well-directed arrow*" point made by Sharp J in *King* (see [20] above) was particularly relevant given the Claimant's profession.

57. He highlighted that the Claimant is particularly concerned to establish whether one of the publishees was a company such as Lexis Nexis or World Check. Such companies often use media articles to conduct "know your client" checks and banks use these companies to help decide whether to allow loans or continue working relationships with individuals. The Claimant is concerned that the words complained of allege that there were grounds to investigate whether he was involved in Russia's attempt to interfere in the 2016 election in the USA and in the surveillance of police officers investigating President Netanyahu, and this information would be likely to cause him serious harm if they appeared on Lexis Nexis or World Check.

58. The Amended Particulars of Claim at [9(3)(b)] pleads that it can be inferred that *Le Point* included corporate subscribers. The Amended Defence at [15(b)] does not deny that there were such corporate subscribers but asserts that "there is no sufficient basis for the inference invited". Mr Sherborne contended that it was unfair of the Defendants to, effectively, deny the Claimant information about the subscribers and then assert that he could not prove serious harm.

59. Mr Sherborne contended that if Lexis Nexis or World Check were subscribers, this would invite an irresistible inference of serious harm, and, indeed, would likely dispose of the issue prior to trial.

60. He referred to the observation of Collins Rice J at [78] of her judgment, to the effect that identifying the UK subscribers to *Le Point* has "some potential to yield information of real significance to the inferential case for serious harm". This was one of the reasons that she considered it premature to determine the serious harm issue in the manner sought by the Defendants.

61. Mr Price objected to this proposed order on the basis that it was a fishing expedition designed to shore up the Claimant's case on serious harm. He had commenced the claim very shortly after publication of the article, including an assertion of serious harm at that stage, and only now was seeking material said to be central to that issue. This was conducting litigation the wrong way round.

62. Mr Sherborne met this point by highlighting that the 94 subscribers point only became apparent on service of the Defence. Further the application was not a fishing expedition to see if any particular material existed, but a focussed request for material which it was known did exist.

63. Mr Price also opposed the draft order on the basis that the information as to the subscribers may not be easily accessible in a particular document, albeit accepting that such a document might be capable of construction. The matter might have been more straightforward had the Claimant made a request for information under Part 18.

64. However Mr Sherborne's Skeleton had made clear that to the extent that any point was taken about the subscribers being information rather than held in documentary form, the Claimant would seek an order under CPR 18.1.

65. The more substantive basis upon which Mr Price opposed the application was that the Defendants consider the request is "neither justified nor legal" under data protection law. Reliance was placed on a letter dated 23 March 2022 which set out the position under French data protection law as far as the Defendants understand it to be. In short, it was said that post-Brexit a court order is not a sufficient basis for disclosure.

66. Mr Sherborne submitted that there is no basis to withhold the identities of corporate subscribers under data protection law. Personal data is defined under the GDPR (and UK GDPR) as "any information relating to an identified or identifiable natural person ('data subject')". Companies, such as Lexis Nexis and World Check, are not data subjects, such that there can be no proper basis for resisting disclosure of such subscribers. Indeed, it would be possible, albeit disproportionately expensive, for one to

check with databases such as Lexis Nexis or World Check by taking out a subscription and checking whether the words complained of appear.

67. Insofar as any of the subscribers are identifiable natural persons, the issue is addressed by paragraph 3 of the draft order which provides that the First Defendant may redact information over which it claims to have a right or duty to withhold inspection. Such a redaction can then be challenged, if necessary, under paragraph 4. In any event the provision of this information would be covered by the implied undertaking under the CPR prohibiting collateral use of disclosed material.

68. In my judgment the reasons advanced by Mr Sherborne in support of the draft order sought are persuasive. Again, I am satisfied that the Claimant has made out a *prima facie* case that the subscriber information is relevant to the issue of serious harm. The order sought is proportionate and making the order sought is appropriate in light of all the circumstances of the case and the overriding objective. The concerns about the data protection rights of individuals can be addressed in the ways set out at [67] above.

Conclusion

69. Accordingly for these reasons both applications for specific disclosure succeed and I approve the draft orders submitted by the Claimant.