Neutral Citation Number: **[2020] EWHC 523 (QB)**

Case No: QB-2018-006349

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

Royal Courts of Justice,
Strand,
London
WC2A 2LL

Date: **27 February 2020**

Before:

Mr Justice Warby

- -

Between:

(1) Petr Aven,	**Claimants**
(2) Mikhail Fridman	
(3) German Khan	
- and -	
Orbis Business Intelligence Limited	**Defendant**

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- -

Hugh Tomlinson QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Robin Hopkins (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing date: **27 February 2020**

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JUDGMENT

Mr Justice Warby **Thursday, 27 February 2020**

(12:43 pm)

Ruling by MR JUSTICE WARBY

Introduction

1. This is the pre-trial review of a claim which is presently listed for trial in the media and communications list before me over four days commencing on Monday, 16 March 2020.

2. The claim relates to a memorandum entitled "Company Intelligence Report 201/112, Russia/US Presidential Election: Kremlin-Alpha Group cooperation". It has been referred to in these proceedings as Memorandum 112.

3. The claim is brought under the Data Protection Act 1998 by three men who describe themselves as international businessman of Russian extraction. It arises from the processing of their personal data in Memorandum 112, which formed part of what is described as “the notorious Steele Dossier.”

4. Mr Steele, whose name is given to the dossier, describes himself in his witness statement for the trial as a former UK Crown servant who served between 1987 and 2009, rising to the position of counsellor in the Foreign & Commonwealth Office, having been posted to Moscow and Paris. He was considered an expert on Russian/Commonwealth of Independent States (CIS) affairs based on 22 years of experience in the field, working mainly on Russian and CIS matters for the Government and since then as a national security professional.

5. He explains that he founded the defendant company (,Orbis), with a former Foreign & Commonwealth Office colleague in 2009.

6. The claimants claim compensation and other remedies for what they allege are breaches of duty by Orbis, contrary to section 4(4) of the DPA 1998, in the way that the company processed the claimants' personal data, by composing and otherwise dealing with Memorandum 112.

7. Much of the factual background relating to Memorandum 112 is common ground. The particulars of claim describe Orbis as a company registered in England and Wales which holds itself out as

providing strategic insight, intelligence and investigative services to clients around the world. The particulars go on to refer to Fusion GPS ("Fusion), a consultancy based in Washington DC USA, founded for the purposes of providing research and strategic intelligence services, and established in 2010 by three journalists. It is explained that in or about June 2016 Fusion engaged Orbis to provide intelligence memoranda concerning Russian efforts to influence the 2016 US presidential campaign, and any links that might exist between Russia and the Republican candidate, Donald Trump. All of that is agreed.

8. The Defence adds that Fusion engaged Orbis to provide the intelligence memoranda because Fusion's client needed the information contained in those memoranda for the purposes of prospective legal proceedings and/or obtaining legal advice and/or for establishing, exercising or defending legal rights. That part of the Defence is not agreed.

9. Orbis delivered Memorandum 112 to Fusion on or around 14 September 2016. The memorandum was also provided to a number of senior politicians and security officials in the US and the United Kingdom and, on the claimants' case, perhaps to others as well.

The issues in the claim

10. Before coming to the issues for decision at the pre-trial review, I should outline the main substantive issues in the case, as they presently stand. In brief, the claimants' claims are that Memorandum 112 contains the following personal data of which the claimants are the data subjects: (a) that significant favours are done by President Putin for the claimants and for President Putin by the claimants; (b) that the first and second claimants give informal advice to President Putin on foreign policy; (c) that shortly before 14 September 2016 the second claimant met directly with President Putin in Russia; (d) that the first and second claimants used Mr Oleg Govorun as a "driver" and "bag carrier" to deliver large amounts of illicit cash to President Putin

when he was deputy mayor of St Petersburg; and (e) that the first and second claimants do President Putin's political bidding.

11. Paragraph 11 of the particulars of claim sets out the alleged breaches of the data protection principles. The first is that the defendant has not been processing the personal data lawfully. Secondly, it is alleged that the processing was not fair. Thirdly, in paragraph 11(c) it is alleged that in breach of the fourth data protection principle the personal data was not accurate in that:

> "(1) the claimants and President Putin do not do 'significant favours' for each other; (2) the first and second claimants do not give informal advice to President Putin on foreign policy ..."

The paragraph continues in the same vein - to assert the opposite of that which, it is said, the memorandum said about the claimants.

12. The remedies sought are compensation pursuant to section 13 of the DPA; a declaration that the personal data is inaccurate; and orders under sections 14(1) and 14(3) of the DPA for rectification, blocking, erasure or destruction of the personal data; and an order requiring the defendant to notify third parties to whom those data have been disclosed of the rectification, blocking, erasure and/or destruction.

13. Orbis admits that Memorandum 112 contained personal data of some of the claimants, although it maintains that some of the information was not permanent data but company data relating to Alfa. There is a dispute about the extent to which some of the non-corporate information relates to some of the individual claimants. Otherwise the defence case, in broad summary, is that none of the remedies claimed should be granted because there were no breaches of any of the data protection principles identified.

14. Paragraph 10 of the Defence says this:

> "The claimants are not entitled to any relief as claimed or at all. In the event that they need to do so, the defendant will rely on the defence under section 13(3) of the DPA. The

defendant took such care as was reasonably required in the circumstances, including to establish the accuracy of the personal data complained of."

15. It is appropriate to identify in more detail what is said in the Defence about the complaint of inaccuracy. Paragraph 6 of the Defence, at paragraph 11 of the particulars of claim, is denied and it is said at paragraph (c) as follows:

"At trial the defendant will rely inter alia on other information about the claimants in the public domain. The defendant will say in light of that other information, the processing complained of caused no prejudice or damage to the claimants, alternatively any such prejudice or damage was not unwarranted."

16. At paragraph 6(h) of the Defence says:

"Paragraph 11(c) is denied. None of the personal data complained of at paragraph 6 of the particulars of claim is incorrect or misleading as to any matter of fact. The claimants are put to proof as to the assertions in paragraphs 11(c)(1) to (5)."

17. Paragraph 6(i) reads as follows:

"Further, as regards paragraph 11(c)(1), the statement complained of is not to the claimants' personal data. The statements complained of at paragraphs 11(c)(1) and (5) are matters of opinion."

18. Paragraph 7 of the Defence goes on to deny paragraph 12 of the particulars of claim and continues as follows:

"The personal data complained of was not and is not inaccurate. The claimants are entitled to no declaratory relief to that effect ..."

19. A Reply has been served, paragraph 10(a) of which says this:

"The contention that 'the personal data complained of is not and was not inaccurate' is in substance a bare denial of the falsity unsupported by any positive case as to accuracy."

Issues at this PTR

20. The main issues at this pre-trial review are,

(1) first of all, the defendant's application for permission to amend the defence to modify the case in relation to the claim that the personal data were inaccurate or misleading.

(2) Secondly, the claimants' application to strike out certain paragraphs of the witness statement of Mr Steele served for trial on a variety of grounds, including irrelevance, abuse and that they maintain a case on accuracy which is outside the scope of the pleaded case for the defence.

(3) Thirdly, there is an application for an order that the defendant be debarred from relying on an expert report from a Professor Bowring. There are also requests for inspection of documents and a number of other case management points.

21. It is the application for permission to amend that comes first logically, and in terms of its importance for the shape and progress of this litigation.

Procedural history

22. I should recount briefly the procedural history.

23. The particulars of claim were served on 4 May 2018, the defence, on 22 June 2018, and the reply on 11 December. Requests for further information were made and answered, and directions were given at a CMC on 4 June 2019.

24. The dates for exchange of witness statements were put back, and on 30 January 2020 Master Davison ordered that, amongst other things, both parties be permitted to rely on expert evidence on Russian criminal law with the defendant permitted to file and serve any responsive evidence by 17 February 2020, the claimants to file any supplemental expert evidence by 24 February 2020.

25. Witness statements were exchanged on 17 February 2020. The claimants served three witness statements; the defendant served one, the statement of Mr Steele, accompanied by a 281-page exhibit.

26. On 21 February 2020, the claimants applied to strike out extensive parts of Mr Steele's witness statement and on the same day the defendant applied for permission to amend the defence. The application notice said this:

> "The claimants' application dated 21 February 2020 relates to this issue and we suggest that both are heard at the PTR on 27 February 2020."

27. That is what has happened.

28. The application is to add two additional passages to the defence. First of all, in paragraph 6(g), the words:

> "The defendant also relies on paragraph 7 of part 2 of schedule 1 of the DPA. Its records have since 8 February 2019 indicated that the claimants contest the accuracy of some of their personal data as contained in CR112."

29. Then it sought to add the following words to paragraph 6(h):

> "Further or in the alternative, the defendant contends that the assertions in paragraph 11(c)(1) to (5) are accurate."

Principles

Late applications to amend: general

30. In argument this morning, and in their skeleton arguments, counsel have identified the relevant principles and there has been debate about their proper application to the facts of this case. The general principles applying to amendments such as these are conveniently summarised in the judgment of Carr J, DBE in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at 38.

31. The emphasis in the modern law is very much on the importance of adhering to trial dates unless there is a good reason not to do so. Among the principles summarised in *Quah* are the following: at (e) and (f):

> "Gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era, it is more readily recognised that the payment of costs may not be adequate compensation. It is incumbent on a party seeking the indulgence of the court to be able to raise a late claim to provide a good explanation for the delay."

32. Those principles have to be applied in the context of each individual case before the court, the specific application for permission to amend, and the particular issues to which it gives rise.

Amendment to plead truth

33. In this case, the core issue for the purposes of this application is the truth or otherwise of the personal information contained in Memorandum 112 or, put another way, the accuracy of that information.

34. I therefore have regard to principles firmly established in the context of late applications to amend to plead truth as a defence to a claim in defamation. I have reminded myself of the principles identified in *Ashcroft v Foley* [2012] EWCA Civ 423 [2012] EMLR 25, and those summarised in Gatley on Libel and Slander, 12th edition, at paragraph 27.49. Among those principles is the following, drawn from *Mackenzie v Business Magazines UK Ltd*, a Court of Appeal case from January 18, 1996, where Lord Justice Kennedy said this:

> "In my judgment it is particularly important in an action of this type that both sides should, if at all possible, be allowed to deploy their case as they wish. The plaintiff seeks to vindicate his reputation. It would be a poor form of vindication if it were only obtained by half muzzling the other side."

See also, to similar effect, *Basham v Gregory*, CA, unreported, 21 February 1996.

35. I have also had regard to the specifics of the particular regime established by the DPA when it comes to accuracy. This includes not only the definition of what amounts to inaccuracy in s 70(2), but also Schedule 1 Part II paragraph 7, which provides as follows:

> "7. The fourth principle is not to be regarded as being contravened by reason of any inaccuracy in personal data which accurately record information obtained by the data controller from the data subject or a third party in a case where (a) having regard to the purpose or purposes for which the data were obtained and further processed the data controller has taken reasonable steps to ensure the accuracy of the data, and (b) if the data subject has notified the data controller of the data subject's view that the data are inaccurate the data indicate that fact."

The application

36. The application for permission to amend was, as I have indicated, prompted by the claimants' application to strike out parts of Mr Steele's witness statement. That witness statement runs to 29 pages of single-spaced text, comprising 125 paragraphs. Of this, roughly 40% is devoted to the topic of accuracy. Between paragraphs 59 and 107 Mr Steele addresses the claimants' case and sets out material in apparent support of the defendant's case on that topic.

37. The general character of this material can be illustrated by reference to two paragraphs dealing with the proposition that the claimants and President Putin have done favours for one another.

38. In paragraph 70.2 Mr Steele says:

> "Each of the claimants was identified in the US Treasury Department's 'Report to Congress pursuant to section 241 of countering America's adversaries through Sanctions Act of 2017 regarding senior foreign political figures and oligarchs in the Russian Federation and Russian parastatal entities' as 'determined by their closeness to the Russian regime and their net worth'."

39. Paragraph 70.5 contains the following:

> "The first claimant has previously given evidence to the US court for the District of Columbia admitting that Alfa Bank was one of a handful of private financial companies who had a special direct line to the Kremlin."

Submissions

40. For the claimants, Mr Tomlinson submitted that all or most of this evidence would fall to be struck out as irrelevant to the pleaded case.

41. So far as accuracy is concerned, his submission has been that the onus has always been on Orbis to assert, in detail, a positive case of accuracy, if that is the case that it wanted to advance at trial evidentially. No positive case has ever been pleaded, or adequately pleaded. The claimants, Mr Tomlinson submits, have made their stance crystal-clear in correspondence. He took me to correspondence, including letters of 20 and 31 May 2019 in which the claimants' solicitors asserted that no positive case had been advanced, and no response was made from the defendant.

42. Mr Tomlinson further argues that the case has not been sufficiently pleaded even now that these belated draft amendments have been produced. The claimants' evidence on this topic comes from Louise Boswell of the claimants' solicitors who says in her paragraph 11 that the Steele witness statement deals for the first time with a variety of matters that are said to establish the accuracy of the personal data in question. She continues:

> "The claimants are seriously prejudiced by this approach as they have not prepared evidence to respond to the matters which are now raised by Mr Steele for the first time."

43. Ms Boswell goes on to the make the point that if this material were included it would substantially increase the length of the trial and lead to the need to consider whether further disclosure was required.

44. Mr Tomlinson has added that it might be that if such matters formed the basis for a positive assertion of truth, the defendants would want to adduce further evidence of fact beyond that which they prepared and served pursuant to the order of Master Davison.

45. Mr Tomlinson submits that the defendant's application falls a very long way short of satisfying the burden identified in *Quah v Goldman Sachs*, namely that of demonstrating the strength of the new case and why justice to the applicant, his opponent and other court users requires that the applicant be able to pursue it.

46. Authorities such as *Mackenzie* do not assist in this case, submits Mr Tomlinson, because there is in reality no risk of "false vindication". Mr Steele, on analysis, gives no worthwhile evidence of truth at all. The real case on accuracy amounts in substance to one that reasonable care was taken to establish the accuracy of third-party information. Mr Tomlinson says that, as a case of truth, that which is set out in Mr Steele's witness statement is hopeless.

47. Mr Hopkins began his submissions for the defendant by identifying three elements to the relevant aspect to the defence case as presently pleaded. First, that much of what was said in the memorandum was essentially or largely a matter of evaluation and judgment, which could not be categorised as factually incorrect or misleading. Secondly, to the extent that the statements were assertions of fact, they were not inaccurate or misleading. Thirdly, they are not to be treated as factually inaccurate or misleading because the case satisfies the requirements of paragraph 7 of Schedule 1 Part II that I have quoted. Mr Hopkins went on to argue that the existing Defence is a sufficient statement of all three elements of the case as so summarised.

48. In his skeleton argument, he submitted that a denial of the inaccuracy of a sentence is, as a matter of logic, an assertion of the accuracy of that sentence. The pleading that none of the five sentences complained of contained incorrect or misleading facts is the same thing as pleading that those sentences are accurate. He went on to argue that there was no legal requirement of the defendant to go further in its pleading, particularly in circumstances where, despite bearing the

burden of proof, the claimants had declined to identify which of the facts contained within those sentences were said to be incorrect and/or misleading. He submitted that the claimants themselves had failed to satisfy the requirements of pleading by being specific as to the inaccuracies or misleading characteristics of the data complained of. Thus, Mr Hopkins submitted, the draft amendments were really only put forward on a protective basis and "out of an abundance of caution". He accepted that if that was wrong and claimants would require time to consider and respond to a case on actual accuracy that had not been sufficiently notified before service of the witness statement, then the consequences of permitting the amendment would be the loss of the trial date. There would be insufficient time to go through the necessary processes. But he submitted that in that event the public interest would still favour the grant of an adjournment to enable the defendant to put forward its full case at a trial.

Assessment

49. As I made clear in the course of argument, I was and I remain unpersuaded by the arguments of Mr Hopkins.

50. If and insofar as the defendant wishes to contend that any of the data complained of are not in contravention of the duty of accuracy because they are not statements of fact but matters of opinion, then the underlying material cited in Mr Steele's witness statement is irrelevant, as is anything Mr Steele thought or believed about it. I am concerned on this application only with the question of whether the defence sufficiently sets out all the draft amendments, sufficiently set out a case that the data, insofar as they are factual, are accurate. By the end of the argument, I had reached a firm conclusion that the Defence, as it stands, is not a sufficient statement of any positive case that the data were factually accurate.

51. The primary burden of proof in relation to inaccuracy lies on the claimant in such a case. The claimant must assert inaccuracy, and give sufficient particulars. The way in which that needs to

be done must depend on the nature of the information that is alleged to be inaccurate. The broader the statement that is impugned as inaccurate, the less detailed the contention that it is false needs to be. I am not persuaded by Mr Hopkins' submission that Particulars of Claim are deficient in this respect

52. In any event, I am not concerned with the Particulars of Claim but with the Defence. The general principles are clear: it is open to a defendant to require a claimant to prove their pleaded case by means of a non-admission, or alternatively to deny the pleaded case. The problem, or part of the problem, in the present case stems from the fact that this defendant has done both. A denial by its nature goes beyond a non-admission.

53. True it is that a bare denial of an allegation of inaccuracy is, in the old language, "pregnant with" an affirmative case that the matter is in fact accurate; but such a denial will often be insufficient to provide the notice to which a claimant is entitled, and indeed requires in order to understand and prepare to meet the defendant's case. That is the position here. Taking by way of example, the first of the alleged inaccuracies (the allegation of mutual favours), proof that the proposition was accurate would necessarily involve evidence of particular incidents or instances of conduct that serve to show the truth of the proposition. Details of the facts to be proved in support of such a positive case would necessarily be required by a claimant in order to prepare for trial. A bare denial, as pleaded here, could not provide the claimants with any notion of what factual case might be advanced to support the assertion of accuracy.

54. It is helpful to go back to some basic principles. The defence have overlooked the provisions of CPR 16.5, which reads as follows:

> "(1) In his defence the defendant must state
>
> (a) which of the allegations in the particulars of claim he denies,
>
> (b) which allegations he is unable to admit or deny but which he requires the claimant to prove, and

(c) which allegations he admits.

(2) Where the defendant denies an allegation

(a) he must state his reasons for doing so and

(b) if he intends to put forward a different version of events than that given by the claimant, he must state his own version."

55. Paragraph 6(h) of the defence does not comply with that rule. It may be right to say that a pleading that none of the five sentences complained of contain incorrect of misleading facts is the same as pleading that those sentences are accurate, but that does not provide the “reasons” for the denial. Nor does it supply the “different version of events” on which the defendant intends to rely. The first time that any such version was provided to these claimants was in the witness statement of Mr Steele.

56. I am not persuaded that Orbis required any further information about the claimants' case to enable it to set out its own case on inaccuracy or accuracy with sufficient detail. No formal request for further information was ever made, and no such detail has ever been provided. But Orbis has been able to set out some sort of case in Mr Steele's witness statement.

57. It cannot avail the defendant that the claimants asked for further information but did not seek details of the defendant's case on inaccuracy, particularly in view of the correspondence to which I have referred. Nor do I accept Mr Hopkins' submission, in his skeleton argument, that paragraph 6(c) of the Defence affords the claimants the necessary notice. As Mr Tomlinson submitted, that paragraph deals with an entirely separate and distinct issue, namely whether material in the public domain goes to show that the defendant's processing of the data caused no unwarranted prejudice or damage to the claimants. That is quite different from relying on press cuttings, or other material of that nature, as evidence of the truth of what is asserted within them.

58. Further, it is not the case that the Defence as it stands indicates sufficiently or at all an intention to rely on the provisions of Schedule 1, Part 2, paragraph 7. Reliance on paragraph 10 of the defence

as a sufficient assertion of that case is misplaced. Plainly, on the face of it, that paragraph relies on section 13(3) of the DPA. Further, as Mr Tomlinson has pointed out, there is an omission from the pleading for the purposes of paragraph 7 which requires pleading and proof of the proposition that the data accurately record data obtained by the data controller.

59. For all those reasons I had, as I say, reached the fairly firm conclusion that the defendant's pleaded case as it stands was not a sufficient statement of case as to accuracy, and that the defendants were right in principle to apply to amend. I had also reached provisional conclusions on four issues relevant to the application to amend. They were these.

(1) First, the draft amendments did not make good the deficiencies I have identified either in isolation from or in combination with the witness statement. The pleading was, to adopt the words of Lord Denning in *Associated Leisure v Associated Newspapers Limited* [1972] QB 450 a "loose, ineffective pleading".

(2) Secondly, that if any amendment was to be made to assert factual accuracy, it would require an adjournment of the trial.

(3) Thirdly, not only was there no evidential explanation or excuse put forward for the lateness of the application it was, on all the evidence, inexcusable.

(4) Fourthly, that the prejudice that would be caused to the claimants, the public and the administration of justice by granting an adjournment would outweigh any prejudice to the defendant were I to refuse permission to amend.

60. As to that last point, I accept the thrust of Mr Tomlinson's submission, that the witness statement of Mr Steele does not in substance and reality amount to an assertion that the propositions complained of by the claimants as false are true as a matter of fact, let alone one which is sufficiently detailed to allow a meaningful response. Mr Steele has no direct evidence of fact to offer on those propositions. His evidence is that he was told or read, or has since read, certain things and that in his professional assessment they are a reasonable basis for what was said in

Memorandum 112. In those circumstances, the public policy considerations identified in *Mackenzie* and *Basham* are not engaged. The refusal of permission to amend would not in reality muzzle or even half muzzle this defendant. The refusal of permission to amend, to allow the assertion of accuracy as a fact would not have the effect of shutting Mr Steele out from giving evidence about what he read or was told or from asserting that he held a reasonable belief in the truth of what he said in the memorandum to the extent that it was factual in nature. Nor, given the ultimate outcome of this application, will it shut out the defendant from relying on a case that what Mr Steele was told or read was itself accurate. It is an important feature of this case that - as it presently appears - if the defence case under paragraph 7 of Schedule 1, Part 2 was made out on the evidence the claimants' assertion of inaccuracy would fail.

61. Before ruling on the application, I gave Mr Hopkins some time to consider the position with his client and those instructing him. The upshot was that he withdrew the application for permission to amend paragraph 6(h) of the defence, making clear that the defendant would not assert the literal accuracy of the data, or assert accuracy as a positive case, otherwise than by reliance on Schedule 1 Part II paragraph 7. As to that, Mr Hopkins has applied for permission to amend in a slightly modified manner by including a further sentence in paragraph 8(g), between the two sentences that I have already quoted, reading:

> "The defendant accurately recorded information it obtained from a third party."

62. Mr Tomlinson does not oppose an amendment in those terms, provided the defendant identifies the third party or third parties relied on. He has sought a direction that that be done without prejudice to the defendant's rights under section 10 of the Contempt of Court Act 1981 and Article 10 of the Convention. With that qualification, I grant that application and I grant permission on those terms. The timing of the provision of that additional information can be the subject of discussion.

63. Finally, as Mr Hopkins fairly acknowledged, in the light of the way that things have developed, it will be necessary for amendments to be made to Mr Steele's witness statement so as to remove by way of amendment any matters that are, putting it in broad terms, “post-publication material” that could not be relevant to the reasonableness of the defendant's state of mind or conduct at the relevant times.