Neutral Citation Number: [2020] EWHC 666 (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: **17 March 2020**

Before:

Mr Justice Warby

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Between:

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

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Hugh Tomlinson QC and Kirsten Sjøvoll (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants**
Gavin Millar QC and Robin Hopkins (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: **17th March 2020**

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JUDGMENT

Mr Justice Warby **Tuesday, 17 March 2020**

(3:18 pm)

Ruling by MR JUSTICE WARBY

1. This is the second day of the trial of this claim for remedies under the Data Protection Act 1998 in respect of a memorandum dated 14 September 2016, which has become known as Memorandum 112.

2. The three claimants have each been called to give evidence and they have been cross-examined by Mr Millar Queen's Counsel, on behalf of the defendant ("Orbis"), and the claimants' case has been closed.

3. The next stage in the trial is due to be the evidence of Christopher Steele, the only witness for the defendant. He is a director of Orbis and one of its principal executives.

4. Yesterday, I was told that it was contemplated by both parties that I should make a ruling before Mr Steele gave evidence on whether, and if so to what extent, he should be required to answer questions about the sources on whom he relied in compiling Memorandum 112. The background to that can be quite shortly summarised.

5. The nature of the case and the essential issues it gives rise to are outlined in two earlier judgments of mine, one given at the pre-trial review on 27 February 2020 and the second on 7 March 2020, [2020] EWHC 474 QB. They need no further recitation. Of particular relevance to the issue that I am dealing with now are the following features of the case.

6. The main ground of complaint by all three claimants is that the personal data relating to them which are contained in Memorandum 112 are inaccurate in five specified ways, with the consequence that Orbis's processing of those data has contravened the Fourth Data Protection Principle.

7. The claimants seek remedies in respect of that contravention and, indeed, in the course of argument so far it has been submitted by Mr Tomlinson that they are entitled to some of those remedies, even if a breach of the Fourth Data Protection Principle is not established. That is to

say, they would be entitled to the remedies provided for by section 14 of the Data Protection Act in respect of inaccurate personal data.

8. The burden of proving inaccuracy lies on the claimant in such a case. Orbis puts the claimants to proof of their case that the personal data were inaccurate, and indeed to some extent to proof of their case that the memorandum contained personal data of the claimants.

9. In addition, or in the alternative, the question has been raised of whether the defendant has a defence to the allegation of breach of the Fourth Data Protection Principle, based upon paragraph 7 of schedule 1, part II, of the Data Protection Act. That paragraph provides as follows:

> "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."

10. Orbis, in its Amended Defence, has relied on paragraph 7. Paragraph 6(g) of the Defence pleads as follows:

> "The defendant also relies on paragraph 7 of part II, schedule 1 of the DPA. The defendant accurately recorded information it obtained from a third party. The identity of that third party is confidential. By virtue of section 10 of the Contempt of Court Act 1981, the defendant is not required to disclose the source of that information. The defendant's records have, since 8 February 2019, indicated that the claimants contest the accuracy of some of their personal data as contained in Memorandum 112."

11. It is relevant to add that at all times the defence has relied in relation to damages on section 13(3) of the DPA, and it is pleaded as a fact in paragraph 10 of the defence that the defendant:

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

12. I take that state of the pleadings, albeit it is open to some criticism and has been criticised by Mr Tomlinson, as advancing an affirmative case that paragraph 7 of schedule 1, part II, applies in this case on the grounds (among others) that the defendant "took reasonable steps to ensure … accuracy", having regard to the purpose or purposes for which the data were obtained and further processed, within the meaning of paragraph 7(a).

13. Further information has been requested by the claimants about Orbis's case under paragraph 6(g). It is not necessary to quote all of the requests and responses. It is sufficient to say that the defendant has elaborated its case by making clear that the intelligence recorded in Memorandum 112 was provided by a single source, also known as an intermediary, and derived from a single sub-source, neither of those being employed by the defendant.

14. Questions in relation to each third party source were posed and, with I think one exception, were not answered. To take an example, without needing to be exhaustive, request 3 was:

> "In relation to each third party source ... state:
>
> (a) the length of time Mr Steele had known that source at the relevant time."

The response to that was as follows:

> "A response to this request ... poses a risk of jigsaw identification and accordingly Mr Steele will not respond voluntarily."

15. Similar responses were given to other requests, including the identity of the country in which the source was located at the relevant time, and the general occupational category and status of that source, eg whether senior or junior and whether "governmental", "business", "law enforcement" or some other category. The only aspect of this request that was answered was a request as to

whether the information was provided orally or in writing, the answer being that it was provided orally.

16. The question that I am now dealing with was raised yesterday, after opening speeches, by Mr Tomlinson. He pointed out that although, in the passage that I have already cited, Orbis had relied on section 10 of the Contempt of Court Act 1981, that reliance had subsequently been abandoned. That was on the grounds that that privilege only applies where information is obtained with a view to publication. Mr Tomlinson submitted that it was for the defendant to establish any other basis for an exemption from answering relevant questions, either in statements of case or, as is now relevant, in the course of evidence. He was flagging the issue up at an early stage to ensure that it did not descend into procedural confusion. He made clear that he would like to be able to ask for information about the senior official referred to as a source, and he observed that if the defendant wished to resist such questions, it was for the defendant to produce evidence sufficient to satisfy the court that it should take the unusual course of permitting the defendant or, more properly, the witness not to answer such questions.

17. It was common ground, and it remains common ground, that the court has a discretion to exclude relevant questions or relevant evidence, and today there has been some examination of the authorities in that respect. It is not necessary for the purposes of this ruling to go into that interesting and somewhat complex area of the law because, at the end of the argument today, Mr Tomlinson has somewhat drawn back from the position he indicated yesterday.

18. He has now said that he does not want further to exercise the court's time by seeking a determination on the precise ambit of the questions that he might ask, and call on the court to enforce answers to. He wants to ask me for a ruling that he would be allowed to ask for non-identifying information; that is to say, information which would not serve to identify the source. He does not want to limit the scope of this cross-examination to the questions set out in the

request for further information from which I have quoted, but he has indicated that he would not seek to ask questions which he recognised as liable to identify the source.

19. I can see the force of Mr Millar's submissions in reply, that leaving the matter in limbo to the extent indicated by Mr Tomlinson's current position may be unsatisfactory, and may lead to problems as and when questions are asked, in relation to which there is a dispute between the witness and counsel over whether the answer is liable to lead to the identification of a source. But I have come to the conclusion, in the end, that I should take the risk that that unsatisfactory procedural situation may arise, and deal with it as and when it does. It seems to me that I will be able at the conclusion of the evidence to make a determination, and will have to make a determination, as to whether the witness is or was entitled to refuse an answer to any given question on the basis put forward. I have heard the argument on that.

20. I fully expect, although I may be misplaced in this, that Mr Steele will adhere to the position that he has adopted so far. In that event I may be called on to rule whether he should be compelled to answer a question. But I will address that situation if and when it arises.